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Title 28
Judicial Administration

Part 43 to End

Revised as of July 1, 2014

Containing a codification of documents
of general applicability and future effect

As of July 1, 2014

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Table of Contents

	Page
Explanation	v
Title 28:	
Chapter I—Department of Justice (Continued)	3
Chapter III—Federal Prison Industries, Inc., Department of Justice	589
Chapter V—Bureau of Prisons, Department of Justice	611
Chapter VI—Offices of Independent Counsel, Department of Justice	767
Chapter VII—Office of Independent Counsel	775
Chapter VIII—Court Services and Offender Supervision Agency for the District of Columbia	799
Chapter IX—National Crime Prevention and Privacy Compact Council	837
Chapter XI—Department of Justice and Department of State	849
Finding Aids:	
Table of CFR Titles and Chapters	859
Alphabetical List of Agencies Appearing in the CFR	879
List of CFR Sections Affected	889

Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 28 CFR 43.1 *refers to title 28, part 43, section 1.*

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

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

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The term ''[Reserved]'' is used as a place holder within the Code of Federal Regulations. An agency may add regulatory information at a ''[Reserved]'' location at any time. Occasionally ''[Reserved]'' is used editorially to indicate that a portion of the CFR was left vacant and not accidentally dropped due to a printing or computer error.

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

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CHARLES A. BARTH,
Director,
Office of the Federal Register.
July 1, 2014.

THIS TITLE

Title 28—JUDICIAL ADMINISTRATION is composed of two volumes. The parts in these volumes are arranged in the following order: Parts 0–42, and part 43 to end. The contents of these volumes represent all current regulations codified by the Department of Justice, the Federal Prison Industries, Inc., the Bureau of Prisons, Department of Justice, the Offices of Independent Counsel, Department of Justice, and the Office of Independent Counsel under this title of the CFR as of July 1, 2014.

For this volume, Bonnie Fritts was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Ann Worley.

Title 28—Judicial Administration

(This book contains part 43 to End)

	Part
CHAPTER I—Department of Justice (Continued)	43
CHAPTER III—Federal Prison Industries, Inc., Department of Justice	301
CHAPTER V—Bureau of Prisons, Department of Justice	500
CHAPTER VI—Offices of Independent Counsel, Department of Justice	600
CHAPTER VII—Office of Independent Counsel	700
CHAPTER VIII—Court Services and Offender Supervision Agency for the District of Columbia	800
CHAPTER IX—National Crime Prevention and Privacy Compact Council	901
CHAPTER XI—Department of Justice and Department of State	1100

CHAPTER I—DEPARTMENT OF JUSTICE (CONTINUED)

Part		Page
43	Recovery of cost of hospital and medical care and treatment furnished by the United States	7
44	Unfair immigration-related employment practices	8
45	Employee responsibilities	12
46	Protection of human subjects	17
47	Right to Financial Privacy Act	28
48	Newspaper Preservation Act	29
49	Antitrust Civil Process Act	34
50	Statements of policy	35
51	Procedures for the administration of section 5 of the Voting Rights Act of 1965, as amended	88
52	Proceedings before U.S. magistrate judges	112
54	Nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance	113
55	Implementation of the provisions of the Voting Rights Act regarding language minority groups	130
56	International Energy Program	138
57	Investigation of discrimination in the supply of petroleum to the Armed Forces	141
58	Regulations relating to the Bankruptcy Reform Acts of 1978 and 1994	142
59	Guidelines on methods of obtaining documentary materials held by third parties	183
60	Authorization of Federal law enforcement officers to request the issuance of a search warrant	187
61	Procedures for implementing the National Environmental Policy Act	188
63	Floodplain management and wetland protection procedures	201
64	Designation of officers and employees of the United States for coverage under section 1114 of title 18 of the U.S. Code	206
65	Emergency Federal law enforcement assistance	208

Part		Page
66	Uniform administrative requirements for grants and cooperative agreements to State and local governments	216
68	Rules of practice and procedure for administrative hearings before administrative law judges in cases involving allegations of unlawful employment of aliens, unfair immigration-related employment practices, and document fraud	244
69	New restrictions on lobbying	273
70	Uniform administrative requirements for grants and agreements (including subawards) with institutions of higher education, hospitals and other non-profit organizations	285
71	Implementation of the provisions of the Program Fraud Civil Remedies Act of 1986	310
72	Sex offender registration and notification	327
73	Notifications to the Attorney General by agents of foreign governments	327
74	Civil Liberties Act redress provision	329
75	Child Protection Restoration and Penalties Enhancement Act of 1990; Protect Act; Adam Walsh Child Protection and Safety Act of 2006; record-keeping and record-inspection provisions	341
76	Rules of procedure for assessment of civil penalties for possession of certain controlled substances	350
77	Ethical standards for attorneys for the government	365
79	Claims under the Radiation Exposure Compensation Act	368
80	Foreign Corrupt Practices Act opinion procedure	441
81	Child abuse and child pornography reporting designations and procedures	443
83	Government-wide requirements for drug-free workplace (grants)	445
85	Civil monetary penalties inflation adjustment	450
90	Violence against women	452
91	Grants for correctional facilities	463
92	Office of Community Oriented Policing Services (COPS)	479
93	Provisions implementing the Violent Crime Control and Law Enforcement Act of 1994	485
94	Crime victim services	487
97	Standards for private entities providing prisoner or detainee services	492
100	Cost recovery regulations, Communications Assistance for Law Enforcement Act of 1994	496
104	September 11th Victim Compensation Fund	505

Department of Justice

Part		*Page*
105	Criminal history background checks	517
115	Prison Rape Elimination Act national standards	526
200	Alien terrorist removal procedures	588
201–299	[Reserved]	

SUPPLEMENTARY PUBLICATIONS: *The official opinions of the Attorneys General of the United States. (Op. A. G.) Irregular, 1789—; Washington, v. 1—, 1852—.*

PART 43—RECOVERY OF COST OF HOSPITAL AND MEDICAL CARE AND TREATMENT FURNISHED BY THE UNITED STATES

Sec.
43.1 Administrative determination and assertion of claims.
43.2 Obligations of persons receiving care and treatment.
43.3 Settlement and waiver of claims.
43.4 Annual reports.

AUTHORITY: Sec. 2, 76 Stat. 593; 42 U.S.C. 2651–2653; E.O. 11060, 3 CFR, 1959–1963 Comp., p. 651.

EDITORIAL NOTE: For establishment and determination of certain rates for use in connection with recovery from tortiously liable third persons, see notice documents published by the Office of Management and Budget each year in the FEDERAL REGISTER.

§ 43.1 Administrative determination and assertion of claims.

(a) The head of a Department or Agency of the United States responsible for the furnishing of hospital, medical, surgical or dental care and treatment (including prostheses and medical appliances), or his designee, shall determine whether such hospital, medical, surgical or dental care and treatment was or will be furnished for an injury or disease caused under circumstances entitling the United States to recovery under the Act of September 25, 1962 (Pub. L. 87–693); and, if it is so determined, shall, subject to the provisions of § 43.3, assert a claim against such third person for the reasonable value of such care and treatment. The Department of Justice, or a Department or Agency responsible for the furnishing of such care and treatment may request any other Department or Agency to investigate, determine, or assert a claim under the regulations in this part.

(b) Each Department or Agency is authorized to implement the regulations in this part to give full force and effect thereto.

(c) The provisions of the regulations in this part shall not apply with respect to hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished by the Veterans Administration to an eligible veteran for a service-connected disability under the provisions of chapter 17 of title 38 of the U.S. Code.

[Order No. 289–62, 27 FR 11317, Nov. 16, 1962]

§ 43.2 Obligations of persons receiving care and treatment.

(a) In the discretion of the Department or Agency concerned, any person furnished care and treatment under circumstances in which the regulations in this part may be applicable, his guardian, personal representative, estate, dependents or survivors may be required:

(1) To assign in writing to the United States his claim or cause of action against the third person to the extent of the reasonable value of the care and treatment furnished or to be furnished, or any portion thereof;

(2) To furnish such information as may be requested concerning the circumstances giving rise to the injury or disease for which care and treatment is being given and concerning any action instituted or to be instituted by or against a third person;

(3) To notify the Department or Agency concerned of a settlement with, or an offer of settlement from, a third person; and

(4) To cooperate in the prosecution of all claims and actions by the United States against such third person.

(b) [Reserved]

[Order No. 289–62, 27 FR 11317, Nov. 16, 1962, as amended by Order No. 896–80, 45 FR 39841, June 12, 1980]

§ 43.3 Settlement and waiver of claims.

(a) The head of the Department or Agency of the United States asserting such claim, or his or her designee, may:

(1) Accept the full amount of a claim and execute a release therefor;

(2) Compromise or settle and execute a release of any claim, not in excess of $300,000, which the United States has for the reasonable value of such care and treatment; or

(3) Waive and in this connection release any claim, not in excess of $300,000, in whole or in part, either for the convenience of the Government, or if the head of the Department or Agency, or his or her designee, determines that collection would result in undue hardship upon the person who suffered

the injury or disease resulting in the care and treatment described in § 43.1.

(b) Claims in excess of $300,000 may be compromised, settled, waived, and released only with the prior approval of the Department of Justice.

(c) The authority granted in this section shall not be exercised in any case in which:

(1) The claim of the United States for such care and treatment has been referred to the Department of Justice; or

(2) A suit by the third party has been instituted against the United States or the individual who received or is receiving the care and treatment described in § 43.1 and the suit arises out of the occurrence which gave rise to the third-party claim of the United States.

(d) The Departments and Agencies concerned shall consult the Department of Justice in all cases involving:

(1) Unusual circumstances;

(2) A new point of law which may serve as a precedent; or

(3) A policy question where there is or may be a difference of views between any of such Departments and Agencies.

[Order No. 1594–92, 57 FR 27356, June 19, 1992, as amended by Order No. 3141–2010, 75 FR 9103, Mar. 1, 2010]

§ 43.4 Annual reports.

The head of each Department or Agency concerned, or his designee, shall report annually to the Attorney General, by March 1, commencing in 1964, the number and dollar amount of claims asserted against, and the number and dollar amount of recoveries from third persons.

[Order No. 289–62, 27 FR 11317, Nov. 16, 1962]

PART 44—UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

Subpart A—General

Sec.
44.100 Purpose.
44.101 Definitions.

Subpart B—Prohibited Practices

44.200 Unfair immigration-related employment practices.

Subpart C—Enforcement Procedures

44.300 Filing a charge.
44.301 Acceptance of charge.
44.302 Investigation.
44.303 Determination.
44.304 Special Counsel acting on own initiative.
44.305 Regional offices.

AUTHORITY: 8 U.S.C. 1324b, 8 U.S.C. 1103(a).

SOURCE: Order No. 1225–87, 52 FR 37409, Oct. 6, 1987, unless otherwise noted.

Subpart A—General

§ 44.100 Purpose.

The purpose of this part is to effectuate section 102 of the Immigration Reform and Control Act of 1986, which prohibits certain unfair immigration-related employment practices.

§ 44.101 Definitions.

(a) *Charge* means a written statement under oath or affirmation that—

(1) Identifies the charging party's name, address, and telephone number;

(2) Identifies the injured party's name, address, and telephone number, if the charging party is not the injured party;

(3) Identifies the name and address of the person or entity against whom the charge is being made;

(4) Includes a statement sufficient to describe the circumstances, place, and date of an alleged unfair immigration-related employment practice;

(5) Indicates whether the basis of the alleged unfair immigration-related employment practice is discrimination based on national origin, citizenship status, or both; or intimidation or retaliation, or documentation abuses;

(6) Indicates whether the injured party is a U.S. citizen, U.S. national, or alien authorized to work in the United States;

(7) Indicates, if the injured party is an alien authorized to work, whether the injured party—

(i) Has been—

(A) Lawfully admitted for permanent residence;

(B) Granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 8 U.S.C. 1161(a), or 8 U.S.C. 1255a(a)(1);

(C) Admitted as a refugee under 8 U.S.C. 1157; or

(D) Granted asylum under 8 U.S.C. 1158; and

(ii) Has applied for naturalization (and if so, indicates the date of the application);

(8) Identifies, if the injured party is an alien authorized to work, the injured party's alien registration number and date of birth.

(9) Indicates, if possible, the number of persons employed on the date of the alleged discrimination by the person or entity against whom the charge is being made;

(10) Is signed by the charging party and, if the charging party is neither the injured party nor an officer of the Immigration and Naturalization Service, indicates that the charging party has the authorization of the injured party to file the charge.

(11) Indicates whether a charge based on the same set of facts has been filed with the Equal Employment Opportunity Commission, and if so, the specific office, and contact person (if known); and

(12) Authorizes the Special Counsel to reveal the identity of the injured or charging party when necessary to carry out the purposes of this part.

(b) *Charging party* means—

(1) An individual who files a charge with the Special Counsel that alleges that he or she has been adversely affected directly by an unfair immigration-related employment practice;

(2) An individual or private organization who is authorized by an individual to file a charge with the Special Counsel that alleges that the individual has been adversely affected directly by an unfair immigration-related employment practice; or

(3) An officer of the Immigration and Naturalization Service who files a charge with the Special Counsel that alleges that an unfair immigration-related employment practice has occurred.

(c) *Protected individual* means an individual who—

(1) Is a citizen or national of the United States; or

(2) Is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 8 U.S.C. 1161(a), or 8 U.S.C. 1255a(a)(1), is admitted as a refugee under 8 U.S.C. 1157, or is granted asylum under 8 U.S.C. 1158. The status of an alien whose application for temporary resident status under 8 U.S.C. 1160(a), 8 U.S.C. 1161(a), or 8 U.S.C. 1255a(a)(1) is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt issued at the Immigration and Naturalization Service Legalization Office. As used in this definition, the term ''protected individual'' does not include an alien who—

(i) Fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, by May 6, 1987; or

(ii) Has applied on a timely basis, but has not been naturalized as a citizen within two years after the date of the application, unless the alien can establish that he or she is actively pursuing naturalization, except that time consumed in the Immigration and Naturalization Service's processing of the application shall not be counted toward the two-year period.

(d) *Complaint* means a written submission filed with an administrative law judge by the Special Counsel or the charging party, other than an officer of the Immigration and Naturalization Service, that is based on the same charge filed with the Special Counsel.

(e) *Injured party* means a person who claims to have been adversely affected directly by an unfair immigration-related employment practice or, in the case of a charge filed by an officer of the Immigration and Naturalization Service or by a charging party other than the injured party, is alleged to be so affected.

(f) *Respondent* means a person or entity against whom a charge of an unfair immigration-related employment practice has been filed.

(g) *Special Counsel* means the Special Counsel for Immigration-Related Unfair Employment Practices appointed by the President under section 102 of

the Immigration Reform and Control Act of 1986, or his or her designee.

[Order No. 1225–87, 52 FR 37409, Oct. 6, 1987, as amended by Order No. 1520–91, 56 FR 40249, Aug. 14, 1991; Order No. 1807–93, 58 FR 59948, Nov. 12, 1993]

Subpart B—Prohibited Practices

§ 44.200 Unfair immigration-related employment practices.

(a)(1) *General.* It is unfair immigration-related employment practice for a person or other entity to knowingly and intentionally discriminate or to engage in a pattern or practice of knowing and intentional discrimination against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

(i) Because of such individual's national origin; or

(ii) In the case of a protected individual, as defined in § 44.101(c), because of such individual's citizenship status.

(2) *Intimidation or retaliation.* It is an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under 8 U.S.C. 1324b or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under that section.

(3) *Documentation abuses.* A person's or other entity's request, for purposes of satisfying the requirements of 8 U.S.C. 1324a(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

(b) *Exceptions.* (1) Paragraph (a) of this section shall not apply to—

(i) A person or other entity that employs three or fewer employees;

(ii) Discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under 42 U.S.C. 2000e–2; or

(iii) Discrimination because of citizenship which—

(A) Is otherwise required in order to comply with law, regulation, or Executive Order; or

(B) Is required by Federal, State, or local government contract; or

(C) Which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

(2) Notwithstanding any other provision of this part, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit or refer for a fee an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

[Order No. 1225–87, 52 FR 37409, Oct. 6, 1987, as amended by Order No. 1520–91, 56 FR 40249, Aug. 14, 1991; Order No. 1807–93, 58 FR 59948, Nov. 12, 1993]

Subpart C—Enforcement Procedures

§ 44.300 Filing a charge.

(a) *Who may file.* (1) Any individual who believes that he or she has been adversely affected directly by an unfair immigration-related employment practice, or any individual or private organization authorized to act on such person's behalf, may file a charge with the Special Counsel.

(2) Any officer of the Immigration and Naturalization Service who believes that an unfair immigration-related employment practice has occurred or is occurring may file a charge with the Special Counsel.

(b) *When to file.* Charges shall be filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice. For purposes of determining when a charge is timely under this paragraph, a charge mailed to the Special Counsel shall be deemed filed on the date it is postmarked.

(c) *How to file.* Charges may be:

(1) Mailed to: Office of Special Counsel for Immigration-Related Unfair

Employment Practices, P.O. Box 27728, Washington, DC 20038–7728 or

(2) Delivered to the Office of Special Counsel at 1425 New York Avenue NW., suite 9000, Washington, DC 20005.

(d) *No overlap with EEOC complaints.* No charge may be filed respecting an unfair immigration-related employment practice described in § 44.200(a)(1) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964, unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this section, unless the charge is dismissed by the Special Counsel as being outside the scope of this part.

[Order No. 1225–87, 52 FR 37409, Oct. 6, 1987, as amended by Order No. 1807–93, 58 FR 59948, Nov. 12, 1993]

§ 44.301 Acceptance of charge.

(a) The Special Counsel shall notify the charging party of receipt of a charge as defined in § 44.101(a) or receipt of a submission deemed to be a charge under paragraph (c)(2) of this section.

(b) The notice to the charging party shall specify the date on which the charge was received, state that the charging party, other than an officer of the Immigration and Naturalization Service, may file a complaint before an administrative law judge if the Special Counsel does not do so within 120 days of receipt of the charge, and state the last date on which such a complaint may be filed.

(c)(1) Subject to paragraph (c)(2) of this section, if a charging party's submission is inadequate to constitute a charge as defined in § 44.101(a), the Special Counsel shall notify the charging party that specified additional information is needed. As of the date that adequate information is received in writing by the Special Counsel, the charging party's submission shall be deemed a filed charge and the Special Counsel shall issue the notices required by paragraphs (b) and (e) of this section.

(2) In the Special Counsel's discretion, the Special Counsel may deem a submission to be a filed charge as of the date of its receipt even though it is inadequate to constitute a charge as defined in § 44.101(a). The Special Counsel may then obtain the additional information specified in § 44.101(a) in the course of investigating the charge.

(d)(1) If the Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice.

(2) Inadequate submissions that are later deemed charges under paragraph (c)(1) of this section are timely filed as long as—

(i) The original submission is filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice; and

(ii) Any additional information requested by the Special Counsel pursuant to paragraph (c)(1) of this section is provided in writing to the Special Counsel within the 180-day period or within 45 days of the date on which the charging party received the Special Counsel's notification pursuant to paragraph (c) of this section, whichever is later.

(e) The Special Counsel shall serve notice of the charge on the respondent by certified mail within 10 days of receipt of the charge. The notice shall include the date, place, and circumstances of the alleged unfair immigration-related employment practice.

[Order No. 1225–87, 52 FR 37409, Oct. 6, 1987, as amended by Order No. 1520–91, 57 FR 40249, Aug. 14, 1991; 57 FR 30397, July 9, 1992]

§ 44.302 Investigation.

(a) The Special Counsel may propound interrogatories, requests for production of documents, and requests for admissions.

(b) The Special Counsel shall have reasonable access to examine the evidence of any person or entity being investigated. The respondent shall permit access by the Special Counsel during normal business hours to such of its books, records, accounts, and other sources of information, as the Special

Counsel may deem pertinent to ascertain compliance with this part.

§ 44.303 Determination.

(a) Within 120 days of the receipt of a charge, the Special Counsel shall undertake an investigation of the charge and determine whether a complaint with respect to the charge will be brought before an administrative law judge specially designated by the Attorney General to hear cases under section 102 of the Act.

(b) When the Special Counsel decides not to file a complaint with respect to such charge before an administrative jaw judge within the 120-day period, or at the end of the 120-day period, the Special Counsel shall issue letters of determination by certified mail which notify the charging party and the respondent of the Special Counsel's determination not to file a complaint.

(c) When the charging party receives a letter of determination issued pursuant to § 44.303(b), indicating that the Special Counsel will not file a complaint with respect to such charge, the charging party, other than an officer of the Immigration and Naturalization Service, may bring his or her complaint directly before an administrative law judge within 90 days after his or her receipt of the Special Counsel's letter of determination. The charging party's complaint must be filed with an administrative law judge pursuant to the regulations issued by the Office of the Chief Administrative Hearing Officer codified at 28 CFR 68.1.

(d) The Special Counsel's failure to file a complaint with respect to such charge, before an administrative law judge within 120 days shall not affect the right of the Special Counsel to continue to investigate the charge or to bring a complaint before an administrative law judge during the additional 90-day period as defined by paragraph (c) of this section.

(e) The Special Counsel may seek to intervene at any time in any proceeding brought by a charging party before an administrative law judge.

[Order No. 1225–87, 52 FR 37409, Oct. 6, 1987, as amended by Order No. 1520–91, 56 FR 40249, Aug. 14, 1991]

§ 44.304 Special Counsel acting on own initiative.

(a) The Special Counsel may, on his or her own initiative, conduct investigations respecting unfair immigration-related employment practices when there is reason to believe that a person or entity has engaged or is engaging in such practices.

(b) The Special Counsel may file a complaint with an administrative law judge where there is reasonable cause to believe that an unfair immigration-related employment practice has occurred within 180 days from the date of the filing of the complaint.

§ 44.305 Regional offices.

The Special Counsel, in consultation with the Attorney General, shall establish such regional offices as may be necessary to carry out his or her duties.

PART 45—EMPLOYEE RESPONSIBILITIES

Sec.

45.1 Cross-reference to ethical standards and financial disclosure regulations.
45.2 Disqualification arising from personal or political relationship.
45.3 Disciplinary proceedings under 18 U.S.C. 207(j).
45.4 Personal use of Government property.
45.10 Procedures to promote compliance with crime victims' rights obligations.
45.11 Reporting to the Office of the Inspector General.
45.12 Reporting to the Department of Justice Office of Professional Responsibility.
45.13 Duty to cooperate in an official investigation.

AUTHORITY: 5 U.S.C. 301, 7301, App. 3, 6; 18 U.S.C. 207; 28 U.S.C. 503, 528; DOJ Order 1735.1.

§ 45.1 Cross-reference to ethical standards and financial disclosure regulations.

Employees of the Department of Justice are subject to the executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635, the Department of Justice regulations at 5 CFR part 3801 which supplement the executive branch-wide standards, the executive branch-wide financial disclosure regulations at 5 CFR part 2634 and the

executive branch-wide employee responsibilities and conduct regulations at 5 CFR part 735.

[61 FR 59815, Nov. 25, 1996]

§45.2 Disqualification arising from personal or political relationship.

(a) Unless authorized under paragraph (b) of this section, no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:

(1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

(2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

(b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section shall report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he shall relieve the employee from participation unless he determines further, in writing, after full consideration of all the facts and circumstances, that:

(1) The relationship will not have the effect of rendering the employee's service less than fully impartial and professional; and

(2) The employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

(c) For the purposes of this section:

(1) *Political relationship* means a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof; and

(2) *Personal relationship* means a close and substantial connection of the type normally viewed as likely to induce partiality. An employee is presumed to have a personal relationship with his father, mother, brother, sister, child and spouse. Whether relationships (including friendships) of an employee to other persons or organizations are ''personal'' must be judged on an individual basis with due regard given to the subjective opinion of the employee.

(d) This section pertains to agency management and is not intended to create rights enforceable by private individuals or organizations.

[Order No. 993–83, 48 FR 2319, Jan. 19, 1983. Redesignated at 61 FR 59815, Nov. 25, 1996]

§45.3 Disciplinary proceedings under 18 U.S.C. 207(j).

(a) Upon a determination by the Assistant Attorney General in charge of the Criminal Division (Assistant Attorney General), after investigation, that there is reasonable cause to believe that a former officer or employee, including a former special Government employee, of the Department of Justice (former departmental employee) has violated 18 U.S.C. 207 (a), (b) or (c), the Assistant Attorney General shall cause a copy of written charges of the violation(s) to be served upon such individual, either personally or by registered mail. The charges shall be accompanied by a notice to the former departmental employee to show cause within a specified time of not less than 30 days after receipt of the notice why he or she should not be prohibited from engaging in representational activities in relation to matters pending in the Department of Justice, as authorized by 18 U.S.C. 207(j), or subjected to other appropriate disciplinary action under that statute. The notice to show cause shall include:

(1) A statement of allegations, and their basis, sufficiently detailed to enable the former departmental employee to prepare an adequate defense,

(2) Notification of the right to a hearing, and

(3) An explanation of the method by which a hearing may be requested.

(b) If a former departmental employee who submits an answer to the notice to show cause does not request a hearing or if the Assistant Attorney General does not receive an answer

within five days after the expiration of the time prescribed by the notice, the Assistant Attorney General shall forward the record, including the report(s) of investigation, to the Attorney General. In the case of a failure to answer, such failure shall constitute a waiver of defense.

(c) Upon receipt of a former departmental employee's request for a hearing, the Assistant Attorney General shall notify him or her of the time and place thereof, giving due regard both to such person's need for an adequate period to prepare a suitable defense and an expeditious resolution of allegations that may be damaging to his or her reputation.

(d) The presiding officer at the hearing and any related proceedings shall be a federal administrative law judge or other federal official with comparable duties. He shall insure that the former departmental employee has, among others, the rights:

(1) To self-representation or representation by counsel,

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

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

(4) To present oral argument, and

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

(e) The Assistant Attorney General shall designate one or more officers or employees of the Department of Justice to present the evidence against the former departmental employee and perform other functions incident to the proceedings.

(f) A decision adverse to the former departmental employee must be sustained by substantial evidence that he violated 18 U.S.C. 207 (a), (b) or (c).

(g) The presiding officer shall issue an initial decision based exclusively on the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, and shall set forth in the decision findings and conclusions, supported by reasons, on the material issues of fact and law presented on the record.

(h) Within 30 days after issuance of the initial decision, either party may appeal to the Attorney General, who in that event shall issue the final decision based on the record of the proceedings or those portions thereof cited by the parties to limit the issues. If the final decision modifies or reverses the initial decision, the Attorney General shall specify the findings of fact and conclusions of law that vary from those of the presiding officer.

(i) If a former departmental employee fails to appeal from an adverse initial decision within the prescribed period of time, the presiding officer shall forward the record of the proceedings to the Attorney General.

(j) In the case of a former departmental employee who filed an answer to the notice to show cause but did not request a hearing, the Attorney General shall make the final decision on the record submitted to him by the Assistant Attorney General pursuant to subsection (b) of this section.

(k) The Attorney General, in a case where:

(1) The defense has been waived,

(2) The former departmental employee has failed to appeal from an adverse initial decision, or

(3) The Attorney General has issued a final decision that the former departmental employee violated 18 U.S.C. 207 (a), (b) or (c),

may issue an order:

(i) Prohibiting the former departmental employee from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, the Department of Justice on a pending matter of business for a period not to exceed five years, or

(ii) Prescribing other appropriate disciplinary action.

(l) An order issued under either paragraph (k)(3) (i) or (ii) of this section may be supplemented by a directive to officers and employees of the Department of Justice not to engage in conduct in relation to the former departmental employee that would contravene such order.

[Order No. 889–80, 45 FR 31717, May 14, 1980. Redesignated at 61 FR 59815, Nov. 25, 1996, and further redesignated at 62 FR 23943, May 2, 1997]

§45.4 Personal use of Government property.

(a) Employees may use Government property only for official business or as authorized by the Government. See 5 CFR 2635.101(b)(9), 2635.704(a). The following uses of Government office and library equipment and facilities are hereby authorized:

(1) Personal uses that involve only negligible expense (such as electricity, ink, small amounts of paper, and ordinary wear and tear); and

(2) Limited personal telephone/fax calls to locations within the office's commuting area, or that are charged to non-Government accounts.

(b) The foregoing authorization does not override any statutes, rules, or regulations governing the use of specific types of Government property (e.g. internal Departmental policies governing the use of electronic mail; and 41 CFR (FPMR) 101–35.201, governing the authorized use of long-distance telephone services), and may be revoked or limited at any time by any supervisor or component for any business reason.

(c) In using Government property, employees should be mindful of their responsibility to protect and conserve such property and to use official time in an honest effort to perform official duties. See 5 CFR 2635.101(b)(9), 2635.704(a), 2635.705(a).

[62 FR 23943, May 2, 1997]

§45.10 Procedures to promote compliance with crime victims' rights obligations.

(a) *Definitions*. The following definitions shall apply with respect to this section, which implements the provisions of the Justice for All Act that relate to protection of the rights of crime victims. *See* 18 U.S.C. 3771.

Crime victim means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights, but in no event shall the defendant be named as such guardian or representative.

Crime victims' rights means those rights provided in 18 U.S.C. 3771.

Employee of the Department of Justice means an attorney, investigator, law enforcement officer, or other personnel employed by any division or office of the Department of Justice whose regular course of duties includes direct interaction with crime victims, not including a contractor.

Office of the Department of Justice means a component of the Department of Justice whose employees directly interact with crime victims in the regular course of their duties.

(b) The Attorney General shall designate an official within the Executive Office for United States Attorneys (EOUSA) to receive and investigate complaints alleging the failure of Department of Justice employees to provide rights to crime victims under 18 U.S.C. 3771. The official shall be called the Department of Justice Victims' Rights Ombudsman (VRO). The VRO shall then designate, in consultation with each office of the Department of Justice, an official in each office to serve as the initial point of contact (POC) for complainants.

(c) *Complaint process*. (1) Complaints must be submitted in writing to the POC of the relevant office or offices of the Department of Justice. If a complaint alleges a violation that would create a conflict of interest for the POC to investigate, the complaint shall be forwarded by the POC immediately to the VRO.

(2) Complaints shall contain, to the extent known to, or reasonably available to, the victim, the following information:

(i) The name and personal contact information of the crime victim who allegedly was denied one or more crime victims' rights;

(ii) The name and contact information of the Department of Justice employee who is the subject of the complaint, or other identifying information if the complainant is not able to provide the name and contact information;

(iii) The district court case number;

(iv) The name of the defendant in the case;

(v) The right or rights listed in 18 U.S.C. 3771 that the Department of Justice employee is alleged to have violated; and

(vi) Specific information regarding the circumstances of the alleged violation sufficient to enable the POC to conduct an investigation, including, but not limited to: The date of the alleged violation; an explanation of how the alleged violation occurred; whether the complainant notified the Department of Justice employee of the alleged violation; how and when such notification was provided to the Department of Justice employee; and actions taken by the Department of Justice employee in response to the notification.

(3) Complaints must be submitted within 60 days of the victim's knowledge of a violation, but not more than one year after the actual violation.

(4)(i) In response to a complaint that provides the information required under paragraph (c)(2) of this section and that contains specific and credible information that demonstrates that one or more crime victims' rights listed in 18 U.S.C. 3771 may have been violated by a Department of Justice employee or office, the POC shall investigate the allegation(s) in the complaint within a reasonable period of time.

(ii) The POC shall report the results of the investigation to the VRO.

(5) Upon receipt of the POC's report of the investigation, the VRO shall determine whether to close the complaint without further action, whether further investigation is warranted, or whether action in accordance with paragraphs (d) or (e) of this section is necessary.

(6) Where the VRO concludes that further investigation is warranted, he may conduct such further investigation. Upon conclusion of the investigation, the VRO may close the complaint if he determines that no further action is warranted or may take action under paragraph (d) or (e) of this section.

(7) The VRO shall be the final arbiter of the complaint.

(8) A complainant may not seek judicial review of the VRO's determination regarding the complaint.

(9) To the extent permissible in accordance with the Privacy Act and other relevant statutes and regulations regarding release of information by the Federal government, the VRO, in his discretion, may notify the complainant of the result of the investigation.

(10) The POC and the VRO shall refer to the Office of the Inspector General and to the Office of Professional Responsibility any matters that fall under those offices' respective jurisdictions that come to light in an investigation.

(d) If the VRO finds that an employee or office of the Department of Justice has failed to provide a victim with a right to which the victim is entitled under 18 U.S.C. 3771, but not in a willful or wanton manner, he shall require such employee or office of the Department of Justice to undergo training on victims' rights.

(e) *Disciplinary procedures.* (1) If, based on the investigation, the VRO determines that a Department of Justice employee has wantonly or willfully failed to provide the complainant with a right listed in 18 U.S.C. 3771, the VRO shall recommend, in conformity with laws and regulations regarding employee discipline, a range of disciplinary sanctions to the head of the office of the Department of Justice in which the employee is located, or to the official who has been designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office. The head of that office of the Department of Justice, or the other official designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office, shall be the final decision-maker regarding the disciplinary sanction to be imposed, in accordance with applicable laws and regulations.

(2) Disciplinary sanctions available under paragraph (e)(1) of this section include all sanctions provided under the Department of Justice Human Resources Order, 1200.1.

[70 FR 69653, Nov. 17, 2005]

§ 45.11 Reporting to the Office of the Inspector General.

Department of Justice employees have a duty to, and shall, report to the

Department of Justice Office of the Inspector General, or to their supervisor or their component's internal affairs office for referral to the Office of the Inspector General:

(a) Any allegation of waste, fraud, or abuse in a Department program or activity;

(b) Any allegation of criminal or serious administrative misconduct on the part of a Department employee (except those allegations of misconduct that are required to be reported to the Department of Justice Office of Professional Responsibility pursuant to § 45.12); and

(c) Any investigation of allegations of criminal misconduct against any Department employee.

[Order No. 2835–2006, 71 FR 54414, Sept. 15, 2006]

§ 45.12 Reporting to the Department of Justice Office of Professional Responsibility.

Department employees have a duty to, and shall, report to the Department of Justice Office of Professional Responsibility (DOJ–OPR), or to their supervisor, or their component's internal affairs office for referral to DOJ–OPR, any allegations of misconduct by a Department attorney that relate to the exercise of the attorney's authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct within the jurisdiction of DOJ–OPR.

[Order No. 2835–2006, 71 FR 54414, Sept. 15, 2006]

§ 45.13 Duty to cooperate in an official investigation.

Department employees have a duty to, and shall, cooperate fully with the Office of the Inspector General and Office of Professional Responsibility, and shall respond to questions posed during the course of an investigation upon being informed that their statement will not be used to incriminate them in a criminal proceeding. Refusal to cooperate could lead to disciplinary action.

[Order No. 2835–2006, 71 FR 54414, Sept. 15, 2006]

PART 46—PROTECTION OF HUMAN SUBJECTS

Sec.

46.101 To what does this policy apply?
46.102 Definitions.
46.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.
46.104–46.106 [Reserved]
46.107 IRB Membership.
46.108 IRB functions and operations.
46.109 IRB review of research.
46.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.
46.111 Criteria for IRB approval of research.
46.112 Review by institution.
46.113 Suspension or termination of IRB approval of research.
46.114 Cooperative research.
46.115 IRB records.
46.116 General requirements for informed consent.
46.117 Documentation of informed consent.
46.118 Applications and proposals lacking definite plans for involvement of human subjects.
46.119 Research undertaken without the intention of involving human subjects.
46.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.
46.121 [Reserved]
46.122 Use of Federal funds.
46.123 Early termination of research support: Evaluation of applications and proposals.
46.124 Conditions.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509–510; 42 U.S.C. 300v–1(b).

SOURCE: 56 FR 28012, 28020, June 18, 1991, unless otherwise noted.

§ 46.101 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 § 46.102(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 § 46.102(e) must be reviewed and approved, in compliance with § 46.101, § 46.102, and § 46.107 through § 46.117 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 and 28020, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 46.102 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

[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 46.101(b) do not apply to research involving prisoners, subpart C. The exemption at 45 CFR 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.

specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department's or agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains

(1) Data through intervention or interaction with the individual, or

(2) Identifiable private information.

Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. *Private information* includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily 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.

§ 46.103 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 §46.101 (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 §46.103(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 §46.101 (b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by §46.103 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 § 46.103 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 and 28020, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

§§ 46.104–46.106 [Reserved]

§ 46.107 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.

§ 46.108 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 § 46.103(b)(4) and, to the extent required by, § 46.103(b)(5).

(b) Except when an expedited review procedure is used (see § 46.110), 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.

§ 46.109 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 § 46.116. The IRB may require that information, in addition to that specifically mentioned in § 46.116, 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 § 46.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research covered by this policy at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

(Approved by the Office of Management and Budget under Control Number 0990–0260)

[56 FR 28012, 28020, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

§ 46.110 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 § 46.108(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]

§ 46.111 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 § 46.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by § 46.117.

(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.

§ 46.112 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.

§ 46.113 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]

§ 46.114 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.

§ 46.115 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 §46.103(b)(3).

(6) Written procedures for the IRB in the same detail as described in §46.103(b)(4) and §46.103(b)(5).

(7) Statements of significant new findings provided to subjects, as required by §46.116(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]

§46.116 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]

§ 46.117 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 § 46.116. 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 § 46.116 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]

§ 46.118 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 § 46.101 (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.

§ 46.119 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.

§ 46.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.

(a) The department or agency head will evaluate all applications and proposals involving human subjects submitted to the department or agency through such officers and employees of the department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

[56 FR 28012, 28020, June 18, 1991, as amended at 61 FR 33658, June 28, 1996]

§ 46.121 [Reserved]

§ 46.122 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.

§ 46.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has have directed the scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

§ 46.124 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 47—RIGHT TO FINANCIAL PRIVACY ACT

Sec.
47.1 Definitions.
47.2 Purpose.
47.3 Authorization.
47.4 Written request.
47.5 Certification.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; section 1108 of the Right to Financial Privacy Act of 1978, 12 U.S.C. 3408.

SOURCE: Order No. 822–79, 44 FR 14554, Mar. 13, 1979, unless otherwise noted.

§ 47.1 Definitions.

The terms used in this part shall have the same meaning as similar terms used in the Right to Financial Privacy Act of 1978. *Departmental unit* means any office, division, board, bureau, or other component of the Department of Justice which is authorized to conduct law enforcement inquiries. *Act* means the Right to Financial Privacy Act of 1978.

§ 47.2 Purpose.

The purpose of these regulations is to authorize Departmental units to request financial records from a financial institution pursuant to the formal written request procedure authorized by section 1108 of the Act, and to set forth the conditions under which such requests may be made.

§ 47.3 Authorization.

Departmental units are authorized to request financial records of any customer from a financial institution pursuant to a formal written request under the Act only if:

(a) No administrative summons or subpoena authority reasonably appears to be available to the Departmental unit to obtain financial records for the purpose for which the records are sought;

(b) There is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and will further that inquiry;

(c) The request is issued by a supervisory official of a rank designated by the head of the requesting Departmental unit. The officials so designated shall not delegate this authority to others;

(d) The request adheres to the requirements set forth in § 47.4; and

(e) The notice requirements set forth in section 1108(4) of the Act, or the requirements pertaining to delay of notice in section 1109 of the Act, are satisfied, except in situations (e.g., section 1113(g)) where no notice is required.

§47.4 Written request.

(a) The formal written request shall be in the form of a letter or memorandum to an appropriate official of the financial institution from which financial records are requested. The request shall be signed by the issuing official, and shall set forth that official's name, title, business address and business phone number. The request shall also contain the following:

(1) The identity of the customer or customers to whom the records pertain;

(2) A reasonable description of the records sought; and

(3) Such additional information as may be appropriate—e.g., the date on which the opportunity for the customer to challenge the formal written request will expire, the date on which the requesting Departmental unit expects to present a certificate of compliance with the applicable provisions of the Act, the name and title of the individual (if known) to whom disclosure is to be made.

(b) In cases where customer notice is delayed by court order, a copy of the court order shall be attached to the formal written request.

§47.5 Certification.

Prior to obtaining the requested records pursuant to a formal written request, an official of a rank designated by the head of the requesting Departmental unit shall certify in writing to the financial institution that the Departmental unit has complied with the applicable provisions of the Act.

PART 48—NEWSPAPER PRESERVATION ACT

Sec.

48.1 Purpose.
48.2 Definitions.
48.3 Procedure for filing all documents.
48.4 Application for approval of joint newspaper operating arrangement entered into after July 24, 1970.
48.5 Requests that information not be made public.
48.6 Public notice.
48.7 Report of the Assistant Attorney General in Charge of the Antitrust Division.
48.8 Written comments and requests for a hearing.
48.9 Extensions of time.
48.10 Hearings.
48.11 Intervention in hearings.
48.12 *Ex parte* communications.
48.13 Record for decision.
48.14 Decision by the Attorney General.
48.15 Temporary approval.
48.16 Procedure for filing of terms of a renewal or amendment to an existing joint newspaper operating arrangement.

AUTHORITY: 28 U.S.C. 509, 510; (5 U.S.C. 301); Newspaper Preservation Act, 84 Stat. 466 (15 U.S.C. 1801 *et seq.*).

SOURCE: Order No. 558–73, 39 FR 7, Jan. 2, 1974, unless otherwise noted.

§48.1 Purpose.

These regulations set forth the procedure by which application may be made to the Attorney General for his approval of joint newspaper operating arrangements entered into after July 24, 1970, and for the filing with the Department of Justice of the terms of a renewal or amendment of existing joint newspaper operating arrangements, as required by the Newspaper Preservation Act, Pub. L. 91–353, 84 Stat. 466, 15 U.S.C. 1801 *et seq*. The Newspaper Preservation Act does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General. The Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so. Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws.

§48.2 Definitions.

(a) The term *Attorney General* means the Attorney General of the United States or his delegate, other than the Assistant Attorney General in charge of the Antitrust Division or other employee in the Antitrust Division.

(b) The term *Assistant Attorney General in charge of the Antitrust Division* means the Assistant Attorney General in charge of the Antitrust Division or his delegate.

(c) The term *Assistant Attorney General for Administration* means the Assistant Attorney General for Administration or his delegate.

(d) The term *existing arrangement* means any joint newspaper operating arrangement entered into before July 24, 1970.

(e) The term *joint newspaper operating arrangement* means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into between two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any of the following: Printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided,* That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(f) The term *newspaper* means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(g) The term *party* means any individual, and any partnership, corporation, association, or other legal entity.

(h) The term *person* means any individual, and any partnership, corporation, association, or other legal entity.

§ 48.3 Procedure for filing all documents.

All filings required by these regulations shall be accomplished by:

(a) Mailing or delivering five copies of each document (two copies in the case of documents filed by the Assistant Attorney General in charge of the Antitrust Division) to the Assistant Attorney General for Administration, Department of Justice, Washington, DC 20530. He shall place one copy in a numbered public docket; one copy in a duplicate of this file for the use of officials with decisional responsibility; and (except in the case of documents filed by the Assistant Attorney General in charge of the Antitrust Division) shall forward three copies to the Assistant Attorney General in charge of the Antitrust Division; except that documents subject to nondisclosure orders under § 48.5 shall be held under seal and disclosed only in accordance with the provisions of that section; and

(b) Mailing or delivering one copy of each document filed after a hearing has been ordered to each party to the proceedings, along with the name and address of the party filing the document or its counsel, and filing in the manner provided in paragraph (a) of this section a certificate that service has been made in accordance herewith.

§ 48.4 Application for approval of joint newspaper operating arrangement entered into after July 24, 1970.

(a) Persons desiring to obtain the approval of the Attorney General of a joint newspaper operating arrangement after July 24, 1970, shall file an application in writing setting forth a short, plain statement of the reasons why the applicants believe that approval should be granted.

(b) With the request, the applicants shall also file copies of the following:

(1) The proposed joint newspaper operating agreement;

(2) Any prior, existing or proposed agreement between any of the newspapers involved, or a statement of any such agreements as have not been reduced to writing;

(3) With respect to each newspaper, for the 5-year period prior to the date of the application,

(i) Annual statements of profit and loss;

(ii) Annual statements of assets and liabilities;

(iii) Reports of the Audit Bureau of Circulation, or statements containing equivalent information;

(iv) Annual advertising lineage records;

(v) Rate cards;

(4) If any amount stated in paragraph (b)(3)(i) or (ii) of this section represents

an allocation of revenues, expenses, assets or liabilities between the newspaper and any parent, subsidiary, division or affiliate, the financial statements shall be accompanied by a full explanation of the method by which each such amount has been allocated.

(5) If any of the newspapers involved purchased or sold goods or services from or to any parent, subsidiary, division or affiliate at any time during the five years preceding the date of application, a statement shall be submitted identifying such products or services, the entity from which they were purchased or to which they were sold, and the amount paid for each product or service during each of the five years.

(6) Any other information which the applicants believe relevant to their request for approval.

(c) A copy of the application and supporting data shall be open to public inspection during normal business hours at the main office of each of the newspapers involved in the arrangement, except to the extent permitted by nondisclosure orders under §48.5; except that materials for which nondisclosure has been requested under §48.5 need not be made available for inspection before the request has been decided.

§48.5 Requests that information not be made public.

(a) Any applicant may file a request that commercial or financial data required to be filed and made public under these regulations, which is privileged and confidential within the meaning of 5 U.S.C. 552(b), be withheld from public disclosure. Each such request shall be accompanied by a statement of the reasons why nondisclosure is required. The request shall be determined by the Attorney General who shall consider the extent to which (1) disclosure may cause substantial harm to the applicant submitting the information, and (2) nondisclosure may impair the ability of persons who may be adversely affected by the proposed arrangement to present their views in proceedings under these regulations. Information relevant to the financial conditions of the newspaper or newspapers represented to be failing ordinarily shall not be ordered withheld from public disclosure.

(b) Upon ordering that any documents be withheld from public disclosure, the Attorney General shall file a statement setting forth the subject matter of the documents withheld. Any person desiring to inspect the documents may file a request for inspection, identifying with as much particularity as possible the materials to be inspected and setting forth the reasons for inspection and the facts in support thereof. The request for disclosure shall be considered by the Attorney General, who shall give the applicant that submitted the documents an opportunity to be heard in opposition to disclosure. Orders granting inspection shall specify the terms and conditions thereof, including restrictions on disclosure to third parties.

(c) Documents ordered withheld from public disclosure shall be made available to the Assistant Attorney General in charge of the Antitrust Division. If a hearing is held, the documents may be offered as evidence by any party to whom they have been disclosed. The administrative law judge may restrict further disclosure as he deems appropriate, taking into account the considerations set forth in paragraph (a) of this section.

(d) Requests for access to materials within the scope of this section that may be filed after the conclusion of proceedings under these regulations shall be processed in accordance with the Department's regulations under 5 U.S.C. 552 (part 16 of this chapter).

§48.6 Public notice.

(a) Upon the filing of the documents required by §48.4, the applicants shall file, and publish on the front pages of each of the newspapers for which application is made, daily and Sunday (if a Sunday edition is published) for a period of one week:

(1) Notice that a request for approval of a joint newspaper operating arrangement has been filed with the Attorney General;

(2) Notice that copies of the proposed arrangement, as well as all other documents submitted pursuant to §48.4, are available for public inspection at the Department of Justice and at the main offices of the newspapers involved; and

(3) Notice that any person may file written comments or a request for a hearing with the Department of Justice, in accordance with the requirements of § 48.3.

(b) Upon the filing of the notice required in paragraph (a) of this section, the Assistant Attorney General for Administration shall cause notice to be published in the FEDERAL REGISTER, and shall cause to be issued a press release setting forth the information contained therein.

(c) If a hearing is scheduled pursuant to § 48.10, the applicants shall publish the time, date, place and purpose of such hearing on their respective front pages at least three times within the 2-week period after the hearing has been scheduled (two times if the applicants are weekly newspapers), and for the 3 days preceding such hearing (one day during the week preceding the hearing if the applicants are weekly newspapers).

(d) The applicants shall file copies of each day's newspaper in which the notice required in paragraph (a) or (c) of this section has appeared.

§ 48.7 Report of the Assistant Attorney General in Charge of the Antitrust Division.

(a) The Assistant Attorney General in charge of the Antitrust Division shall, not later than 30 days from the publication in the FEDERAL REGISTER of the notice required by § 48.6, submit to the Attorney General a report on any application filed pursuant to § 48.4. In preparing such report he may require submission by the applicants of any further information which may be relevant to a determination of whether approval of the proposed arrangement is warranted under the Act.

(b) In his report he may state (1) that the proposed arrangement should be approved or disapproved without a hearing; or (2) that a hearing should be held to resolve material issues of fact.

(c) The report shall be filed, and a copy shall be sent to the applicants. Upon the filing of the report, the Assistant Attorney General for Administration shall cause to be issued a press release setting forth the substance thereof.

(d) Any person may, within 30 days after filing of the report, file a reply to the report for the consideration of the Attorney General.

§ 48.8 Written comments and requests for a hearing.

(a) Any person who believes that the Attorney General should or should not approve a proposed arrangement, may at any time after filing of the application until 30 days after publication in the FEDERAL REGISTER of the notice required in § 48.6,

(1) File written comments stating the reasons why approval should or should not be granted, and/or

(2) File a request that a hearing be held on the application. A request for a hearing shall set forth the issues of fact to be determined and the reasons that a hearing is required to determine them.

(b) Any person may within 30 days after the filing of any comment or request pursuant to paragraph (a) of this section, file a reply for the consideration of the Attorney General.

(c) After the expiration of the time for filing of replies in accordance with § 48.7 and this section the Attorney General shall either approve or deny approval of the arrangement, in accordance with § 48.14, or shall order that a hearing be held.

§ 48.9 Extensions of time.

Any of the time periods established by these Regulations may be extended for good cause, upon timely application to the Attorney General, or to the administrative law judge if one has been appointed.

§ 48.10 Hearings.

(a) Upon the issuance by the Attorney General of an order for a hearing, the Assistant Attorney General for Administration shall appoint an administrative law judge in accordance with section 11 of the Administrative Procedure Act, 5 U.S.C. 3105. The administrative law judge shall:

(1) Set a date, time and place for the hearing convenient for all parties involved. The date set shall be as soon as practicable, allowing time for publication of the notice required in § 48.6 and for a reasonable period of discovery as

provided in this section. In setting a place for the hearing, preference shall be given to the community in which the applicants' newspapers operate.

(2) Mail notice of the hearing to the parties, to each person who filed written comments or a request for a hearing, and to any other person he believes may have an interest in the proceeding.

(3) Permit discovery by any party, as provided in the Federal Rules of Civil Procedure; except that he may place such limits as he deems reasonable on the time and manner of taking discovery in order to avoid unnecessary delays in the proceedings.

(4) Conduct a hearing in accordance with section 7 of the Administrative Procedure Act, 5 U.S.C. 556. At such hearing, the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act will be on the proponents of the arrangement. The rules of evidence which govern civil proceedings in matters not involving trial by jury in the courts of the United States shall apply, but these rules may be relaxed if the ends of justice will be better served in so doing: Provided, that the introduction of irrelevant, immaterial, or unduly repetitious evidence is avoided. Only parties to the proceedings may present evidence, or cross-examine witnesses.

(b) The applicants and the Assistant Attorney General in charge of the Antitrust Division shall be parties in any hearing held hereunder. Other persons may intervene as parties as provided in §48.11.

(c) The Assistant Attorney General for Administration shall procure the services of a stenographic reporter. One copy of the transcript produced shall be placed in the public docket. Additional copies may be purchased from the reporter or, if the arrangement with the reporter permits, from the Department of Justice at its cost.

(d) Following the hearing the administrative law judge shall render to the Attorney General his recommendation that the proposed arrangement be approved or denied approval in accordance with the standards of the Act. The recommendation shall be in writing, shall be based solely on the hearing record, and shall include a statement of the administrative law judge's findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record. Copies of the recommendation shall be filed and sent to each party.

(e) Within 30 days of the date the administrative law judge files his recommendation, any party may file written exceptions to the recommendation for consideration by the Attorney General. Parties shall then have a further 15 days in which to file responses to any such exceptions.

§48.11 Intervention in hearings.

(a) Any person may intervene as a party in a hearing held under these regulations if (1) he has an interest which may be affected by the Attorney General's decision, and (2) it appears that his interest may not be adequately represented by existing parties.

(b) Application for intervention shall be made by filing in accordance with §48.3(a) and (b), within 20 days after a hearing has been ordered, a statement of the nature of the applicant's interest, the way in which it may be affected, the facts and reasons in support thereof and the reasons why the applicant's interest may not be adequately represented by existing parties.

(c) Existing parties may file a statement in opposition to or in support of an application to intervene within 10 days of the filing of the application.

(d) Applications for intervention shall be decided by the Attorney General.

(e) Intervenors shall have the same rights as existing parties in connection with any hearing held under these regulations.

§48.12 *Ex parte* communications.

No person shall communicate on any matter related to these proceedings with the administrative law judge, the Attorney General or anyone having decisional responsibility, except as provided in these regulations.

§48.13 Record for decision.

(a) The record on which the Attorney General shall base his decision in the

event a hearing is not held shall be comprised of all material filed in accordance with these regulations, including any material that has been ordered withheld from public disclosure.

(b) If a hearing is held, the record on which the Attorney General shall base his decision shall consist exclusively of the hearing record, the examiner's recommendation and any exceptions and responses filed with respect thereto.

§ 48.14 Decision by the Attorney General.

(a) The Attorney General shall decide, on the basis of the record as constituted in accordance with § 48.13, whether approval is warranted under the Act. In rendering his decision, the Attorney General shall file therewith a statement of his findings and conclusions and the reasons therefor, or where a hearing has been held, he may adopt the findings and conclusions of the administrative law judge.

(b) Approval of a proposed arrangement by the Attorney General shall not become effective until the tenth day after the filing of the Attorney General's decision as provided in this section.

§ 48.15 Temporary approval.

(a) If the Attorney General concludes that one or more of the newspapers involved would otherwise fail before the procedures under these regulations can be completed, he may grant temporary approval of whatever form of joint or unified action would be lawful under the Act if performed as part of an approved joint newspaper operating arrangement, and that he concludes is: (1) Essential to the survival of the newspaper or newspapers; and (2) most likely capable of being terminated without impairment to the ability of both newspapers to resume independent operation should final approval eventually be denied.

(b) Upon the filing of a request for temporary approval, the applicants shall publish notice of such application on the front pages of their respective newspapers for a period of three consecutive days in the case of daily newspapers or in the next issue in the case of weekly newspapers. The notice shall state:

(1) That a request for temporary approval of a joint operating arrangement or other joint or unified action has been made to the Attorney General; and

(2) That anyone wishing to protest the application for temporary approval may do so by delivering a statement of protest or telephoning his views to an employee of the Department of Justice, whose name, address and telephone number shall be designated by the Department upon receipt of the application for temporary approval, and that such protests must be received by the Department within five days of the first publication of notice in accordance with paragraph (a) of this section.

(c) The notice required by this section shall be in addition to the notice required by § 48.6.

(d) Such temporary approval may be granted without hearing at any time following the expiration of the period provided for protests, but shall create no presumption that final approval will be granted.

§ 48.16 Procedure for filing of terms of a renewal or amendment to an existing joint newspaper operating arrangement.

Within 30 days after a renewal of or an amendment to the terms of an existing arrangement, the parties to said renewal or amendment shall file five copies of the agreement of renewal or amendment. In the case of an amendment, the parties shall also file copies of the amended portion of the original agreement.

[Order No. 558–73, 39 FR 7, Jan. 2, 1974, as amended by Order No. 568–74, 39 FR 18646, May 29, 1974]

PART 49—ANTITRUST CIVIL PROCESS ACT

Sec.

49.1 Purpose.
49.2 Duties of custodian.
49.3 Examination of the material.
49.4 Deputy custodians.

AUTHORITY: 15 U.S.C. 1313.

SOURCE: At 60 FR 44277, Aug. 25, 1995, unless otherwise noted.

§ 49.1 Purpose.

The regulations in this part are issued in compliance with the requirements imposed by the provisions of section 4(c) of the Antitrust Civil Process Act, as amended (15 U.S.C. 1313(c)). The terms used in this part shall be deemed to have the same meaning as similar terms used in that Act.

§ 49.2 Duties of custodian.

(a) Upon taking physical possession of documentary material, answers to interrogatories, or transcripts of oral testimony delivered pursuant to a civil investigative demand issued under section 3(a) of the Act, the antitrust document custodian designated pursuant to section 4(a) of the Act (subject to the general supervision of the Assistant Attorney General in charge of the Antitrust Division), shall, unless otherwise directed by a court of competent jurisdiction, select, from time to time, from among such documentary material, answers to interrogatories or transcripts of oral testimony, the documentary material, answers to interrogatories or transcripts of oral testimony the copying of which the custodian deems necessary or appropriate for the official use of the Department of Justice, and shall determine, from time to time, the number of copies of any such documentary material, answers to interrogatories or transcripts of oral testimony that are to be reproduced pursuant to the Act.

(b) Copies of documentary material, answers to interrogatories, or transcripts of oral testimony in the physical possession of the custodian pursuant to a civil investigative demand may be reproduced by or under the authority of any officer, employee, or agent of the Department of Justice designated by the custodian. Documentary material for which a civil investigative demand has been issued but which is still in the physical possession of the person upon whom the demand has been served may, by agreement between such person and the custodian, be reproduced by such person, in which case the custodian may require that the copies so produced be duly certified as true copies of the original of the material involved.

[60 FR 44277, Aug. 25, 1995; 60 FR 61290, Nov. 29, 1995]

§ 49.3 Examination of the material.

Documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to the Act, while in the custody of the custodian, shall be for the official use of officers, employees, and agents of the Department of Justice in accordance with the Act. Upon reasonable notice to the custodian—

(a) Such documentary material or answers to interrogatories shall be made available for examination by the person who produced such documentary material or answers to interrogatories, or by any duly authorized representative of such person; and

(b) Such transcripts of oral testimony shall be made available for examination by the person who produced such testimony, or by such person's counsel, during regular office hours established for the Department of Justice. Examination of such documentary material, answers to interrogatories, or transcripts of oral testimony at other times may be authorized by the Assistant Attorney General or the custodian.

[60 FR 44277, Aug. 25, 1995; 60 FR 61290, Nov. 29, 1995]

§ 49.4 Deputy custodians.

Deputy custodians may perform such of the duties assigned to the custodian as may be authorized or required by the Assistant Attorney General.

PART 50—STATEMENTS OF POLICY

Sec.

50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.
50.3 Guidelines for the enforcement of title VI, Civil Rights Act of 1964.
50.5 Notification of Consular Officers upon the arrest of foreign nationals.
50.6 Antitrust Division business review procedure.
50.7 Consent judgments in actions to enjoin discharges of pollutants.
50.8 [Reserved]
50.9 Policy with regard to open judicial proceedings.

50.10 Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.
50.12 Exchange of FBI identification records.
50.14 Guidelines on employee selection procedures.
50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities.
50.16 Representation of Federal employees by private counsel at Federal expense.
50.17 *Ex parte* communications in informal rulemaking proceedings.
50.18 [Reserved]
50.19 Procedures to be followed by government attorneys prior to filing recusal or disqualification motions.
50.20 Participation by the United States in court-annexed arbitration.
50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.
50.22 Young American Medals Program.
50.23 Policy against entering into final settlement agreements or consent decree that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents.
50.24 Annuity broker minimum qualifications.
50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.*, 1973c; and Pub. L. 107–273, 116 Stat. 1758, 1824.

§ 50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.

(a) *General.* (1) The availability to news media of information in criminal and civil cases is a matter which has become increasingly a subject of concern in the administration of justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice.

(2) While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the law. The task of striking a fair balance between the protection of individuals accused of crime or involved in civil proceedings with the Government and public understandings of the problems of controlling crime and administering government depends largely on the exercise of sound judgment by those responsible for administering the law and by representatives of the press and other media.

(3) Inasmuch as the Department of Justice has generally fulfilled its responsibilities with awareness and understanding of the competing needs in this area, this statement, to a considerable extent, reflects and formalizes the standards to which representatives of the Department have adhered in the past. Nonetheless, it will be helpful in ensuring uniformity of practice to set forth the following guidelines for all personnel of the Department of Justice.

(4) Because of the difficulty and importance of the questions they raise, it is felt that some portions of the matters covered by this statement, such as the authorization to make available Federal conviction records and a description of items seized at the time of arrest, should be the subject of continuing review and consideration by the Department on the basis of experience and suggestions from those within and outside the Department.

(b) *Guidelines to criminal actions.* (1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

(3) Personnel of the Department of Justice, subject to specific limitations

imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

(8) This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

(9) Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

(c) *Guidelines to civil actions.* Personnel of the Department of Justice associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal records of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) An opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

[Order No. 469–71, 36 FR 21028, Nov. 3, 1971, as amended by Order No. 602–75, 40 FR 22119, May 20, 1975]

§ 50.3 Guidelines for the enforcement of title VI, Civil Rights Act of 1964.

(a) Where the heads of agencies having responsibilities under title VI of the Civil Rights Act of 1964 conclude there is noncompliance with regulations issued under that title, several alternative courses of action are open. In each case, the objective should be to secure prompt and full compliance so that needed Federal assistance may commence or continue.

(b) Primary responsibility for prompt and vigorous enforcement of title VI rests with the head of each department and agency administering programs of Federal financial assistance. Title VI itself and relevant Presidential directives preserve in each agency the authority and the duty to select, from among the available sanctions, the methods best designed to secure compliance in individual cases. The decision to terminate or refuse assistance is to be made by the agency head or his designated representative.

(c) This statement is intended to provide procedural guidance to the responsible department and agency officials in exercising their statutory discretion and in selecting, for each noncompliance situation, a course of action that fully conforms to the letter and spirit of section 602 of the Act and to the implementing regulations promulgated thereunder.

I. Alternative Courses of Action

A. Ultimate Sanctions

The ultimate sanctions under title VI are the refusal to grant an application for assistance and the termination of assistance being rendered. Before these sanctions may be invoked, the Act requires completion of the procedures called for by section 602. That section require the department or agency concerned (1) to determine that compliance cannot be secured by voluntary means, (2) to consider alternative courses of action consistent with achievement of the objectives of the statutes authorizing the particular financial assistance, (3) to afford the applicant an opportunity for a hearing, and (4) to complete the other procedural steps outlined in section 602, including notification to the appropriate committees of the Congress.

In some instances, as outlined below, it is legally permissible temporarily to defer action on an application for assistance, pending initiation and completion of section 602 procedures—including attempts to secure voluntary compliance with title VI. Normally, this course of action is appropriate only with respect to applications for noncontinuing assistance or initial applications for programs of continuing assistance. It is not available where Federal financial assistance is due and payable pursuant to a previously approved application.

Whenever action upon an application is deferred pending the outcome of a hearing and subsequent section 602 procedures, the efforts to secure voluntary compliance and the hearing and such subsequent procedures, if found necessary, should be conducted without delay and completed as soon as possible.

B. Available Alternatives

1. Court Enforcement

Compliance with the nondiscrimination mandate of title VI may often be obtained more promptly by appropriate court action than by hearings and termination of assistance. Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements or compliance or desegregation plans filed pursuant to agency regulations, (2) a suit to enforce compliance with other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination, and (3) initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance.

The possibility of court enforcement should not be rejected without consulting the Department of Justice. Once litigation has been begun, the affected agency should consult with the Department of Justice before taking any further action with respect to the noncomplying party.

2. Administrative Action

A number of effective alternative courses not involving litigation may also be available in many cases. These possibilities include (1) consulting with or seeking assistance from other Federal agencies (such as

the Contract Compliance Division of the Department of Labor) having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from, or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries. The possibility of utilizing such administrative alternatives should be considered at all stages of enforcement and used as appropriate or feasible.

C. INDUCING VOLUNTARY COMPLIANCE

Title VI requires that a concerted effort be made to persuade any noncomplying applicant or recipient voluntarily to comply with title VI. Efforts to secure voluntary compliance should be undertaken at the outset in every noncompliance situation and should be pursued through each stage of enforcement action. Similarly, where an applicant fails to file an adequate assurance or apparently breaches its terms, notice should be promptly given of the nature of the noncompliance problem and of the possible consequences thereof, and an immediate effort made to secure voluntary compliance.

II. PROCEDURES

A. NEW APPLICATIONS

The following procedures are designed to apply in cases of noncompliance involving applications for one-time or noncontinuing assistance and initial applications for new or existing programs of continuing assistance.

1. Where the Requisite Assurance Has Not Been Filed or Is Inadequate on Its Face.

Where the assurance, statement of compliance or plan of desegregation required by agency regulations has not been filed or where, in the judgment of the head of the agency in question, the filed assurance fails on its face to satisfy the regulations, the agency head should defer action on the application pending prompt initiation and completion of section 602 procedures. The applicant should be notified immediately and attempts made to secure voluntary compliance. If such efforts fail, the applicant should promptly be offered a hearing for the purpose of determining whether an adequate assurance has in fact been filed.

If it is found that an adequate assurance has not been filed, and if administrative alternatives are ineffective or inappropriate, and court enforcement is not feasible, section 602 procedures may be completed and assistance finally refused.

2. Where it Appears that the Field Assurance Is Untrue or Is Not Being Honored.

Where an otherwise adequate assurance, statement of compliance, or plan has been filed in connection with an application for assistance, but prior to completion of action on the application the head of the agency in question has reasonable grounds, based on a substantiated complaint, the agency's own investigation, or otherwise, to believe that the representations as to compliance are in some material respect untrue or are not being honored, the agency head may defer action on the application pending prompt initiation and completion of section 602 procedures. The applicant should be notified immediately and attempts made to secure voluntary compliance. If such efforts fail and court enforcement is determined to be ineffective or inadequate, a hearing should be promptly initiated to determine whether, in fact, there is noncompliance.

If noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is still not feasible, section 602 procedures may be completed and assistance finally refused.

The above-described deferral and related compliance procedures would normally be appropriate in cases of an application for noncontinuing assistance. In the case of an initial application for a new or existing program of continuing assistance, deferral would often be less appropriate because of the opportunity to secure full compliance during the life of the assistance program. In those cases in which the agency does not defer action on the application, the applicant should be given prompt notice of the asserted noncompliance; funds should be paid out for short periods only, with no long-term commitment of assistance given; and the applicant advised that acceptance of the funds carries an enforceable obligation of nondiscrimination and the risk of invocation of severe sanctions, if noncompliance in fact is found.

B. REQUESTS FOR CONTINUATION OR RENEWAL OF ASSISTANCE

The following procedures are designed to apply in cases of noncompliance involving all submissions seeking continuation or renewal under programs of continuing assistance.

In cases in which commitments for Federal financial assistance have been made prior to the effective date of title VI regulations and funds have not been fully disbursed, or in which there is provision for future periodic payments to continue the program or activity for which a present recipient has previously applied and qualified, or in which assistance is given without formal application pursuant to statutory direction or authorization, the responsible agency may nonetheless

require an assurance, statement of compliance, or plan in connection with disbursement or further funds. However, once a particular program grant or loan has been made or an application for a certain type of assistance for a specific or indefinite period has been approved, no funds due and payable pursuant to that grant, loan, or application, may normally be deferred or withheld without first completing the procedures prescribed in section 602.

Accordingly, where the assurance, statement of compliance, or plan required by agency regulations has not been filed or where, in the judgment of the head of the agency in question, the filed assurance fails on its face to satisfy the regulations, or there is reasonable cause to believe it untrue or not being honored, the agency head should, if efforts to secure voluntary compliance are unsuccessful, promptly institute a hearing to determine whether an adequate assurance has in fact been filed, or whether, in fact, there is noncompliance, as the case may be. There should ordinarily be no deferral of action on the submission or withholding of funds in this class of cases, although the limitation of the payout of funds to short periods may appropriately be ordered. If noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is not feasible, section 602 procedures may be completed and assistance terminated.

C. SHORT-TERM PROGRAMS

Special procedures may sometimes be required where there is noncompliance with title VI regulations in connection with a program of such short total duration that all assistance funds will have to be paid out before the agency's usual administrative procedures can be completed and where deferral in accordance with these guidelines would be tantamount to a final refusal to grant assistance.

In such a case, the agency head may, although otherwise following these guidelines, suspend normal agency procedures and institute expedited administrative proceedings to determine whether the regulations have been violated. He should simultaneously refer the matter to the Department of Justice for consideration of possible court enforcement, including interim injunctive relief. Deferral of action on an application is appropriate, in accordance with these guidelines, for a reasonable period of time, provided such action is consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with the action taken. As in other cases, where noncompliance is found in the hearing proceeding, and if administrative alternatives are ineffective or inappropriate and court enforcement is not feasible, section 602 procedures may be completed and assistance finally refused.

III. PROCEDURES IN CASES OF SUBGRANTEES

In situations in which applications for Federal assistance are approved by some agency other than the Federal granting agency, the same rules and procedures would apply. Thus, the Federal Agency should instruct the approving agency—typically a State agency—to defer approval or refuse to grant funds, in individual cases in which such action would be taken by the original granting agency itself under the above procedures. Provision should be made for appropriate notice of such action to the Federal agency which retains responsibility for compliance with section 602 procedures.

IV. EXCEPTIONAL CIRCUMSTANCES

The Attorney General should be consulted in individual cases in which the head of an agency believes that the objectives of title VI will be best achieved by proceeding other than as provided in these guidelines.

V. COORDINATION

While primary responsibility for enforcement of title VI rests directly with the head of each agency, in order to assure coordination of title VI enforcement and consistency among agencies, the Department of Justice should be notified in advance of applications on which action is to be deferred, hearings to be scheduled, and refusals and terminations of assistance or other enforcement actions or procedures to be undertaken. The Department also should be kept advised of the progress and results of hearings and other enforcement actions.

[31 FR 5292, Apr. 2, 1966]

§ 50.5 Notification of Consular Officers upon the arrest of foreign nationals.

(a) This statement is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department on charges of criminal violations. It conforms to practice under international law and in particular implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and detention of foreign nationals. Some of the treaties obligate the United States to notify the consular officer only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not

the arrested person requests such notification.

(1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.

(2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.

(3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. However, if there is a treaty provision in effect which requires notification of consul, without reference to a demand or request of the arrested national, the consul shall be notified even if the arrested person has asked that he not be notified. In such case, the U.S. Attorney shall advise the foreign national that his consul has been notified and inform him that notification was necessary because of the treaty obligation.

(b) The procedure prescribed by this statement shall not apply to cases involving arrests made by the Immigration and Naturalization Service in administrative expulsion or exclusion proceedings, since that Service has heretofore established procedures for the direct notification of the appropriate consular officer upon such arrest. With respect to arrests made by the Service for violations of the criminal provisions of the immigration laws, the U.S. Marshal, upon delivery of the foreign national into his custody, shall be responsible for informing the U.S. Attorney of the arrest in accordance with numbered paragraph 2 of this statement.

[Order No. 375–67, 32 FR 1040, Jan. 28, 1967]

§50.6 Antitrust Division business review procedure.

Although the Department of Justice is not authorized to give advisory opinions to private parties, for several decades the Antitrust Division has been willing in certain circumstances to review proposed business conduct and state its enforcement intentions. This originated with a ''railroad release'' procedure under which the Division would forego the initiation of criminal antitrust proceedings. The procedure was subsequently expanded to encompass a ''merger clearance'' procedure under which the Division would state its present enforcement intention with respect to a merger or acquisition; and the Department issued a written statement entitled ''Business Review Procedure.'' That statement has been revised several times.

1. A request for a business review letter must be submitted in writing to the Assistant Attorney General, Antitrust Division, Department of Justice, Washington, DC 20530.

2. The Division will consider only requests with respect to proposed business conduct, which may involve either domestic or foreign commerce.

3. The Division may, in its discretion, refuse to consider a request.

4. A business review letter shall have no application to any party which does not join in the request therefor.

5. The requesting parties are under an affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request must be accompanied by all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any. All parties requesting the review letter must provide the Division with whatever additional information or documents the Division may thereafter request in order to review the matter. Such additional information, if furnished orally, shall be promptly confirmed in writing. In connection with any request for review the Division will also conduct whatever independent investigation it believes is appropriate.

6. No oral clearance, release or other statement purporting to bind the enforcement discretion of the Division may be given. The

requesting party may rely upon only a written business review letter signed by the Assistant Attorney General in charge of the Antitrust Division or his delegate.

7. (a) If the business conduct for which review is requested is subject to approval by a regulatory agency, a review request may be considered before agency approval has been obtained only where it appears that exceptional and unnecessary burdens might otherwise be imposed on the party or parties requesting review, or where the agency specifically requests that a party or parties request review. However, any business review letter issued in these as in any other circumstances will state only the Department's present enforcement intentions under the antitrust laws. It shall in no way be taken to indicate the Department's views on the legal or factual issues that may be raised before the regulatory agency, or in an appeal from the regulatory agency's decision. In particular, the issuance of such a letter is not to be represented to mean that the Division believes that there are no anticompetitive consequences warranting agency consideration.

(b) The submission of a request for a business review, or its pendency, shall in no way alter any responsibility of any party to comply with the Premerger Notification provisions of the Antitrust Improvements Act of 1976, 15 U.S.C. 18A, and the regulations promulgated thereunder, 16 CFR, part 801.

8. After review of a request submitted hereunder the Division may: state its present enforcement intention with respect to the proposed business conduct; decline to pass on the request; or take such other position or action as it considers appropriate.

9. A business review letter states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest. As to a stated present intention not to bring an action, however, the Division has never exercised its right to bring a criminal action where there has been full and true disclosure at the time of presenting the request.

10. (a) Simultaneously upon notifying the requesting party of and Division action described in paragraph 8, the business review request, and the Division's letter in response shall be indexed and placed in a file available to the public upon request.

(b) On that date or within thirty days after the date upon which the Division takes any action as described in paragraph 8, the information supplied to support the business review request and any other information supplied by the requesting party in connection with the transaction that is the subject of the business review request, shall be indexed and placed in a file with the request and the Division's letter, available to the public upon request. This file shall remain open for one year, after which time it shall be closed and the documents either returned to the requesting party or otherwise disposed of, at the discretion of the Antitrust Division.

(c) Prior to the time the information described in subparagraphs (a) and (b) is indexed and made publicly available in accordance with the terms of that subparagraph, the requesting party may ask the Division to delay making public some or all of such information. However the requesting party must: (1) Specify precisely the documents or parts thereof that he asks not be made public; (2) state the minimum period of time during which nondisclosure is considered necessary; and (3) justify the request for nondisclosure, both as to content and time, by showing good cause therefor, including a showing that disclosure would have a detrimental effect upon the requesting party's operations or relationships with actual or potential customers, employees, suppliers (including suppliers of credit), stockholders, or competitors. The Department of Justice, in its discretion, shall make the final determination as to whether good cause for nondisclosure has been shown.

(d) Nothing contained in subparagraphs (a), (b) and (c) shall limit the Division's right, in its discretion, to issue a press release describing generally the identity of the requesting party or parties and the nature of action taken by the Division upon the request.

(e) This paragraph reflects a policy determination by the Justice Department and is subject to any limitations on public disclosure arising from statutory restrictions, Executive Order, or the national interest.

11. Any requesting party may withdraw a request for review at any time. The Division remains free, however, to submit such comments to such requesting party as it deems appropriate. Failure to take action after receipt of documents or information whether submitted pursuant to this procedure or otherwise, does not in any way limit or stop the Division from taking such action at such time thereafter as it deems appropriate. The Division reserves the right to retain documents submitted to it under this procedure or otherwise and to use them for all governmental purposes.

[42 FR 11831, Mar. 1, 1977]

§ 50.7 Consent judgments in actions to enjoin discharges of pollutants.

(a) It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to enjoin discharges of pollutants into the environment only after or on condition that an opportunity is afforded persons (natural or corporate)

who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court.

(b) To effectuate this policy, each proposed judgment which is within the scope of paragraph (a) of this section shall be lodged with the court as early as feasible but at least 30 days before the judgment is entered by the court. Prior to entry of the judgment, or some earlier specified date, the Department of Justice will receive and consider, and file with the court, any written comments, views or allegations relating to the proposed judgment. The Department shall reserve the right (1) to withdraw or withhold its consent to the proposed judgment if the comments, views and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate and (2) to oppose an attempt by any person to intervene in the action.

(c) The Assistant Attorney General in charge of the Land and Natural Resources Division may establish procedures for implementing this policy. Where it is clear that the public interest in the policy hereby established is not compromised, the Assistant Attorney General may permit an exception to this policy in a specific case where extraordinary circumstances require a period shorter than 30 days or a procedure other than stated herein.

[Order No. 529–73, 38 FR 19029, July 17, 1973]

§50.8 [Reserved]

§50.9 Policy with regard to open judicial proceedings.

Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted. The Government should take a position on any motion to close a judicial proceeding, and should ordinarily oppose closure; it should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice. In furtherance of the Department's concern for the right of the public to attend judicial proceedings and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all attorneys for the United States.

(a) These guidelines apply to all federal trials, pre- and post-trial evidentiary proceedings, arraignments, bond hearings, plea proceedings, sentencing proceedings, or portions thereof, except as indicated in paragraph (e) of this section.

(b) A Government attorney has a compelling duty to protect the societal interest in open proceedings.

(c) A Government attorney shall not move for or consent to closure of a proceeding covered by these guidelines unless:

(1) No reasonable alternative exists for protecting the interests at stake;

(2) Closure is clearly likely to prevent the harm sought to be avoided;

(3) The degree of closure is minimized to the greatest extent possible;

(4) The public is given adequate notice of the proposed closure; and, in addition, the motion for closure is made on the record, except where the disclosure of the details of the motion papers would clearly defeat the reason for closure specified under paragraph (c)(6) of this section;

(5) Transcripts of the closed proceedings will be unsealed as soon as the interests requiring closure no longer obtain; and

(6) Failure to close the proceedings will produce;

(i) A substantial likelihood of denial of the right of any person to a fair trial; or

(ii) A substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons; or

(iii) A substantial likelihood that ongoing investigations will be seriously jeopardized.

(d) A government attorney shall not move for or consent to the closure of any proceeding, civil or criminal, except with the express authorization of:

(1) The Deputy Attorney General, or,

(2) The Associate Attorney General, if the Division seeking authorization is under the supervision of the Associate Attorney General.

(e) These guidelines do not apply to:

(1) The closure of part of a judicial proceeding where necessary to protect national security information or classified documents; or

(2) *In camera* inspection, consideration or sealing of documents, including documents provided to the Government under a promise of confidentiality, where permitted by statute, rule of evidence or privilege; or

(3) Grand jury proceedings or proceedings ancillary thereto; or

(4) Conferences traditionally held at the bench or in chambers during the course of an open proceeding; or

(5) The closure of judicial proceedings pursuant to 18 U.S.C. 3509 (d) and (e) for the protection of child victims or child witnesses.

(f) Because of the vital public interest in open judicial proceedings, the records of any proceeding closed pursuant to this section, and still sealed 60 days after termination of the proceeding, shall be reviewed to determine if the reasons for closure are still applicable. If they are not, an appropriate motion will be made to have the records unsealed. If the reasons for closure are still applicable after 60 days, this review is to be repeated every 60 days until such time as the records are unsealed. Compliance with this section will be monitored by the Criminal Division.

(g) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

[Order No. 914–80, 45 FR 69214, Oct. 20, 1980, as amended by Order No. 1031–83, 48 FR 49509, Oct. 26, 1983; Order No. 1115–85, 50 FR 51677, Dec. 19, 1985; Order No. 1507–91, 56 FR 32327, July 16, 1991]

§ 50.10 Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.

(a) *Statement of principles.* (1) Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair ordinary newsgathering activities. The policy is not intended to extend special protections to members of the news media who are the focus of criminal investigations for conduct not based on, or within the scope of, ordinary newsgathering activities.

(2) In determining whether to seek information from, or records of, members of the news media, the approach in every instance must be to strike the proper balance among several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society.

(3) The Department views the use of certain law enforcement tools, including subpoenas, court orders issued pursuant to 18 U.S.C. 2703(d) or 3123, and search warrants to seek information from, or records of, non-consenting members of the news media as extraordinary measures, not standard investigatory practices. Subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123, in particular, may be used, after authorization by the Attorney General, or by another senior official in accordance with the exceptions set forth in paragraph (c)(3) of this section, only to obtain information from, or records of, members of the news media when the information sought is essential to a successful investigation, prosecution, or litigation; after all reasonable alternative attempts have been made to obtain the information from alternative sources; and after negotiations with the affected member of the news media have been pursued, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(4) When the Attorney General has authorized the use of a subpoena, court order issued pursuant to 18 U.S.C. 2703(d) or 3123, or warrant to obtain from a third party communications

records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(b) *Scope.*—(1) *Covered individuals and entities.* (i) The policy governs the use of certain law enforcement tools to obtain information from, or records of, members of the news media.

(ii) The protections of the policy do not extend to any individual or entity who is or is reasonably likely to be—

(A) A foreign power or agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) A member or affiliate of a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(C) Designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order No. 13224 of September 23, 2001 (66 FR 49079);

(D) A specially designated terrorist as that term is defined in 31 CFR 595.311 (or any successor thereto);

(E) A terrorist organization as that term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi));

(F) Committing or attempting to commit a crime of terrorism, as that offense is described in 18 U.S.C. 2331(5) or 2332b(g)(5);

(G) Committing or attempting the crime of providing material support or resources, as that term is defined in 18 U.S.C. 2339A(b)(1), to a terrorist organization; or

(H) Aiding, abetting, or conspiring in illegal activity with a person or organization described in paragraphs (b)(1)(ii)(A) through (G) of this section.

(2) *Covered law enforcement tools and records.* (i) The policy governs the use by law enforcement authorities of subpoenas or, in civil matters, other similar compulsory process such as a civil investigative demand (collectively ''subpoenas'') to obtain information from members of the news media, including documents, testimony, and other materials; and the use by law enforcement authorities of subpoenas, or court orders issued pursuant to 18 U.S.C. 2703(d) (''2703(d) order'') or 18 U.S.C. 3123 (''3123 order''), to obtain from third parties ''communications records'' or ''business records'' of members of the news media.

(ii) The policy also governs applications for warrants to search the premises or property of members of the news media, pursuant to Federal Rule of Criminal Procedure 41; or to obtain from third-party ''communication service providers'' the communications records of members of the news media, pursuant to 18 U.S.C. 2703(a) and (b).

(3) *Definitions.* (i)(A) ''Communications records'' include the contents of electronic communications as well as source and destination information associated with communications, such as email transaction logs and local and long distance telephone connection records, stored or transmitted by a third-party communication service provider with which the member of the news media has a contractual relationship.

(B) Communications records do not include information described in 18 U.S.C. 2703(c)(2)(A), (B), (D), (E), and (F).

(ii) A ''communication service provider'' is a provider of an electronic communication service or remote computing service as defined, respectively, in 18 U.S.C. 2510(15) and 18 U.S.C. 2711(2).

(iii)(A) ''Business records'' include records of the activities, including the financial transactions, of a member of the news media related to the coverage, investigation, or reporting of news, which records are generated or maintained by a third party with which the member of the news media has a contractual relationship. Business records are limited to those that could provide information about the newsgathering techniques or sources of a member of the news media.

(B) Business records do not include records unrelated to ordinary newsgathering activities, such as those related to the purely commercial, financial, administrative, or technical, operations of a news media entity.

(C) Business records do not include records that are created or maintained either by the government or by a contractor on behalf of the government.

(c) *Issuing subpoenas to members of the news media, or using subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain from third parties communications records or business records of a member of the news media.* (1) Except as set forth in paragraph (c)(3) of this section, members of the Department must obtain the authorization of the Attorney General to issue a subpoena to a member of the news media; or to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media.

(2) Requests for the authorization of the Attorney General for the issuance of a subpoena to a member of the news media, or to use a subpoena, 2703(d) order, or 3123 order to obtain communications records or business records of a member of the news media, must personally be endorsed by the United States Attorney or Assistant Attorney General responsible for the matter.

(3) *Exceptions to the Attorney General authorization requirement.* (i)(A) A United States Attorney or Assistant Attorney General responsible for the matter may authorize the issuance of a subpoena to a member of the news media (e.g., for documents, video or audio recordings, testimony, or other materials) if the member of the news media expressly agrees to provide the requested information in response to a subpoena. This exception applies, but is not limited, to both published and unpublished materials and aired and unaired recordings.

(B) In the case of an authorization under paragraph (c)(3)(i)(A) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide notice to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization of the issuance of the subpoena.

(ii) In light of the intent of the policy to protect freedom of the press, ordinary newsgathering activities, and confidential news media sources, authorization of the Attorney General will not be required of members of the Department in the following circumstances:

(A) To issue subpoenas to news media entities for purely commercial, financial, administrative, technical, or other information unrelated to ordinary newsgathering activities; or for information or records relating to personnel not involved in ordinary newsgathering activities.

(B) To issue subpoenas to members of the news media for information related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which the member of the news media does not exercise editorial control prior to publication.

(C) To use subpoenas to obtain information from, or to use subpoenas, 2703(d) orders, or 3123 orders to obtain communications records or business records of, members of the news media who may be perpetrators or victims of, or witnesses to, crimes or other events, when such status (as a perpetrator, victim, or witness) is not based on, or within the scope of, ordinary newsgathering activities.

(iii) In the circumstances identified in paragraphs (c)(3)(ii)(A) through (C) of this section, the United States Attorney or Assistant Attorney General responsible for the matter must—

(A) Authorize the use of the subpoena or court order;

(B) Consult with the Criminal Division regarding appropriate review and safeguarding protocols; and

(C) Provide a copy of the subpoena or court order to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization.

(4) *Considerations for the Attorney General in determining whether to authorize the issuance of a subpoena to a member of the news media.* (i)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from nonmedia sources, that a crime has occurred, and that the information

sought is essential to a successful investigation or prosecution. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(ii) The government should have made all reasonable attempts to obtain the information from alternative, nonmedia sources.

(iii)(A) The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. Where the nature of the investigation permits, the government should have explained to the member of the news media the government's needs in a particular investigation or prosecution, as well as its willingness to address the concerns of the member of the news media.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as required in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(iv) The proposed subpoena generally should be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(v) In investigations of unauthorized disclosures of national defense information or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation and prosecution, the Attorney General may authorize the Department, in such investigations, to issue subpoenas to members of the news media. The certification will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(vi) Requests should be treated with care to avoid interference with ordinary newsgathering activities or claims of harassment.

(vii) The proposed subpoena should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, should avoid requiring production of a large volume of material, and should give reasonable and timely notice of the demand.

(5) *Considerations for the Attorney General in determining whether to authorize the use of a subpoena, 2703(d) order, or 3123 order to obtain from third parties the communications records or business records of a member of the news media.* (i)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that a crime has been committed, and that the information sought is essential to the successful investigation or prosecution of that crime. The subpoena or court order should not be used to obtain peripheral, nonessential, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(ii) The use of a subpoena or court order to obtain from a third party communications records or business records of a member of the news media should be pursued only after the government has made all reasonable attempts to obtain the information from alternative sources.

(iii)(A) The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as set forth in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(iv) In investigations of unauthorized disclosures of national defense information or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation and prosecution, the Attorney General may authorize the Department, in such investigations, to use subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain communications records or business records of a member of the news media. The certification will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(v) The proposed subpoena or court order should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of material.

(vi) If appropriate, investigators should propose to use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams (reviewing teams separate from the prosecution and investigative teams).

(d) *Applying for warrants to search the premises, property, or communications records of members of the news media.* (1) Except as set forth in paragraph (d)(4) of this section, members of the Department must obtain the authorization of the Attorney General to apply for a warrant to search the premises, property, or communications records of a member of the news media.

(2) All requests for authorization of the Attorney General to apply for a warrant to search the premises, property, or communications records of a member of the news media must personally be endorsed by the United States Attorney or Assistant Attorney General responsible for the matter.

(3) In determining whether to authorize an application for a warrant to search the premises, property, or contents of communications records of a member of the news media, the Attorney General should take into account the considerations identified in paragraph (c)(5) of this section.

(4) Members of the Department may apply for a warrant to obtain work product materials or other documentary materials of a member of the news media pursuant to the ''suspect exception'' of the Privacy Protection Act (''PPA suspect exception''), 42 U.S.C. 2000aa(a)(1) and (b)(1), only when the member of the news media is a focus of a criminal investigation for conduct not based on, or within the scope of, ordinary newsgathering activities. In such instances, members of the Department must secure authorization from a Deputy Assistant Attorney General for the Criminal Division.

(5) Members of the Department should not be authorized to apply for a warrant to obtain work product materials or other documentary materials

of a member of the news media under the PPA suspect exception, 42 U.S.C. 2000aa(a)(1) & (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media.

(6) A Deputy Assistant Attorney General for the Criminal Division may authorize, under an applicable PPA exception, an application for a warrant to search the premises, property, or communications records of an individual other than a member of the news media, but who is reasonably believed to have ''a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.'' 42 U.S.C. 2000aa(a) and (b).

(7) In executing a warrant authorized by the Attorney General or by a Deputy Assistant Attorney General for the Criminal Division investigators should use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams (reviewing teams separate from the prosecution and investigative teams).

(e) *Notice to affected member of the news media.* (1)(i) When the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain from a third party communications records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(ii) The mere possibility that notice to the affected member of the news media, and potential judicial review, might delay the investigation is not, on its own, a compelling reason to delay notice.

(2) When the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain communications records or business records of a member of the news media, and the affected member of the news media has not been given notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the affected member of the news media notice of the order or warrant as soon as it is determined that such notice will no longer pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. In any event, such notice shall occur within 45 days of the government's receipt of any return made pursuant to the subpoena, court order, or warrant, except that the Attorney General may authorize delay of notice for an additional 45 days if he or she determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. No further delays may be sought beyond the 90-day period.

(3) The United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations a copy of any notice to be provided to a member of the news media whose communications records or business records were sought or obtained at least 10 business days before such notice is provided to the affected member of the news media, and immediately after such notice is, in fact, provided to the affected member of the news media.

(f) *Questioning members of the news media about, arresting members of the news media for, or charging members of the news media with, criminal conduct they are suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as members of the news media.* (1) No member of the Department shall

subject a member of the news media to questioning as to any offense that he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, without notice to the Director of the Office of Public Affairs and the express authorization of the Attorney General. The government need not view the member of the news media as a subject or target of an investigation, or have the intent to prosecute the member of the news media, to trigger the requirement that the Attorney General must authorize such questioning.

(2) No member of the Department shall seek a warrant for an arrest, or conduct an arrest, of a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, without notice to the Director of the Office of Public Affairs and the express authorization of the Attorney General.

(3) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, without notice to the Director of the Office of Public Affairs and the express authorization of the Attorney General.

(4) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking an indictment or to file an information against, a member of the news media for an offense that he or she is suspected of having committed during the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, a member of the Department shall state all facts necessary for a determination by the Attorney General.

(g) *Exigent circumstances.* (1) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of a subpoena or court order, as described in paragraph (c) of this section, or the questioning, arrest, or charging of a member of the news media, as described in paragraph (f) of this section, if he or she determines that the exigent use of such law enforcement tool or technique is necessary to prevent or mitigate an act of terrorism; other acts that are reasonably likely to cause significant and articulable harm to national security; death; kidnapping; substantial bodily harm; conduct that constitutes a specified offense against a minor (for example, as those terms are defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16911), or an attempt or conspiracy to commit such a criminal offense; or incapacitation or destruction of critical infrastructure (for example, as defined in section 1016(e) of the USA PATRIOT Act, 42 U.S.C. 5195c(e)).

(2) A Deputy Assistant Attorney General for the Criminal Division may authorize an application for a warrant, as described in paragraph (d) of this section, if there is reason to believe that the immediate seizure of the materials at issue is necessary to prevent the death of, or serious bodily injury to, a human being, as provided in 42 U.S.C. 2000aa(a)(2) and (b)(2).

(3) Within 10 business days of a Deputy Assistant Attorney General for the Criminal Division approving a request under paragraph (g) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General and to the Director of the Office of Public Affairs a statement containing the information that would have been given in requesting prior authorization.

(h) *Failure to comply with policy.* Failure to obtain the prior approval of the Attorney General, as required by this policy, may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(i) *General provision.* This policy is not intended to, and does not, create

any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[AG Order No. 3420–2014, 79 FR 10990, Feb. 27, 2014]

§ 50.12 Exchange of FBI identification records.

(a) The Federal Bureau of Investigation, hereinafter referred to as the FBI, is authorized to expend funds for the exchange of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by state statute and approved by the Director of the FBI, acting on behalf of the Attorney General, with officials of state and local governments for purposes of employment and licensing, pursuant to section 201 of Public Law 92–544, 86 Stat. 1115. Also, pursuant to 15 U.S.C. 78q, 7 U.S.C. 21 (b)(4)(E), and 42 U.S.C. 2169, respectively, such records can be exchanged with certain segments of the securities industry, with registered futures associations, and with nuclear power plants. The records also may be exchanged in other instances as authorized by federal law.

(b) The FBI Director is authorized by 28 CFR 0.85(j) to approve procedures relating to the exchange of identification records. Under this authority, effective September 6, 1990, the FBI Criminal Justice Information Services (CJIS) Division has made all data on identification records available for such purposes. Records obtained under this authority may be used solely for the purpose requested and cannot be disseminated outside the receiving departments, related agencies, or other authorized entities. Officials at the governmental institutions and other entities authorized to submit fingerprints and receive FBI identification records under this authority must notify the individuals fingerprinted that the fingerprints will be used to check the criminal history records of the FBI. The officials making the determination of suitability for licensing or employment shall provide the applicants the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. These officials also must advise the applicants that procedures for obtaining a change, correction, or updating of an FBI identification record are set forth in 28 CFR 16.34. Officials making such determinations should not deny the license or employment based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record, or has declined to do so. A statement incorporating these use-and-challenge requirements will be placed on all records disseminated under this program. This policy is intended to ensure that all relevant criminal record information is made available to provide for the public safety and, further, to protect the interests of the prospective employee/licensee who may be affected by the information or lack of information in an identification record.

[Order No. 2258–99, 64 FR 52229, Sept. 28, 1999]

§ 50.14 Guidelines on employee selection procedures.

The guidelines set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to equal employment opportunity.

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

NOTE: These guidelines are issued jointly by four agencies. Separate official adoptions follow the guidelines in this part IV as follows: Civil Service Commission, Department of Justice, Equal Employment Opportunity Commission, Department of Labor.

For official citation see section 18 of these guidelines.

TABLE OF CONTENTS

GENERAL PRINCIPLES

1. Statement of Purpose
   A. Need for Uniformity—Issuing Agencies
   B. Purpose of Guidelines
   C. Relation to Prior Guidelines
2. Scope
   A. Application of Guidelines
   B. Employment Decisions
   C. Selection Procedures
   D. Limitations
   E. Indian Preference Not Affected

3. Discrimination Defined: Relationship Between Use of Selection Procedures and Discrimination
A. Procedure Having Adverse Impact Constitutes Discrimination Unless Justified
B. Consideration of Suitable Alternative Selection Procedures
4. Information on Impact
A. Records Concerning Impact
B. Applicable Race, Sex and Ethnic Groups For Record Keeping
C. Evaluation of Selection Rates. The ''Bottom Line''
D. Adverse Impact And The ''Four-Fifths Rule''
E. Consideration of User's Equal Employment Opportunity Posture
5. General Standards for Validity Studies
A. Acceptable types of Validity Studies
B. Criterion-Related, Content, and Construct Validity
C. Guidelines Are Consistent with Professional Standards
D. Need For Documentation of Validity
E. Accuracy and Standardization
F. Caution Against Selection on Basis of Knowledges, Skills or Abilities Learned in Brief Orientation Period
G. Method of Use of Selection Procedures
H. Cutoff Scores
I. Use of Selection Procedures for Higher Level Jobs
J. Interim Use of Selection Procedures
K. Review of Validity Studies for Currency
6. Use of Selection Procedures Which Have Not Been Validated
A. Use of Alternate Selection Procedures to Eliminate Adverse Impact
B. Where Validity Studies Cannot or Need Not Be Performed
(1) Where Informal or Unscored Procedures Are Used
(2) Where Formal And Scored Procedures Are Used
7. Use of Other Validity Studies
A. Validity Studies not Conducted by the User
B. Use of Criterion-Related Validity Evidence from Other Sources
(1) Validity Evidence
(2) Job Similarity
(3) Fairness Evidence
C. Validity Evidence from Multi-Unit Study
D. Other Significant Variables
8. Cooperative Studies
A. Encouragement of Cooperative Studies
B. Standards for Use of Cooperative Studies
9. No Assumption of Validity
A. Unacceptable Substitutes for Evidence of Validity
B. Encouragement of Professional Supervision
10. Employment Agencies and Employment Services
A. Where Selection Procedures Are Devised by Agency
B. Where Selection Procedures Are Devised Elsewhere
11. Disparate Treatment
12. Retesting of Applicants
13. Affirmative Action
A. Affirmative Action Obligations
B. Encouragement of Voluntary Affirmative Action Programs

TECHNICAL STANDARDS

14. Technical Standards for Validity Studies
A. Validity Studies Should be Based on Review of Information about the Job
B. Technical Standards for Criterion-Related Validity Studies
(1) Technical Feasibility
(2) Analysis of the Job
(3) Criterion Measures
(4) Representativeness of the Sample
(5) Statistical Relationships
(6) Operational Use of Selection Procedures
(7) Over-Statement of Validity Findings
(8) Fairness
(a) Unfairness Defined
(b) Investigation of Fairness
(c) General Considerations in Fairness Investigations
(d) When Unfairness Is Shown
(e) Technical Feasibility of Fairness Studies
(f) Continued Use of Selection Procedures When Fairness Studies not Feasible
C. Technical Standards for Content Validity Studies
(1) Appropriateness of Content Validity Studies
(2) Job Analysis for Content Validity
(3) Development of Selection Procedure
(4) Standards For Demonstrating Content Validity
(5) Reliability
(6) Prior Training or Experience
(7) Training Success
(8) Operational Use
(9) Ranking Based on Content Validity Studies
D. Technical Standards For Construct Validity Studies
(1) Appropriateness of Construct Validity Studies
(2) Job Analysis For Construct Validity Studies
(3) Relationship to the Job
(4) Use of Construct Validity Study Without New Criterion-Related Evidence
(a) Standards for Use
(b) Determination of Common Work Behaviors

DOCUMENTATION OF IMPACT AND VALIDITY EVIDENCE

15. Documentation of Impact and Validity Evidence

A. Required Information
(1) Simplified Recordkeeping for Users With Less Than 100 Employees
(2) Information on Impact
(a) Collection of Information on Impact
(b) When Adverse Impact Has Been Eliminated in The Total Selection Process
(c) When Data Insufficient to Determine Impact
(3) Documentation of Validity Evidence
(a) Type of Evidence
(b) Form of Report
(c) Completeness
B. Criterion-Related Validity Studies
(1) User(s), Location(s), and Date(s) of Study
(2) Problem and Setting
(3) Job Analysis or Review of Job Information
(4) Job Titles and Codes
(5) Criterion Measures
(6) Sample Description
(7) Description of Selection Procedure
(8) Techniques and Results
(9) Alternative Procedures Investigated
(10) Uses and Applications
(11) Source Data
(12) Contact Person
(13) Accuracy and Completeness
C. Content Validity Studies
(1) User(s), Location(s), and Date(s) of Study
(2) Problem and Setting
(3) Job Analysis—Content of the Job
(4) Selection Procedure and its Content
(5) Relationship Between Selection Procedure and the Job
(6) Alternative Procedures Investigated
(7) Uses and Applications
(8) Contact Person
(9) Accuracy and Completeness
D. Construct Validity Studies
(1) User(s), Location(s), and Date(s) of Study
(2) Problem and Setting
(3) Construct Definition
(4) Job Analysis
(5) Job Titles and Codes
(6) Selection Procedure
(7) Relationship to Job Performance
(8) Alternative Procedures Investigated
(9) Uses and Applications
(10) Accuracy and Completeness
(11) Source Data
(12) Contact Person
E. Evidence of Validity from Other Studies
(1) Evidence from Criterion-Related Validity Studies
(a) Job Information
(b) Relevance of Criteria
(c) Other Variables
(d) Use of the Selection Procedure
(e) Bibliography
(2) Evidence from Content Validity Studies
(3) Evidence from Construct Validity Studies
F. Evidence of Validity from Cooperative Studies
G. Selection for Higher Level Jobs
H. Interim Use of Selection Procedures

DEFINITIONS

16. Definitions

APPENDIX

17. Policy Statement on Affirmative Action (see Section 13B)
18. Citations

General Principles

SECTION 1. *Statement of purpose*—A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

SEC. 2. *Scope*—A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter ''Title VII''); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1

of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter ''Executive Order 11246''); by the Civil Service Commission and other Federal agencies subject to section 717 of title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

SEC. 3. *Discrimination defined: Relationship between use of selection procedures and discrimination*—A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

SEC. 4. *Information on impact*—A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection

procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in paragraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO–1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates. The ''bottom line.''* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the ''four-fifths rule.''* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals

and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

SEC. 5. *General standards for validity studies*—A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See section 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter ''A.P.A. Standards'') and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A ''reasonable period of time'' will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

SEC. 6. *Use of selection procedures which have not been validated*—A. *Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

SEC. 7. *Use of other validity studies*—A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2) above but do not contain an investigation of

test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study*. if validity evidence from a study covering more than one unit within an organization satisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables*. If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

SEC. 8. *Cooperative studies*—A. *Encouragement of cooperative studies*. The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies*. If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

SEC. 9. *No assumption of validity*—A. *Unacceptable substitutes for evidence of validity*. Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: Assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision*. Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

SEC. 10. *Employment agencies and employment services*—A. *Where selection procedures are devised by agency*. An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to device and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere*. Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

SEC. 11. *Disparate treatment*. The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that

the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

SEC. 12. *Retesting of applicants.* Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

SEC. 13. *Affirmative action*—A. *Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's ''Policy Statement on Affirmative Action Programs for State and Local Government Agencies'' (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

TECHNICAL STANDARDS

SEC. 14. *Technical standards for validity studies.* The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies*—(1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training

should be properly measured and the relevance of the training should be shown either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors remain the same, the greater the magnitude of the relationship (e.g., correlation coefficient) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: Cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in

accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following:

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies*—(1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed

work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies*—(1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with paragraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence*—(a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies paragraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of paragraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

DOCUMENTATION OF IMPACT AND VALIDITY EVIDENCE

SEC. 15. *Documentation of impact and validity evidence*—A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO–1, *et seq.,* reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see section 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records

are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the ''four-fifths rule,'' as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word ''(Essential)'' is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading ''Source Data'' in sections 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion-related validity studies.* Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis or review of job information.* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less then perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the

procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tend- ency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of reliability should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of

section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

F. *Evidence of validity from cooperative studies.* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) A description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and

the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. *Interim use of selection procedures*. If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

DEFINITIONS

SEC. 16. *Definitions*. The following definitions shall apply throughout these guidelines:

A. *Ability*. A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact*. A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines*. Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. *Content validity*. Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity*. Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity*. Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer*. Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontractor covered by Executive Order 11246, as amended.

H. *Employment agency*. Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action*. For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a concil- ation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency*. Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis*. A detailed statement of work behaviors and other information relevant to the job.

L. *Job description*. A general statement of job duties and responsibilities.

M. *Knowledge*. A body of information applied directly to the performance of a function.

N. *Labor organization*. Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. *Observable*. Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. *Race, sex, or ethnic group*. Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. *Selection procedure*. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. *Selection rate*. The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should*. The term ''should'' as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill*. A present, observable competence to perform a learned psychomoter act.

U. *Technical feasibility*. The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure*. A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User*. Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated*. A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior*. An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

APPENDIX

17. *Policy statement on affirmative action* (see section 13B). The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to

develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic ''conscious,'' include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking ''journeyman'' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, Jr.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman, Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman, Civil Service Commission.

ARTHUR E. FLEMMING,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

RICHARD ALBRECHT,
General Counsel, Department of the Treasury.

SECTION 18. *Citations.* The official title of these guidelines is ''Uniform Guidelines on Employee Selection Procedures (1978)''. The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

''Section ____, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR ____ (August 25, 1978).''

The short form citation is:

''Section ____, U.G.E.S.P. (1978); 43 FR ____ (August 25, 1978).''

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60–3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1–18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: ''Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR ____, (August 25, 1978); 29 CFR part 1607, section 6A.''

ELEANOR HOLMES NORTON,
Chair, Equal Employment Opportunity Commission.

ALAN K. CAMPBELL,
Chairman, Civil Service Commission.

RAY MARSHALL,
Secretary of Labor.

GRIFFIN B. BELL,
Attorney General.

[Order No. 668–76, 41 FR 51735, Nov. 23, 1976, as amended at 43 FR 38295, Aug. 25, 1978]

§ 50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities.

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the proceedings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request

from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation generally is not available in federal criminal proceedings. Representation may be provided to a federal employee in connection with a federal criminal proceeding only where the Attorney General or his designee determines that representation is in the interest of the United States and subject to applicable limitations of §50.16. In determining whether representation in a federal criminal proceeding is in the interest of the United States, the Attorney General or his designee shall consider, among other factors, the relevance of any nonprosecutorial interests of the United States, the importance of the interests implicated, the Department's ability to protect those interests through other means, and the likelihood of a conflict of interest between the Department's prosecutorial and representational responsibilities. If representation is authorized, the Attorney General or his designee also may determine whether representation by Department attorneys, retention of private counsel at federal expense, or reimbursement to the employee of private counsel fees is most appropriate under the circumstances.

(5) Where representation is sought for proceedings other than federal criminal proceedings, but there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter ''prosecuting division'') to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(6) If a prosecuting division of the Department indicates that the employee

is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(7) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in that federal criminal proceeding or in any related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16, or provide reimbursement to employees for private attorney fees incurred in connection with such related civil, congressional, or state criminal proceeding, provided no decision has been made to seek an indictment or file an information against the employee.

(8) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed:

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the U.S. Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the employee may apply for such indemnification from his employing agency upon the entry of an adverse verdict, judgment, or other monetary award;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraph (a) (6), (9) and (10) of this section, and by § 50.16.

(9) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(10) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(11) Whenever the Solicitor General declines to authorize further appellate

review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of §50.16.

(12) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(2) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

(c)(1) The Department of Justice may indemnify the defendant Department of Justice 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 by the Attorney General or his designee.

(2) The Department of Justice may settle or compromise a personal damages claim against a Department of Justice 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 by the Attorney General or his designee.

(3) Absent exceptional circumstances as determined by the Attorney General or his 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.

(4) The Department of Justice employee may 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 head of his employing component, who shall thereupon submit to the appropriate Assistant Attorney General, in a timely manner, a recommended disposition of the request. Where appropriate, the Assistant Attorney General shall seek the views of the U.S. Attorney; in all such cases the Civil Division shall be consulted. The

Assistant Attorney General shall forward the request, the employing component's recommendation, and the Assistant Attorney General's recommendation to the Attorney General for decision.

(5) Any payment under this section either to indemnify a Department of Justice employee or to settle a personal damages claim shall be contingent upon the availability of appropriated funds of the employing component of the Department of Justice.

[Order No. 970–82, 47 FR 8172, Feb. 25, 1982, as amended at Order No. 1139–86, 51 FR 27022, July 29, 1986; Order No. 1409–90, 55 FR 13130, Apr. 9, 1990]

§ 50.16 Representation of Federal employees by private counsel at Federal expense.

(a) Representation by private counsel at federal expense or reimbursement of private counsel fees is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a) (4), (7), (10), and (11), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention and reimbursement procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel and the reimbursement to an employee of private counsel fees, including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel or to provide reimbursement of private counsel fees under this section, the Civil Division shall be consulted before the retention or reimbursement is undertaken.

(c) Where private counsel is provided, the following procedures shall apply:

(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

(d) Where reimbursement is provided for private counsel fees incurred by employees, the following limitations shall apply:

(1) Reimbursement shall be limited to fees incurred for legal work that is determined to be in the interest of the United States. Reimbursement is not available for legal work that advances only the individual interests of the employee.

(2) Reimbursement shall not be provided if at any time the Attorney General or his designee determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment or that representation is no longer in the interest of the United States.

(3) Reimbursement shall not be provided for fees incurred during any period of time for which representation by Department of Justice attorneys was tendered.

(4) Reimbursement shall not be provided if the United States decides to seek an indictment of or to file an information against the employee seeking reimbursement, on a criminal charge relating to the conduct concerning which representation was undertaken.

[Order No. 970–82, 47 FR 8174, Feb. 25, 1982, as amended by Order No. 1409–90, 55 FR 13130, Apr. 9, 1990]

§ 50.17 *Ex parte* communications in informal rulemaking proceedings.

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553:

(a) A general prohibition applicable to all offices, boards, bureaus and divisions of the Department of Justice against the receipt of private, *ex parte* oral or written communications is undesirable, because it would deprive the Department of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow, and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

(b) All written communications from outside the Department addressed to the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, and bureaus, and divisions or their personnel participating in the decision, should be placed promptly in a file available for public inspection.

(c) All oral communications from outside the Department of significant information or argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, bureaus, and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in a file available for public inspection.

(d) The Department may properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552.

(e) The Department may conclude that restrictions on *ex parte* communications in particular rulemaking proceedings are necessitated by considerations of fairness or for other reasons.

[Order No. 801–78, 43 FR 43297, Sept. 25, 1978, as amended at Order No. 1409–90, 55 FR 13130, Apr. 9, 1990]

§ 50.18 [Reserved]

§ 50.19 Procedures to be followed by government attorneys prior to filing recusal or disqualification motions.

The determination to seek for any reason the disqualification or recusal of a justice, judge, or magistrate is a most significant and sensitive decision. This is particularly true for government attorneys, who should be guided by uniform procedures in obtaining the requisite authorization for such a motion. This statement is designed to establish a uniform procedure.

(a) No motion to recuse or disqualify a justice, judge, or magistrate (*see, e.g.*, 28 U.S.C. 144, 455) shall be made or supported by any Department of Justice attorney, U.S. Attorney (including Assistant U.S. Attorneys) or agency counsel conducting litigation pursuant to agreement with or authority delegated by the Attorney General, without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered.

(b) Prior to seeking such approval, Justice Department lawyer(s) handling the litigation shall timely seek the recommendations of the U.S. Attorney for the district in which the matter is pending, and the views of the client agencies, if any. Similarly, if agency attorneys are primarily handling any such suit, they shall seek the recommendations of the U.S. Attorney and provide them to the Department of Justice with the request for approval. In actions where the United States Attorneys are primarily handling the litigation in question, they shall seek the recommendation of the client agencies, if any, for submission to the Assistant Attorney General.

(c) In the event that the conduct and pace of the litigation does not allow sufficient time to seek the prior written approval by the Assistant Attorney General, prior oral authorization shall be sought and a written record fully reflecting that authorization shall be subsequently prepared and submitted to the Assistant Attorney General.

(d) Assistant Attorneys General may delegate the authority to approve or

deny requests made pursuant to this section, but only to Deputy Assistant Attorneys General or an equivalent position.

(e) This policy statement does not create or enlarge any legal obligations upon the Department of Justice in civil or criminal litigation, and it is not intended to create any private rights enforceable by private parties in litigation with the United States.

[Order No. 977–82, 47 FR 22094, May 21, 1982]

§ 50.20 Participation by the United States in court-annexed arbitration.

(a) *Considerations affecting participation in arbitration.* (1) The Department recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation. Experimentations with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court-annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.

(b) *General rule consenting to arbitration consistent with the department's regulations.* (1) Subject to the considerations set forth in the following paragraphs and the restrictions set forth in paragraphs (c) and (d), in a case assigned to arbitration or mediation under a local district court rule, the Department of Justice agrees to participate in the arbitration process under the local rule. The attorney for the government responsible for the case should take any appropriate steps in conducting the case to protect the interests of the United States.

(2) Based upon its experience under arbitration programs to date, and the purposes and limitations of court-annexed arbitration, the Department generally endorses inclusion in a district's court-annexed arbitration program of civil actions—

(i) In which the United States or a Department, agency, or official of the United States is a party, and which seek only money damages in an amount not in excess of $100,000, exclusive of interest and costs; and

(ii) Which are brought (A) under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, or (B) under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. 905, or (C) under the Miller Act, 40 U.S.C. 270(b).

(3) In any other case in which settlement authority has been delegated to the U.S. Attorney under the regulations of the Department and the directives of the applicable litigation division and none of the exceptions to such delegation apply, the U.S. Attorney for the district, if he concludes that a settlement of the case upon the terms of the arbitration award would be appropriate, may proceed to settle the case accordingly.

(4) Cases other than those described in paragraph (2) that are not within the delegated settlement authority of the U.S. Attorney for the district ordinarily are not appropriate for an arbitration process because the Department generally will not be able to act favorably or negatively in a short period of time upon a settlement of the case in accordance with the arbitration award. Therefore, this will result in a demand for trial de novo in a substantial proportion of such cases to preserve the interests of the United States.

(5) The Department recommends that any district court's arbitration rule include a provision exempting any case from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves

complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

(c) *Objection to the imposition of penalties or sanctions against the United States for demanding trial de novo.* (1) Under the principle of sovereign immunity, the United States cannot be held liable for costs or sanctions in litigation in the absence of a statutory provision waiving its immunity. In view of the statutory limitations on the costs payable by the United States (28 U.S.C. 2412(a), 2412(b), and 1920), the Department does not consent to provisions in any district's arbitration program providing for the United States or the Department, agency, or official named as a party to the action to pay any sanction for demanding a trial de novo—either as a deposit in advance or as a penalty imposed after the fact—which is based on the arbitrators' fees, the opposing party's attorneys' fees, or any other costs not authorized by statute to be awarded against the United States. This objection applies whether the penalty or sanction is required to be paid to the opposing party, to the clerk of the court, or to the Treasury of the United States.

(2) In any case involving the United States that is designated for arbitration under a program pursuant to which such a penalty or sanction might be imposed against the United States, its officers or agents, the attorney for the government is instructed to take appropriate steps, by motion, notice of objection, or otherwise, to apprise the court of the objection of the United States to the imposition of such a penalty or sanction.

(3) Should such a penalty or sanction actually be required of or imposed on the United States, its officers or agents, the attorney for the government is instructed to:

(i) Advise the appropriate Assistant Attorney General of this development promptly in writing;

(ii) Seek appropriate relief from the district court; and

(iii) If necessary, seek authority for filing an appeal or petition for mandamus.

The Solicitor General, the Assistant Attorneys General, and the U.S. Attorneys are instructed to take all appropriate steps to resist the imposition of such penalties or sanctions against the United States.

(d) *Additional restrictions.* (1) The Assistant Attorneys General, the U.S. Attorneys, and their delegates, have no authority to settle or compromise the interests of the United States in a case pursuant to an arbitration process in any respect that is inconsistent with the limitations upon the delegation of settlement authority under the Department's regulations and the directives of the litigation divisions. See 28 CFR part 0, subpart Y and appendix to subpart Y. The attorney for the government shall demand trial de novo in any case in which:

(i) Settlement of the case on the basis of the amount awarded would not be in the best interests of the United States;

(ii) Approval of a proposed settlement under the Department's regulations in accordance with the arbitration award cannot be obtained within the period allowed by the local rule for rejection of the award; or

(iii) The client agency opposes settlement of the case upon the terms of the settlement award, unless the appropriate official of the Department approves a settlement of the case in accordance with the delegation of settlement authority under the Department's regulations.

(2) Cases sounding in tort and arising under the Constitution of the United States or under a common law theory filed against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to have caused injury or loss of property or personal injury or death are not appropriate for arbitration.

(3) Cases for injunctive or declaratory relief are not appropriate for arbitration.

(4) The Department reserves the right to seek any appropriate relief to which its client is entitled, including injunctive relief or a ruling on motions for judgment on the pleadings, for summary judgment, or for qualified immunity, or on issues of discovery, before proceeding with the arbitration process.

(5) In view of the provisions of the Federal Rules of Evidence with respect to settlement negotiations, the Department objects to the introduction of the arbitration process or the arbitration award in evidence in any proceeding in which the award has been rejected and the case is tried de novo.

(6) The Department's consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated; nor is it intended to affect jurisdictional limitations (*e.g.*, the Tucker Act).

(e) *Notification of new or revised arbitration rules.* The U.S. Attorney in a district which is considering the adoption of or has adopted a program of court-annexed arbitration including cases involving the United States shall:

(1) Advise the district court of the provisions of this section and the limitations on the delegation of settlement authority to the United States Attorney pursuant to the Department's regulations and the directives of the litigation divisions; and

(2) Forward to the Executive Office for United States Attorneys a notice that such a program is under consideration or has been adopted, or is being revised, together with a copy of the rules or proposed rules, if available, and a recommendation as to whether United States participation in the program as proposed, adopted, or revised, would be advisable, in whole or in part.

[Order No. 1109–85, 50 FR 40524, Oct. 4, 1985]

§ 50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.

(a) *General.* The procedures set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to the destruction of seized contraband drugs.

(b) *Purpose.* This policy implements the authority of the Attorney General under title I, section 1006(c)(3) of the Anti-Drug Abuse Act of 1986, Public Law 99–570 which is codified at 21 U.S.C. 881(f)(2), to direct the destruction, as necessary, of Schedule I and II contraband substances.

(c) *Policy.* This regulation is intended to prevent the warehousing of large quantities of seized contraband drugs which are unnecessary for due process in criminal cases. Such stockpiling of contraband drugs presents inordinate security and storage problems which create additional economic burdens on limited law enforcement resources of the United States.

(d) *Definitions.* As used in this subpart, the following terms shall have the meanings specified:

(1) The term *Contraband drugs* are those controlled substances listed in Schedules I and II of the Controlled Substances Act seized for violation of that Act.

(2) The term *Marijuana* is as defined in 21 U.S.C. 801(15) but does not include, for the purposes of this regulation, the derivatives hashish or hashish oil for purposes of destruction.

(3) The term *Representative sample* means the exemplar for testing and a sample aggregate portion of the whole amount seized sufficient for current criminal evidentiary practice.

(4) The term *Threshold amount* means:

(i) Two kilograms of a mixture or substance containing a detectable amount of heroin;

(ii) Ten kilograms of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecognine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (d)(4)(ii) (A) through (C) of this section;

(iii) Ten kilograms of a mixture or substance described in paragraph (d)(4)(ii)(B) of this section which contains cocaine base;

(iv) Two hundred grams of powdered phencyclidine (PCP) or two kilograms of a powdered mixture or substance containing a detectable amount of phencyclidine (PCP) or 28.35 grams of a

liquid containing a detectable amount of phencyclidine (PCP);

(v) Twenty grams of a mixture or substance containing a detectable amount of Lysergic Acid Diethylamide (LSD);

(vi) Eight hundred grams of a mixture or substance containing a detectable amount of N-phenyl-N[1-(2-phenylethyl)-4-piperidiny] propanamide (commonly known as fentanyl) or two hundred grams of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl propanamide; or

(vii) Twenty kilograms of hashish or two kilograms of hashish oil (21 U.S.C. 841(b)(1)(D), 960(b)(4)).

In the event of any changes to section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1) as amended occurring after the date of these regulations, the threshold amount of any substance therein listed, except marijuana, shall be twice the minimum amount required for the most severe mandatory minimum sentence.

(e) *Procedures.* Responsibilities of the Federal Bureau of Investigation and Drug Enforcement Administration.

When contraband drug substances in excess of the threshold amount or in the case of marijuana a quantity in excess of the representative sample are seized pursuant to a criminal investigation and retained in the custody of the Federal Bureau of Investigation or Drug Enforcement Administration, the Agency having custody shall:

(1) Immediately notify the appropriate U.S. Attorney, Assistant U.S. Attorney, or the responsible state/local prosecutor that the amount of seized contraband drug exceeding the threshold amount and its packaging, will be destroyed after sixty days from the date notice is provided of the seizures, unless the agency providing notice is requested in writing by the authority receiving notice not to destroy the excess contraband drug; and

(2) Assure that appropriate tests of samples of the drug are conducted to determined the chemical nature of the contraband substance and its weight sufficient to serve as evidence before the trial courts of that jurisdiction; and

(3) Photographically depict, and if requested by the appropriate prosecutorial authority, videotape, the contraband drugs as originally packaged or an appropriate display of the seized contraband drugs so as to create evidentiary exhibits for use at trial; and

(4) Isolate and retain the appropriate threshold amounts of contraband drug evidence when an amount greater than the appropriate threshold amount has been seized, or when less than the appropriate threshold amounts of contraband drugs have been seized, the entire amount of the seizure, with the exception of marijuana, for which a representative sample shall be retained; and

(5) Maintain the retained portions of the contraband drugs until the evidence is no longer required for legal proceedings, at which time it may be destroyed, first having obtained consent of the U.S. Attorney, an Assistant U.S. Attorney, or the responsible state/local prosecutor;

(6) Notify the appropriate U.S. Attorney, Assistant U.S. Attorney, or the responsible state/local prosecutor to obtain consent to destroy the retained amount or representative sample whenever the related suspect(s) has been a fugitive from justice for a period of five years. An exemplar sufficient for testing will be retained consistent with this section.

(f) *Procedures.* Responsibilities of the U.S. Attorney or the District Attorney (or equivalent state/local prosecutorial authority). When so notified by the Federal Bureau of Investigation or the Drug Enforcement Administration of an intent to destroy excess contraband drugs, the U.S. Attorney or the District Attorney (or equivalent) may:

(1) Agree to the destruction of the contraband drug evidence in excess of the threshold amount, or for marijuana in excess of the representative sample, prior to the normal sixty-day period. The U.S. Attorney, or the District Attorney (or equivalent) may delegate to his/her assistants authority to enter into such agreement; or

(2) Request an exception to the destruction policy in writing to the Special Agent in Charge of the responsible division prior to the end of the sixty-day period when retaining only the

threshold amount or representative sample will significantly affect any legal proceedings; and

(3) In the event of a denial of the request may appeal the denial to the Assistant Attorney General, Criminal Division. Such authority may not be redelegated. An appeal shall stay the destruction until the appeal is complete.

(g) *Supplementary regulations.* The Federal Bureau of Investigation and the Drug Enforcement Administration are authorized to issue regulations and establish procedures consistent with this section.

[Order No. 1256–88, 53 FR 8453, Mar. 15, 1988, as amended by Order No. 2920–2007, 72 FR 69144, Dec. 7, 2007]

§ 50.22 Young American Medals Program.

(a) *Scope.* There are hereby established two medals, one to be known as the Young American Medal for Bravery and the other to be known as the Young American Medal for Service.

(b) *Young American Medal for Bravery.* (1)(i) The Young American Medal for Bravery may be awarded to a person—

(A) Who during a given calendar year has exhibited exceptional courage, attended by extraordinary decisiveness, presence of mind, and unusual swiftness of action, regardless of his or her own personal safety, in an effort to save or in saving the life of any person or persons in actual imminent danger;

(B) Who was eighteen years of age or younger at the time of the occurrence; and

(C) Who habitually resides in the United States (including its territories and possessions), but need not be a citizen thereof.

(ii) These conditions must be met at the time of the event.

(2) The act of bravery must have been public in nature and must have been acknowledged by the Governor, Chief Executive Officer of a State, county, municipality, or other political subdivision, or by a civic, educational, or religious institution, group, or society.

(3) No more than two such medals may be awarded in any one calendar year.

(c) *Young American Medal for Service.* (1) The Young American Medal for Service may be awarded to any citizen of the United States eighteen years of age or younger at the time of the occurrence, who has achieved outstanding or unusual recognition for character and service during a given calendar year.

(2) Character attained and service accomplished by a candidate for this medal must have been such as to make his or her achievement worthy of public report. The outstanding and unusual recognition of the candidate's character and service must have been public in nature and must have been acknowledged by the Governor, Chief Executive Officer of a State, county, municipality, or other political subdivision, or by a civic, educational, or religious institution, group, or society.

(3) The recognition of the character and service upon which the award of the Medal for Service is based must have been accorded separately and apart from the Young American Medals program and must not have been accorded for the specific and announced purpose of rendering a candidate eligible, or of adding to a candidate's qualifications, for the award of the Young American Medal for Service.

(4) No more than two such medals may be awarded in any one calendar year.

(d) *Eligibility.* (1) The act or acts of bravery and the recognition for character and service that make a candidate eligible for the respective medals must have occurred during the calendar year for which the award is made.

(2) A candidate may be eligible for both medals in the same year. Moreover, the receipt of either medal in any year will not affect a candidate's eligibility for the award of either or both of the medals in a succeeding year.

(3) Acts of bravery performed and recognition of character and service achieved by persons serving in the Armed Forces, which arise from or out of military duties, shall not make a candidate eligible for either of the medals, provided, however, that a person serving in the Armed Forces shall be eligible to receive either or both of the medals if the act of bravery performed or the recognition for character and service achieved is on account of acts and service performed or rendered

outside of and apart from military duties.

(e) *Request for information.* (1) A recommendation in favor of a candidate for the award of a Young American Medal for Bravery or for Service must be accompanied by:

(i) A full and complete statement of the candidate's act or acts of bravery or recognized character and service (including the times and places) that supports qualification of the candidate to receive the appropriate medal;

(ii) Statements by witnesses or persons having personal knowledge of the facts surrounding the candidate's act or acts of bravery or recognized character and service, as required by the respective medals;

(iii) A certified copy of the candidate's birth certificate, or, if no birth certificate is available, other authentic evidence of the date and place of the candidate's birth; and

(iv) A biographical sketch of the candidate, including information as to his or her citizenship or habitual residence, as may be required by the respective medals.

(f) *Procedure.* (1)(i) All recommendations and accompanying documents and papers should be submitted to the Governor or Chief Executive Officer of the State, territory, or possession of the United States where the candidate's act or acts of bravery or recognized character and service were demonstrated. In the case of the District of Columbia, the recommendations should be submitted to the Mayor of the District of Columbia.

(ii) If the act or acts of bravery or recognized character and service did not occur within the boundaries of any State, territory, or possession of the United States, the papers should be submitted to the Governor or Chief Executive Officer of the territory or other possession of the United States wherein the candidate habitually maintains his or her residence.

(2) The Governor or Chief Executive Officer, after considering the various recommendations received after the close of the pertinent calendar year, may nominate therefrom no more than two candidates for the Young American Medal for Bravery and no more than two candidates for the Young American Medal for Service. Nominated individuals should have, in the opinion of the appropriate official, shown by the facts and circumstances to be the most worthy and qualified candidates from the jurisdiction to receive consideration for awards of the above-named medals.

(3) Nominations of candidates for either medal must be submitted no later than 120 days after notification that the Department of Justice is seeking nominations under this program for a specific calendar year. Each nomination must contain the necessary documentation establishing eligibility, must be submitted by the Governor or Chief Executive Officer, together with any comments, and should be submitted to the address published in the notice.

(4) Nominations of candidates for medals will be considered only when received from the Governor or Chief Executive Officer of a State, territory, or possession of the United States.

(5) The Young American Medals Committee will select, from nominations properly submitted, those candidates who are shown by the facts and circumstances to be eligible for the award of the medals. The Committee shall make recommendations to the Attorney General based on its evaluation of the nominees. Upon consideration of these recommendations, the Attorney General may select up to the maximum allowable recipients for each medal for the calendar year.

(g) *Presentation.* (1) The Young American Medal for Bravery and the Young American Medal for Service will be presented personally by the President of the United States to the candidates selected. These medals will be presented in the name of the President and the Congress of the United States. Presentation ceremonies shall be held at such times and places selected by the President in consultation with the Attorney General.

(2) The Young American Medals Committee will officially designate two adults (preferably the parents of the candidate) to accompany each candidate selected to the presentation ceremonies. The candidates and persons designated to accompany them

will be furnished transportation and other appropriate allowances.

(3) There shall be presented to each recipient an appropriate Certificate of Commendation stating the circumstances under which the act of bravery was performed or describing the outstanding recognition for character and service, as appropriate for the medal awarded. The Certificate will bear the signature of the President of the United States and the Attorney General of the United States.

(4) There also shall be presented to each recipient of a medal, a miniature replica of the medal awarded in the form of a lapel pin.

(h) *Posthumous awards.* In cases where a medal is awarded posthumously, the Young American Medals Committee will designate the father or mother of the deceased or other suitable person to receive the medal on behalf of the deceased. The decision of the Young American Medals Committee in designating the person to receive the posthumously awarded medal, on behalf of the deceased, shall be final.

(i) *Young American Medals Committee.* The Young American Medals Committee shall be represented by the following:

(1) Director of the FBI, Chairman;

(2) Administrator of the Drug Enforcement Administration, Member;

(3) Director of the U.S. Marshals Service, Member; and

(4) Assistant Attorney General, Office of Justice Programs, Member and Executive Secretary.

(Authority: The United States Department of Justice is authorized under 42 U.S.C. 1921 *et seq.* to promulgate rules and regulations establishing medals, one for bravery and one for service. This authority was enacted by chapter 520 of Pub. L. 81–638 (August 3, 1950).)

[61 FR 49260, Sept. 19, 1996]

§ 50.23 Policy against entering into final settlement agreements or consent decree that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents.

(a) It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings (see 28 CFR 50.9) and the Freedom of Information Act (see Memorandum for Heads of Departments and Agencies from the Attorney General *Re: The Freedom of Information Act (Oct. 4, 1993)).*

(b) There may be rare circumstances that warrant an exception to this general rule. In determining whether an exception is appropriate, any such circumstances must be considered in the context of the public's strong interest in knowing about the conduct of its Government and expenditure of its resources. The existence of such circumstances must be documented as part of the approval process, and any confidentiality provision must be drawn as narrowly as possible. Non-delegable approval authority to determine that an exception justifies use of a confidentiality provision in, or seeking or concurring in the sealing of, a final settlement or consent decree resides with the relevant Assistant Attorney General or United States Attorney, unless authority to approve the settlement itself lies with a more senior Department official, in which case the more senior official will have such approval authority.

(c) Regardless of whether particular information is subject to a confidentiality provision or to seal, statutes and regulations may prohibit its disclosure from Department of Justice files. Thus, before releasing any information, Department attorneys should consult all appropriate statutes and regulations (e.g., 5 U.S.C. 552a (Privacy Act); 50 U.S.C. 403–3(c)(6) (concerning intelligence sources and methods), and Execution Order 12958 (concerning national security information). In particular, in matters involving individuals, the Privacy Act regulates disclosure of settlement agreements that have not been made part of the court record.

(d) The principles set forth in this section are intended to provide guidance to attorneys for the Government

and are not intended to create or recognize any legally enforceable right in any person.

[Order No. 2270–99, 64 FR 59122, Nov. 2, 1999]

§ 50.24 Annuity broker minimum qualifications.

(a) *Minimum standards*. The Civil Division, United States Department of Justice, shall establish a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States. Those qualifications are as follows:

(1) The broker must have a current license issued by at least one State, the District of Columbia, or a Territory of the United States as a life insurance agent, producer, or broker;

(2) The broker must have a current license or appointment issued by at least one life insurance company to sell its structured settlement annuity contracts or to act as a structured settlement consultant or broker for the company;

(3) The broker must be currently covered by an Errors and Omissions insurance policy, or an equivalent form of insurance;

(4) The broker must never have had a license to be a life insurance agent, producer, or broker revoked, rescinded, or suspended for any reason or for any period of time;

(5) The broker must not have been convicted of a felony; and

(6) The broker must have had substantial experience in each of the past three years in providing structured settlement brokerage services to or on behalf of defendants or their counsel.

(b) *Procedures for inclusion on the list*. (1) An annuity broker who desires to be included on the list must submit a ''Declaration'' that he or she has reviewed the list of minimum qualifications set forth in paragraph (a) of this section and that he or she meets those minimum qualifications. A sample of the Declaration for annuity brokers to submit is available from the Civil Division's Web site (*http://www.usdoj.gov/civil/home.html*) or by written request to the address in this section. These minimum qualifications must be continually met for a broker who has been included on the list to remain included when the list is updated thereafter. The Declaration must be executed under penalty of perjury in a manner specified in 28 U.S.C. 1746.

(2) Each broker must submit a new Declaration annually to be included on updated lists. For a broker to be included on the initial list to be established by May 1, 2003, the Torts Branch, Civil Division, must receive the broker's Declaration no later than April 24, 2003. If the broker wishes to be included on updated lists, the Torts Branch must receive a new Declaration from the broker between January 1 and April 10 of each successive calendar year. After the Declaration is completed and signed, the original must be mailed to the United States Department of Justice, Civil Division, FTCA Staff, Post Office Box 888, Benjamin Franklin Station, Washington, DC 20044. The Department of Justice will not accept a photocopy or facsimile of the Declaration.

(3) A Declaration will not be accepted by the Department of Justice unless it is complete and has been signed by the individual annuity broker requesting inclusion on the list. A Declaration that is incomplete or has been altered, amended, or changed in any respect from the Declaration at the Civil Division's Web site will not be accepted by the Department of Justice. Such a Declaration will be returned to the annuity broker who submitted it, and the Department of Justice will take no further action on the request for inclusion on the list until the defect in the Declaration has been cured by the annuity broker.

(4) The Department of Justice will retain a complete Declaration signed and filed by an annuity broker requesting to be on the list. Because this rule does not require the submission of any additional information, the Department retains discretion to dispose of additional information or documentation provided by an annuity broker.

(5) The Department of Justice will not accept a Declaration submitted by an annuity company or by someone on behalf of another individual or group of individuals. Each individual annuity broker who desires to be included on

the list must submit his or her own Declaration.

(6) An annuity broker whose name appears on the list incorrectly may submit a written request that his or her name be corrected. An annuity broker whose name appears on the list may submit a written request that his or her name be removed from the list.

(7) To the extent practicable, a name correction or deletion will appear on the next revision of the list immediately after receipt of the written request for a name correction or deletion. A written request for a name correction or deletion must be mailed to the United States Department of Justice, Civil Division, FTCA Staff, Post Office Box 888, Benjamin Franklin Station, Washington, DC 20044. Facsimiles will not be accepted.

(8) The list of annuity brokers established pursuant to this section will be updated periodically, but not more often than twice every calendar year, beginning in calendar year 2004.

(c) *Disclaimers*. (1) The inclusion of an annuity broker on the list signifies only that the individual declared under penalty of perjury that he or she meets the minimum qualifications required by the Attorney General for providing annuity brokerage services in connection with structured settlements entered into by the United States. Because the decision to include an individual annuity broker on the list is based solely and exclusively on the Declaration submitted by the annuity broker, the appearance of an annuity broker's name on the list does not signify that the annuity broker actually meets those minimum qualifications or is otherwise competent to provide structured settlement brokerage services to the United States. No preferential consideration will be given to an annuity broker appearing on the list except to the extent that United States Attorneys utilize the list pursuant to section 11015(b) of Public Law 107–273.

(2) By submitting a Declaration to the Department of Justice, the individual annuity broker agrees that the Declaration and the list each may be made public in its entirety, and the annuity broker expressly consents to such release and disclosure of the Declaration and list.

[Order No. 2667–2003, 68 FR 18120, Apr. 15, 2003]

§ 50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

(a) *Assumption of concurrent Federal criminal jurisdiction*. (1) Under 18 U.S.C. 1162(d), the United States may accept concurrent Federal criminal jurisdiction to prosecute violations of 18 U.S.C. 1152 (the General Crimes, or Indian Country Crimes, Act) and 18 U.S.C. 1153 (the Major Crimes, or Indian Major Crimes, Act) within areas of Indian country in the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin that are subject to State criminal jurisdiction under Public Law 280, 18 U.S.C. 1162(a), if the tribe requests such an assumption of jurisdiction and the Attorney General consents to that request. Once the Attorney General has consented to an Indian tribe's request for assumption of concurrent Federal criminal jurisdiction, the General Crimes and Major Crimes Acts shall apply in the Indian country of the requesting tribe that is located in any of these ''mandatory'' Public Law 280 States, and criminal jurisdiction over those areas shall be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) does not require the agreement, consent, or concurrence of any State or local government.

(2) Under 25 U.S.C. 1321(a)(2), the United States may exercise concurrent Federal criminal jurisdiction in other areas of Indian country as to which States have assumed ''optional'' Public Law 280 criminal jurisdiction under 25 U.S.C. 1321(a), if a tribe so requests and after consultation with and consent by the Attorney General. The Department's view is that such concurrent Federal criminal jurisdiction exists under applicable statutes in these areas of Indian country, even if the Federal Government does not formally accept such jurisdiction in response to petitions from individual tribes. This

rule therefore does not establish procedures for processing requests from tribes under 25 U.S.C. 1321(a)(2).

(b) *Request requirements.* (1) A tribal request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) shall be made by the chief executive official of a federally recognized Indian tribe that occupies Indian country listed in 18 U.S.C. 1162(a). For purposes of this section, a chief executive official may include a tribal chairperson, president, governor, principal chief, or other equivalent position.

(2) The tribal request shall be submitted in writing to the Director of the Office of Tribal Justice at the Department of Justice. The first page of the tribal request shall be clearly marked: ''Request for United States Assumption of Concurrent Federal Criminal Jurisdiction.'' The tribal request shall explain why the assumption of concurrent Federal criminal jurisdiction will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe. The tribal request shall also identify each local or State agency that currently has jurisdiction to investigate or prosecute criminal violations in the Indian country of the tribe and shall provide contact information for each such agency.

(c) *Process for handling tribal requests.* (1) Upon receipt of a tribal request, the Office of Tribal Justice shall:

(i) Acknowledge receipt; and

(ii) Open a file.

(2) Within 30 days of receipt of a tribal request, the Office of Tribal Justice shall:

(i) Publish a notice in the FEDERAL REGISTER, seeking comments from the general public;

(ii) Send written notice of the request to the State and local agencies identified by the tribe as having criminal jurisdiction over the tribe's Indian country, with a copy of the notice to the governor of the State in which the agency is located, requesting that any comments be submitted within 45 days of the date of the notice;

(iii) Seek comments from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request; and

(iv) Seek comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(3) As soon as possible but not later than 30 days after receipt of a tribal request, the Office of Tribal Justice shall initiate consultation with the requesting tribe, consistent with applicable Executive Orders and Presidential Memoranda on tribal consultation.

(4) To the extent appropriate and consistent with applicable laws and regulations, including requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, governing personally identifiable information, and with the duty to protect law enforcement sensitive information, the Office of Tribal Justice may share with the requesting tribe any comments from other parties and provide the tribe with an opportunity to respond in writing.

(5) An Indian tribe may submit a request at any time after the effective date of this rule. However, requests received by February 28 of each calendar year will be prioritized for decision by July 31 of the same calendar year, if feasible; and requests received by August 31 of each calendar year will be prioritized for decision by January 31 of the following calendar year, if feasible. The Department will seek to complete its review of prioritized requests within these time frames, recognizing that it may not be possible to do so in each instance.

(d) *Factors.* Factors that will be considered in determining whether or not to consent to a tribe's request for assumption of concurrent Federal criminal jurisdiction include the following:

(1) Whether consenting to the request will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe.

(2) Whether consenting to the request will increase the availability of law enforcement resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(3) Whether consenting to the request will improve access to judicial resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(4) Whether consenting to the request will improve access to detention and correctional resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(5) Other comments and information received from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request.

(6) Other comments and information received from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(7) Other comments and information received from tribal consultation.

(8) Other comments and information received from other sources, including governors and State and local law enforcement agencies.

(e) *Decision*. (1) The decision whether to consent to a tribal request for assumption of concurrent Federal criminal jurisdiction shall be made by the Deputy Attorney General after receiving written recommendations from the Office of Tribal Justice, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation.

(2) The Deputy Attorney General will:

(i) Consent to the request for assumption of concurrent Federal criminal jurisdiction, effective as of some future date certain within the next twelve months (and, if feasible, within the next six months), with or without conditions, and publish a notice of the consent in the FEDERAL REGISTER;

(ii) Deny the request for assumption of concurrent Federal criminal jurisdiction; or

(iii) Request further information or comment before making a final decision.

(3) The Deputy Attorney General shall explain the basis for the decision in writing.

(4) The decision to grant or deny a request for assumption of concurrent Federal criminal jurisdiction is not appealable. However, at any time after a denial of such a request, a tribe may submit a renewed request for assumption of concurrent Federal criminal jurisdiction. A renewed request shall address the basis for the prior denial. The Office of Tribal Justice may provide appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request.

(f) *Retrocession of State criminal jurisdiction*. Retrocession of State criminal jurisdiction under Public Law 280 is governed by 25 U.S.C. 1323(a) and Executive Order 11435 of November 21, 1968. The procedures for retrocession do not govern a request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d).

[AG Order 3314–2011, 76 FR 76042, Dec. 6, 2011]

PART 51—PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

Subpart A—General Provisions

Sec.
51.1 Purpose.
51.2 Definitions.
51.3 Delegation of authority.
51.4 Date used to determine coverage; list of covered jurisdictions.
51.5 Termination of coverage.
51.6 Political subunits.
51.7 Political parties.
51.8 Section 3 coverage.
51.9 Computation of time.
51.10 Requirement of action for declaratory judgment or submission to the Attorney General.
51.11 Right to bring suit.
51.12 Scope of requirement.
51.13 Examples of changes.
51.14 Recurrent practices.
51.15 Enabling legislation and contingent or nonuniform requirements.
51.16 Distinction between changes in procedure and changes in substance.
51.17 Special elections.
51.18 Federal court-ordered changes.
51.19 Request for notification concerning voting litigation.

Subpart B—Procedures for Submission to the Attorney General

51.20 Form of submissions.

51.21 Time of submissions.
51.22 Submitted changes that will not be reviewed.
51.23 Party and jurisdiction responsible for making submissions.
51.24 Delivery of submissions.
51.25 Withdrawal of submissions.

Subpart C—Contents of Submissions

51.26 General.
51.27 Required contents.
51.28 Supplemental contents.

Subpart D—Communications From Individuals and Groups

51.29 Communications concerning voting changes.
51.30 Action on communications from individuals or groups.
51.31 Communications concerning voting suits.
51.32 Establishment and maintenance of registry of interested individuals and groups.

Subpart E—Processing of Submissions

51.33 Notice to registrants concerning submissions.
51.34 Expedited consideration.
51.35 Disposition of inappropriate submissions and resubmissions.
51.36 Release of information concerning submissions.
51.37 Obtaining information from the submitting authority.
51.38 Obtaining information from others.
51.39 Supplemental information and related submissions.
51.40 Failure to complete submissions.
51.41 Notification of decision not to object.
51.42 Failure of the Attorney General to respond.
51.43 Reexamination of decision not to object.
51.44 Notification of decision to object.
51.45 Request for reconsideration.
51.46 Reconsideration of objection at the instance of the Attorney General.
51.47 Conference.
51.48 Decision after reconsideration.
51.49 Absence of judicial review.
51.50 Records concerning submissions.

Subpart F—Determinations by the Attorney General

51.51 Purpose of the subpart.
51.52 Basic standard.
51.53 Information considered.
51.54 Discriminatory purpose and effect.
51.55 Consistency with constitutional and statutory requirements.
51.56 Guidance from the courts.
51.57 Relevant factors.
51.58 Representation.
51.59 Redistricting plans.
51.60 Changes in electoral systems.
51.61 Annexations.

Subpart G—Sanctions

51.62 Enforcement by the Attorney General.
51.63 Enforcement by private parties.
51.64 Bar to termination of coverage (bailout).

Subpart H—Petition To Change Procedures

51.65 Who may petition.
51.66 Form of petition.
51.67 Disposition of petition.

APPENDIX TO PART 51—JURISDICTIONS COVERED UNDER SECTION 4(b) OF THE VOTING RIGHTS ACT, AS AMENDED

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, and 42 U.S.C. 1973b, 1973c.

SOURCE: 52 FR 490, Jan. 6, 1987, unless otherwise noted.

Subpart A—General Provisions

§51.1 Purpose.

(a) Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(b) of the Act, 42 U.S.C. 1973b(b), of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either:

(1) A declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or

(2) It has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission.

(b) In order to make clear the responsibilities of the Attorney General under section 5 and the interpretation of the Attorney General of the responsibility imposed on others under this section, the procedures in this part have been established to govern the administration of section 5.

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§ 51.2 Definitions.

As used in this part—

Act means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the Civil Rights Act of 1968, 82 Stat. 73, the Voting Rights Act Amendments of 1970, 84 Stat. 314, the District of Columbia Delegate Act, 84 Stat. 853, the Voting Rights Act Amendments of 1975, 89 Stat. 400, the Voting Rights Act Amendments of 1982, 96 Stat. 131, the Voting Rights Language Assistance Act of 1992, 106 Stat. 921, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577, and the Act to Revise the Short Title of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 122 Stat. 2428, 42 U.S.C. 1973 *et seq*. Section numbers, such as ''section 14(c)(3),'' refer to sections of the Act.

Attorney General means the Attorney General of the United States or the delegate of the Attorney General.

Change affecting voting or *change* means any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage under section 4(b) or from the existing standard, practice, or procedure if it was subsequently altered and precleared under section 5. In assessing whether a change has a discriminatory purpose or effect, the comparison shall be with the standard, practice, or procedure in effect on the date used to determine coverage under section 4(b) or the most recent precleared standard, practice, or procedure. Some examples of changes affecting voting are given in § 51.13.

Covered jurisdiction is used to refer to a State, where the determination referred to in § 51.4 has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis.

Language minorities or *language minority group* is used, as defined in the Act, to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. (Sections 14(c)(3) and 203(e)). See 28 CFR part 55, Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups.

Political subdivision is used, as defined in the Act, to refer to ''any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.'' (Section 14(c)(2)).

Preclearance is used to refer to the obtaining of the declaratory judgment described in section 5, to the failure of the Attorney General to interpose an objection pursuant to section 5, or to the withdrawal of an objection by the Attorney General pursuant to § 51.48(b).

Submission is used to refer to the written presentation to the Attorney General by an appropriate official of any change affecting voting.

Submitting authority means the jurisdiction on whose behalf a submission is made.

Vote and *voting* are used, as defined in the Act, to include ''all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.'' (Section 14(c)(1)).

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§ 51.3 Delegation of authority.

The responsibility and authority for determinations under section 5 and section 3(c) have been delegated by the Attorney General to the Assistant Attorney General, Civil Rights Division. With the exception of objections and decisions following the reconsideration of objections, the Chief of the Voting Section is authorized to perform the functions of the Assistant Attorney General. With the concurrence of the Assistant Attorney General, the Chief of the Voting Section may designate supervisory attorneys in the Voting

Section to perform the functions of the Chief.

[Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§51.4 Date used to determine coverage; list of covered jurisdictions.

(a) The requirement of section 5 takes effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census and the Attorney General under section 4(b). These determinations are not reviewable in any court. (Section 4(b)).

(b) Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. For each covered jurisdiction that date is one of the following: November 1, 1964; November 1, 1968; or November 1, 1972.

(c) The appendix to this part contains a list of covered jurisdictions, together with the applicable date used to determine coverage and the FEDERAL REGISTER citation for the determination of coverage.

§51.5 Termination of coverage.

(a) *Expiration*. The requirements of section 5 will expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA), which amendments became effective on July 27, 2006. *See* section 4(a)(8) of the VRARA.

(b) *Bailout*. Any political subunit in a covered jurisdiction or a political subdivision of a covered State, a covered jurisdiction or a political subdivision of a covered State, or a covered State may terminate the application of section 5 (''bailout'') by obtaining the declaratory judgment described in section 4(a) of the Act.

[Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§51.6 Political subunits.

All political subunits within a covered jurisdiction (*e.g.*, counties, cities, school districts) that have not terminated coverage by obtaining the declaratory judgment described in section 4(a) of the Act are subject to the requirements of section 5.

[Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§51.7 Political parties.

Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement:

(a) If the change relates to a public electoral function of the party and

(b) If the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5.

For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. Where appropriate the term ''jurisdiction'' (but not ''covered jurisdiction'') includes political parties.

§51.8 Section 3 coverage.

Under section 3(c) of the Act, a court in voting rights litigation can order as relief that a jurisdiction not subject to the preclearance requirement of section 5 preclear its voting changes by submitting them either to the court or to the Attorney General. Where a jurisdiction is required under section 3(c) to preclear its voting changes, and it elects to submit the proposed changes to the Attorney General for preclearance, the procedures in this part will apply.

§51.9 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting for which a response on the merits is appropriate (*see* §51.35, §51.37).

(b) The 60-day period shall commence upon receipt of a submission by the Voting Section of the Department of Justice's Civil Rights Division or upon

receipt of a submission by the Office of the Assistant Attorney General, Civil Rights Division, if the submission is properly marked as specified in § 51.24(f). The 60-day period shall recommence upon the receipt in like manner of a resubmission (*see* § 51.35), information provided in response to a written request for additional information (*see* § 51.37(b)), or material, supplemental information or a related submission (*see* § 51.39).

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted, and with the 60th day ending at 11:59 p.m. Eastern Time of that day. If the final day of the period should fall on a Saturday, Sunday, or any day designated as a holiday by the President or Congress of the United States, or any other day that is not a day of regular business for the Department of Justice, the next full business day shall be counted as the final day of the 60-day period. The date of the Attorney General's response shall be the date on which it is transmitted to the submitting authority by any reasonable means, including placing it in a postbox of the U.S. Postal Service or a private mail carrier, sending it by telefacsimile, email, or other electronic means, or delivering it in person to a representative of the submitting authority.

[Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§ 51.10 Requirement of action for declaratory judgment or submission to the Attorney General.

Section 5 requires that, prior to enforcement of any change affecting voting, the jurisdiction that has enacted or seeks to administer the change must either:

(a) Obtain a judicial determination from the U.S. District Court for the District of Columbia that the voting change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(b) Make to the Attorney General a proper submission of the change to which no objection is interposed.

It is unlawful to enforce a change affecting voting without obtaining preclearance under section 5. The obligation to obtain such preclearance is not relieved by unlawful enforcement.

[52 FR 490, Jan. 6, 1987; 52 FR 2648, Jan. 23, 1987, as amended by Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§ 51.11 Right to bring suit.

Submission to the Attorney General does not affect the right of the submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change affecting voting neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

[Order 3262–2011, 76 FR 21243, Apr. 15, 2011]

§ 51.12 Scope of requirement.

Except as provided in § 51.18 (Federal court-ordered changes), the section 5 requirement applies to any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, seemingly expands voting rights, or is designed to remove the elements that caused the Attorney General to object to a prior submitted change. The scope of section 5 coverage is based on whether the generic category of changes affecting voting to which the change belongs (for example, the generic categories of changes listed in § 51.13) has the potential for discrimination. *NAACP* v. *Hampton County Election Commission*, 470 U.S. 166 (1985). The method by which a jurisdiction enacts or administers a change does not affect the requirement to comply with section 5, which applies to changes enacted or administered through the executive, legislative, or judicial branches.

[Order 3262–2011, 76 FR 21244, Apr. 15, 2011]

§ 51.13 Examples of changes.

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (*e.g.*, through redistricting, annexation, deannexation, incorporation, dissolution, merger, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official, or any change in the offices that are elective (*e.g.*, by shortening or extending the term of an office; changing from election to appointment; transferring authority from an elected to an appointed official that, in law or in fact, eliminates the elected official's office; or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in preelection activities, such as political campaigns.

(l) Any change that transfers or alters the authority of any official or governmental entity regarding who may enact or seek to implement a voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting.

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21244, Apr. 15, 2011]

§51.14 Recurrent practices.

Where a jurisdiction implements a practice or procedure periodically or upon certain established contingencies, a change occurs:

(a) The first time such a practice or procedure is implemented by the jurisdiction,

(b) When the manner in which such a practice or procedure is implemented by the jurisdiction is changed, or

(c) When the rules for determining when such a practice or procedure will be implemented are changed.

The failure of the Attorney General to object to a recurrent practice or procedure constitutes preclearance of the future use of the practice or procedure if its recurrent nature is clearly stated or described in the submission or is expressly recognized in the final response of the Attorney General on the merits of the submission.

§51.15 Enabling legislation and contingent or nonuniform requirements.

(a) With respect to legislation (1) that enables or permits the State or its political subunits to institute a voting change or (2) that requires or enables the State or its political sub-units to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

(b) For example, such legislation includes—

(1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in §51.13,

(2) Legislation requiring a political subunit that chooses a certain form of government to follow specified election procedures,

(3) Legislation requiring or authorizing political subunits of a certain size or a certain location to institute specified changes,

(4) Legislation requiring a political subunit to follow certain practices or procedures unless the subunit's charter or ordinances specify to the contrary.

§ 51.16 Distinction between changes in procedure and changes in substance.

The failure of the Attorney General to interpose an objection to a procedure for instituting a change affecting voting does not exempt the substantive change from the preclearance requirement. For example, if the procedure for the approval of an annexation is changed from city council approval to approval in a referendum, the preclearance of the new procedure does not exempt an annexation accomplished under the new procedure from the preclearance requirement.

§ 51.17 Special elections.

(a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.

(b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

(c) A jurisdiction conducting a referendum election to ratify a change in a practice or procedure that affects voting may submit the change to be voted on at the same time that it submits any changes involved in the conduct of the referendum election. A jurisdiction wishing to receive preclearance for the change to be ratified should state clearly that such preclearance is being requested. See § 51.22 of this part.

§ 51.18 Federal court-ordered changes.

(a) *In general*. Changes affecting voting for which approval by a Federal court is required, or that are ordered by a Federal court, are exempt from section 5 review only where the Federal court prepared the change and the change has not been subsequently adopted or modified by the relevant governmental body. *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981). (*See also* § 51.22.)

(b) *Subsequent changes*. Where a Federal court-ordered change is not itself subject to the preclearance requirement, subsequent changes necessitated by the court order but decided upon by the jurisdiction remain subject to preclearance. For example, voting precinct and polling changes made necessary by a court-ordered redistricting plan are subject to section 5 review.

(c) *Alteration in section 5 status*. Where a Federal court-ordered change at its inception is not subject to review under section 5, a subsequent action by the submitting authority demonstrating that the change reflects its policy choices (*e.g.*, adoption or ratification of the change, or implementation in a manner not explicitly authorized by the court) will render the change subject to review under section 5 with regard to any future implementation.

(d) *In emergencies*. A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of that practice not explicitly authorized by the court.

[Order 3262–2011, 76 FR 21244, Apr. 15, 2011]

§ 51.19 Request for notification concerning voting litigation.

A jurisdiction subject to the preclearance requirements of section 5 that becomes involved in any litigation concerning voting is requested to notify the Chief, Voting Section, Civil Rights Division, at the addresses, telefacsimile number, or email address specified in § 51.24. Such notification will not be considered a submission under section 5.

[Order 3262–2011, 76 FR 21244, Apr. 15, 2011]

Subpart B—Procedures for Submission to the Attorney General

§ 51.20 Form of submissions.

(a) Submissions may be made in letter or any other written form.

(b) The Attorney General will accept certain machine readable data in the following electronic media: 3.5 inch 1.4 megabyte disk, compact disc read-only memory (CD–ROM) formatted to the ISO–9660/Joliet standard, or digital versatile disc read-only memory (DVD–

ROM). Unless requested by the Attorney General, data provided on electronic media need not be provided in hard copy.

(c) All electronic media shall be clearly labeled with the following information:

(1) Submitting authority.

(2) Name, address, title, and telephone number of contact person.

(3) Date of submission cover letter.

(4) Statement identifying the voting change(s) involved in the submission.

(d) Each magnetic medium (floppy disk or tape) provided must be accompanied by a printed description of its contents, including an identification by name or location of each data file contained on the medium, a detailed record layout for each such file, a record count for each such file, and a full description of the magnetic medium format.

(e) Text documents should be provided in a standard American Standard Code for Information Interchange (ASCII) character code; documents with graphics and complex formatting should be provided in standard Portable Document Format (PDF). The label shall be affixed to each electronic medium, and the information included on the label shall also be contained in a documentation file on the electronic medium.

(f) All data files shall be provided in a delimited text file and must include a header row as the first row with a name for each field in the data set. A separate data dictionary file documenting the fields in the data set, the field separators or delimiters, and a description of each field, including whether the field is text, date, or numeric, enumerating all possible values is required; separators and delimiters should not also be used as data in the data set. Proprietary or commercial software system data files (*e.g.*, SAS, SPSS, dBase, Lotus 1–2–3) and data files containing compressed data or binary data fields will not be accepted.

[52 FR 490, Jan. 6, 1987, as amended by Order No. 1536–91, 56 FR 51836, Oct. 16, 1991; Order 3262–2011, 76 FR 21244, Apr. 15, 2011]

§51.21 Time of submissions.

Changes affecting voting should be submitted as soon as possible after they become final, except as provided in §51.22.

[Order 3262–2011, 76 FR 21244, Apr. 15, 2011]

§51.22 Submitted changes that will not be reviewed.

(a) The Attorney General will not consider on the merits:

(1) Any proposal for a change submitted prior to final enactment or administrative decision except as provided in paragraph (b) of this section.

(2) Any submitted change directly related to another change that has not received section 5 preclearance if the Attorney General determines that the two changes cannot be substantively considered independently of one another.

(3) Any submitted change whose enforcement has ceased and been superseded by a standard, practice, or procedure that has received section 5 preclearance or that is otherwise legally enforceable under section 5.

(b) For any change requiring approval by referendum, by a State or Federal court, or by a Federal agency, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken. (*See also* §51.18.)

[Order 3262–2011, 76 FR 21244, Apr. 15, 2011]

§51.23 Party and jurisdiction responsible for making submissions.

(a) Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. A State, whether partially or fully covered, has authority to submit any voting change on behalf of its covered jurisdictions and political subunits. Where a State is covered as a whole, State legislation or other changes undertaken or required by the State shall be submitted by the State (except that legislation of local applicability may be submitted by political subunits). Where a State is partially covered, changes of statewide application may be submitted by the State. Submissions from the State,

rather than from the individual covered jurisdictions, would serve the State's interest in at least two important respects: first, the State is better able to explain to the Attorney General the purpose and effect of voting changes it enacts than are the individual covered jurisdictions; second, a single submission of the voting change on behalf of all of the covered jurisdictions would reduce the possibility that some State acts will be legally enforceable in some parts of the State but not in others.

(b) A change effected by a political party (*see* § 51.7) may be submitted by an appropriate official of the political party.

(c) A change affecting voting that results from a State court order should be submitted by the jurisdiction or entity that is to implement or administer the change (in the manner specified by paragraphs (a) and (b) of this section).

[Order 3262–2011, 76 FR 21245, Apr. 15, 2011]

§ 51.24 Delivery of submissions.

(a) *Delivery by U.S. Postal Service.* Submissions sent to the Attorney General by the U.S. Postal Service, including certified mail or express mail, shall be addressed to the Chief, Voting Section, Civil Rights Division, United States Department of Justice, Room 7254–NWB, 950 Pennsylvania Avenue, NW, Washington, DC 20530.

(b) *Delivery by other carriers.* Submissions sent to the Attorney General by carriers other than the U.S. Postal Service, including by hand delivery, should be addressed or may be delivered to the Chief, Voting Section, Civil Rights Division, United States Department of Justice, Room 7254–NWB, 1800 G Street, NW, Washington, DC 20006.

(c) *Electronic submissions.* Submissions may be delivered to the Attorney General through an electronic form available on the website of the Voting Section of the Civil Rights Division at *www.justice.gov/crt/voting/.* Detailed instructions appear on the website. Jurisdictions should answer the questions appearing on the electronic form, and should attach documents as specified in the instructions accompanying the application.

(d) *Telefacsimile submissions.* In urgent circumstances, submissions may be delivered to the Attorney General by telefacsimile to (202) 616–9514. Submissions should not be sent to any other telefacsimile number at the Department of Justice. Submissions that are voluminous should not be sent by telefacsimile.

(e) *Email.* Submissions may not be delivered to the Attorney General by email in the first instance. However, after a submission is received by the Attorney General, a jurisdiction may supply additional information on that submission by email to *vot1973c@usdoj.gov.* The subject line of the email shall be identified with the Attorney General's file number for the submission (YYYY–NNNN), marked as ''Additional Information,'' and include the name of the jurisdiction.

(f) *Special marking.* The first page of the submission, and the envelope (if any), shall be clearly marked: ''Submission under Section 5 of the Voting Rights Act.''

(g) The most current information on addresses for, and methods of making, section 5 submissions is available on the Voting Section website at *www.justice.gov/crt/voting/.*

[Order 3262–2011, 76 FR 21245, Apr. 15, 2011]

§ 51.25 Withdrawal of submissions.

(a) A jurisdiction may withdraw a submission at any time prior to a final decision by the Attorney General. Notice of the withdrawal of a submission must be made in writing addressed to the Chief, Voting Section, Civil Rights Division, to be delivered at the addresses, telefacsimile number, or email address specified in § 51.24. The submission shall be deemed withdrawn upon the Attorney General's receipt of the notice.

(b) Notice of withdrawals will be given to interested parties registered under § 51.32.

[52 FR 490, Jan. 6, 1987, as amended by Order 1214–87, 52 FR 33409, Sept. 3, 1987; Order 3262–2011, 76 FR 21245, Apr. 15, 2011]

Subpart C—Contents of Submissions

§51.26 General.

(a) The source of any information contained in a submission should be identified.

(b) Where an estimate is provided in lieu of more reliable statistics, the submission should identify the name, position, and qualifications of the person responsible for the estimate and should briefly describe the basis for the estimate.

(c) Submissions should be no longer than is necessary for the presentation of the appropriate information and materials.

(d) The Attorney General will not accept for review any submission that fails to describe the subject change in sufficient particularity to satisfy the minimum requirements of §51.27(c).

(e) A submitting authority that desires the Attorney General to consider any information supplied as part of an earlier submission may incorporate such information by reference by stating the date and subject matter of the earlier submission and identifying the relevant information.

(f) Where information requested by this subpart is relevant but not known or available, or is not applicable, the submission should so state.

(g) The following Office of Management and Budget control number under the Paperwork Reduction Act applies to the collection of information requirements contained in these Procedures: OMB No. 1190–0001 (expires February 28, 1994). See 5 CFR 1320.13.

[52 FR 490, Jan. 6, 1987, as amended by Order No. 1284–88, 53 FR 25327, July 6, 1988; Order No. 1498–91, 56 FR 26032, June 6, 1991]

§51.27 Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to section 5 with respect to the submitted change affecting voting:

(a) A copy of any ordinance, enactment, order, or regulation embodying the change affecting voting for which section 5 preclearance is being requested.

(b) A copy of any ordinance, enactment, order, or regulation embodying the voting standard, practice, or procedure that is proposed to be repealed, amended, or otherwise changed.

(c) A statement that identifies with specificity each change affecting voting for which section 5 preclearance is being requested and that explains the difference between the submitted change and the prior law or practice. If the submitted change is a special referendum election and the subject of the referendum is a proposed change affecting voting, the submission should specify whether preclearance is being requested solely for the special election or for both the special election and the proposed change to be voted on in the referendum (*see* §§51.16, 51.22).

(d) The name, title, mailing address, and telephone number of the person making the submission. Where available, a telefacsimile number and an email address for the person making the submission also should be provided.

(e) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

(f) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

(g) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

(h) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(i) The date of adoption of the change affecting voting.

(j) The date on which the change is to take effect.

(k) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(l) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(m) A statement of the reasons for the change.

(n) A statement of the anticipated effect of the change on members of racial or language minority groups.

(o) A statement identifying any past or pending litigation concerning the change or related voting practices.

(p) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(q) For redistrictings and annexations: the items listed under § 51.28 (a)(1) and (b)(1); for annexations only: the items listed under § 51.28(c)(3).

(r) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in § 51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in § 51.37.

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21245, Apr. 15, 2011]

§ 51.28 Supplemental contents.

Review by the Attorney General will be facilitated if the following information, where pertinent, is provided in addition to that required by § 51.27.

(a) *Demographic information.* (1) Total and voting age population of the affected area before and after the change, by race and language group. If such information is contained in publications of the U.S. Bureau of the Census, reference to the appropriate volume and table is sufficient.

(2) The number of registered voters for the affected area by voting precinct before and after the change, by race and language group.

(3) Any estimates of population, by race and language group, made in connection with the adoption of the change.

(4) Demographic data provided on magnetic media shall be based upon the Bureau of the Census Public Law 94–171 file unique block identity code of state, county, tract, and block.

(5) Demographic data on electronic media that are provided in conjunction with a redistricting plan shall be contained in an ASCII, comma delimited block equivalency import file with two fields as detailed in the following table. A separate import file shall accompany each redistricting plan:

Field No.	Description	Total length	Comments
1	PL94–171 reference number: GEOID10.	15	
2	District Number	3	No leading zeroes.

(i) *Field 1:* The PL 94–171/GEOID10 reference number is the state, county, tract, and block reference numbers concatenated together and padded with leading zeroes so as to create a 15-digit character field; and

(ii) *Field 2:* The district number is a 3 digit character field with no padded leading zeroes.

Example: 482979501002099,1 482979501002100,3 482979501004301,10 482975010004305,23 482975010004302,101

(6) Demographic data on magnetic media that are provided in conjunction with a redistricting can be provided in shapefile (.shp) spatial data format.

(i) The shapefile shall include at a minimum the main file, index file, and dBASE table.

(ii) The dBASE table shall contain a row for each census block. Each census block will be identified by the state, county, tract and block identifier [GEOID10] as specified by the Bureau of Census. Each row shall identify the district assignment and relevant population for that specific row.

(iii) The shapefile should include a projection file (.prj).

(iv) The shapefile should be sent in NAD 83 geographic projection. If another projection is used, it should be described fully.

(b) *Maps.* Where any change is made that revises the constituency that elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation,

change from district to at-large elections) or that changes voting precinct boundaries, polling place locations, or voter registration sites, maps in duplicate of the area to be affected, containing the following information:

(1) The prior and new boundaries of the voting unit or units.

(2) The prior and new boundaries of voting precincts.

(3) The location of racial and language minority groups.

(4) Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.

(5) The location of prior and new polling places.

(6) The location of prior and new voter registration sites.

(c) *Annexations.* For annexations, in addition to that information specified elsewhere, the following information:

(1) The present and expected future use of the annexed land (*e.g.*, garden apartments, industrial park).

(2) An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.

(3) A statement that all prior annexations (and deannexations) subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations (and deannexations) subject to the preclearance requirement that have not been submitted for review. *See* §51.61(b).

(4) To the extent that the jurisdiction elects some or all members of its governing body from single-member districts, it should inform the Attorney General how the newly annexed territory will be incorporated into the existing election districts.

(d) *Election returns.* Where a change may affect the electoral influence of a racial or language minority group, returns of primary and general elections conducted by or in the jurisdiction, containing the following information:

(1) The name of each candidate.

(2) The race or language group of each candidate, if known.

(3) The position sought by each candidate.

(4) The number of votes received by each candidate, by voting precinct.

(5) The outcome of each contest.

(6) The number of registered voters, by race and language group, for each voting precinct for which election returns are furnished. Information with respect to elections held during the last ten years will normally be sufficient.

(7) Election related data containing any of the information described above that are provided on magnetic media shall conform to the requirements of §51.20 (b) through (e). Election related data that cannot be accurately presented in terms of census blocks may be identified by county and by precinct.

(e) *Language usage.* Where a change is made affecting the use of the language of a language minority group in the electoral process, information that will enable the Attorney General to determine whether the change is consistent with the minority language requirements of the Act. The Attorney General's interpretation of the minority language requirements of the Act is contained in Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 CFR part 55.

(f) *Publicity and participation.* For submissions involving controversial or potentially controversial changes, evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place. Examples of materials demonstrating public notice or participation include:

(1) Copies of newspaper articles discussing the proposed change.

(2) Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).

(3) Minutes or accounts of public hearings concerning the proposed change.

(4) Statements, speeches, and other public communications concerning the proposed change.

(5) Copies of comments from the general public.

(6) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(g) *Availability of the submission.* (1) Copies of public notices that announce the submission to the Attorney General, inform the public that a complete duplicate copy of the submission is available for public inspection (e.g., at the county courthouse) and invite comments for the consideration of the Attorney General and statements regarding where such public notices appeared.

(2) Information demonstrating that the submitting authority, where a submission contains magnetic media, made the magnetic media available to be copied or, if so requested, made a hard copy of the data contained on the magnetic media available to be copied.

(h) *Minority group contacts.* For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process.

[52 FR 490, Jan. 6, 1987, as amended by Order No. 1536–91, 56 FR 51836, Oct. 16, 1991; Order 3262–2011, 76 FR 21245, Apr. 15, 2011]

Subpart D—Communications From Individuals and Groups

§ 51.29 Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which section 5 applies.

(a) Communications may be in the form of a letter stating the name, address, and telephone number of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect, or simply bringing to the attention of the Attorney General the fact that a voting change has occurred.

(b) Comments should be sent to the Chief, Voting Section, Civil Rights Division, at the addresses, telefacsimile number, or email address specified in § 51.24. The first page and the envelope (if any) should be marked: ''Comment under section 5 of the Voting Rights Act.'' Comments should include, where available, the name of the jurisdiction and the Attorney General's file number (YYYY–NNNN) in the subject line.

(c) Comments by individuals or groups concerning any change affecting voting may be sent at any time; however, individuals and groups are encouraged to comment as soon as they learn of the change.

(d) To the extent permitted by the Freedom of Information Act, 5 U.S.C. 552, the Attorney General shall not disclose to any person outside the Department of Justice the identity of any individual or entity providing information on a submission or the administration of section 5 where the individual or entity has requested confidentiality; an assurance of confidentiality may reasonably be implied from the circumstances of the communication; disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy under 5 U.S.C. 552; or disclosure is prohibited by any applicable provisions of federal law.

(e) When an individual or group desires the Attorney General to consider information that was supplied in connection with an earlier submission, it is not necessary to resubmit the information but merely to identify the earlier submission and the relevant information.

[52 FR 490, Jan. 6, 1987, as amended by Order 1214–87, 52 FR 33409, Sept. 3, 1987; Order 3262–2011, 76 FR 21246, Apr. 15, 2011]

§ 51.30 Action on communications from individuals or groups.

(a) If there has already been a submission received of the change affecting voting brought to the attention of the Attorney General by an individual or group, any evidence from the individual or group shall be considered along with the materials submitted and materials resulting from any investigation.

(b) If such a submission has not been received, the Attorney General shall advise the appropriate jurisdiction of the requirement of section 5 with respect to the change in question.

§51.31 Communications concerning voting suits.

Individuals and groups are urged to notify the Chief, Voting Section, Civil Rights Division, of litigation concerning voting in jurisdictions subject to the requirement of section 5.

§51.32 Establishment and maintenance of registry of interested individuals and groups.

The Attorney General shall establish and maintain a Registry of Interested Individuals and Groups, which shall contain the name and address of any individual or group that wishes to receive notice of section 5 submissions. Information relating to this registry and to the requirements of the Privacy Act of 1974, 5 U.S.C. 552a *et seq.*, is contained in JUSTICE/CRT–004. 48 FR 5334 (Feb. 4, 1983).

Subpart E—Processing of Submissions

§51.33 Notice to registrants concerning submissions.

Weekly notice of submissions that have been received will be given to the individuals and groups who have registered for this purpose under §51.32. Such notice will also be given when section 5 declaratory judgment actions are filed or decided.

§51.34 Expedited consideration.

(a) When a submitting authority is required under State law or local ordinance or otherwise finds it necessary to implement a change within the 60-day period following submission, it may request that the submission be given expedited consideration. The submission should explain why such consideration is needed and provide the date by which a determination is required.

(b) Jurisdictions should endeavor to plan for changes in advance so that expedited consideration will not be required and should not routinely request such consideration. When a submitting authority demonstrates good cause for expedited consideration the Attorney General will attempt to make a decision by the date requested. However, the Attorney General cannot guarantee that such consideration can be given.

(c) Notice of the request for expedited consideration will be given to interested parties registered under §51.32.

§51.35 Disposition of inappropriate submissions and resubmissions.

(a) When the Attorney General determines that a response on the merits of a submitted change is inappropriate, the Attorney General shall notify the submitting official in writing within the 60-day period that would have commenced for a determination on the merits and shall include an explanation of the reason why a response is not appropriate.

(b) Matters that are not appropriate for a merits response include:

(1) Changes that do not affect voting (*see* §51.13);

(2) Standards, practices, or procedures that have not been changed (*see* §§51.4, 51.14);

(3) Changes that previously have received preclearance;

(4) Changes that affect voting but are not subject to the requirement of section 5 (*see* §51.18);

(5) Changes that have been superseded or for which a determination is premature (*see* §§51.22, 51.61(b));

(6) Submissions by jurisdictions not subject to the preclearance requirement (*see* §§51.4, 51.5);

(7) Submissions by an inappropriate or unauthorized party or jurisdiction (*see* §51.23); and

(8) Deficient submissions (*see* §51.26(d)).

(c) Following such a notification by the Attorney General, a change shall be deemed resubmitted for section 5 review upon the Attorney General's receipt of a submission or other written information that renders the change appropriate for review on the merits (such as a notification from the submitting authority that a change previously determined to be premature has been formally adopted). Notice of the resubmission of a change affecting

voting will be given to interested parties registered under § 51.32.

[Order 3262–2011, 76 FR 21246, Apr. 15, 2011]

§ 51.36 Release of information concerning submissions.

The Attorney General shall have the discretion to call to the attention of the submitting authority or any interested individual or group information or comments related to a submission.

§ 51.37 Obtaining information from the submitting authority.

(a) *Oral requests for information.* (1) If a submission does not satisfy the requirements of § 51.27, the Attorney General may request orally any omitted information necessary for the evaluation of the submission. An oral request may be made at any time within the 60-day period, and the submitting authority should provide the requested information as promptly as possible. The oral request for information shall not suspend the running of the 60-day period, and the Attorney General will proceed to make a determination within the initial 60-day period. The Attorney General reserves the right as set forth in § 51.39, however, to commence a new 60-day period in which to make the requisite determination if the written information provided in response to such request materially supplements the submission.

(2) An oral request for information shall not limit the authority of the Attorney General to make a written request for information.

(3) The Attorney General will notify the submitting authority in writing when the 60-day period for a submission is recalculated from the Attorney General's receipt of written information provided in response to an oral request as described in § 51.37(a)(1), above.

(4) Notice of the Attorney General's receipt of written information pursuant to an oral request will be given to interested parties registered under § 51.32.

(b) *Written requests for information.* (1) If the Attorney General determines that a submission does not satisfy the requirements of § 51.27, the Attorney General may request in writing from the submitting authority any omitted information necessary for evaluation of the submission. *Branch* v. *Smith*, 538 U.S. 254 (2003); *Georgia* v. *United States*, 411 U.S. 526 (1973). This written request shall be made as promptly as possible within the original 60-day period or the new 60-day period described in § 51.39(a). The written request shall advise the jurisdiction that the submitted change remains unenforceable unless and until preclearance is obtained.

(2) A copy of the request shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(3) The Attorney General shall notify the submitting authority that a new 60-day period in which the Attorney General may interpose an objection shall commence upon the Attorney General's receipt of a response from the submitting authority that provides the information requested or states that the information is unavailable. The Attorney General can request further information in writing within the new 60-day period, but such a further request shall not suspend the running of the 60-day period, nor shall the Attorney General's receipt of such further information begin a new 60-day period.

(4) Where the response from the submitting authority neither provides the information requested nor states that such information is unavailable, the response shall not commence a new 60-day period. It is the practice of the Attorney General to notify the submitting authority that its response is incomplete and to provide such notification as soon as possible within the 60-day period that would have commenced had the response been complete. Where the response includes a portion of the available information that was requested, the Attorney General will reevaluate the submission to ascertain whether a determination on the merits may be made based upon the information provided. If a merits determination is appropriate, it is the practice of the Attorney General to make that determination within the new 60-day period that would have commenced had the response been complete. *See* § 51.40.

(5) If, after a request for further information is made pursuant to this section, the information requested by the

Attorney General becomes available to the Attorney General from a source other than the submitting authority, the Attorney General shall promptly notify the submitting authority in writing, and the new 60-day period will commence the day after the information is received by the Attorney General.

(6) Notice of the written request for further information and the receipt of a response by the Attorney General will be given to interested parties registered under §51.32.

[Order 3262–2011, 76 FR 21246, Apr. 15, 2011]

§51.38 Obtaining information from others.

(a) The Attorney General may at any time request relevant information from governmental jurisdictions and from interested groups and individuals and may conduct any investigation or other inquiry that is deemed appropriate in making a determination.

(b) If a submission does not contain evidence of adequate notice to the public, and the Attorney General believes that such notice is essential to a determination, steps will be taken by the Attorney General to provide public notice sufficient to invite interested or affected persons to provide evidence as to the presence or absence of a discriminatory purpose or effect. The submitting authority shall be advised when any such steps are taken.

§51.39 Supplemental information and related submissions.

(a)(1) *Supplemental information*. When a submitting authority, at its own instance, provides information during the 60-day period that the Attorney General determines materially supplements a pending submission, the 60-day period for the pending submission will be recalculated from the Attorney General's receipt of the supplemental information.

(2) *Related submissions*. When the Attorney General receives related submissions during the 60-day period for a submission that cannot be independently considered, the 60-day period for the first submission shall be recalculated from the Attorney General's receipt of the last related submission.

(b) The Attorney General will notify the submitting authority in writing when the 60-day period for a submission is recalculated due to the Attorney General's receipt of supplemental information or a related submission.

(c) Notice of the Attorney General's receipt of supplemental information or a related submission will be given to interested parties registered under §51.32.

[Order 3262–2011, 76 FR 21247, Apr. 15, 2011]

§51.40 Failure to complete submissions.

If after 60 days the submitting authority has not provided further information in response to a request made pursuant to §51.37(b), the Attorney General, absent extenuating circumstances and consistent with the burden of proof under section 5 described in §51.52(a) and (c), may object to the change, giving notice as specified in §51.44.

[Order 3262–2011, 76 FR 21247, Apr. 15, 2011]

§51.41 Notification of decision not to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose no objection to a submitted change affecting voting.

(b) The notification shall state that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change.

(c) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

§51.42 Failure of the Attorney General to respond.

It is the practice and intention of the Attorney General to respond in writing to each submission within the 60-day period. However, the failure of the Attorney General to make a written response within the 60-day period constitutes preclearance of the submitted change, provided that a 60-day review period had commenced after receipt by the Attorney General of a complete

submission that is appropriate for a response on the merits. (*See* § 51.22, § 51.27, § 51.35.)

[Order 3262–2011, 76 FR 21247, Apr. 15, 2011]

§ 51.43 Reexamination of decision not to object.

(a) After notification to the submitting authority of a decision not to interpose an objection to a submitted change affecting voting has been given, the Attorney General may reexamine the submission if, prior to the expiration of the 60-day period, information comes to the attention of the Attorney General that would otherwise require objection in accordance with section 5.

(b) In such circumstances, the Attorney General may by letter withdraw his decision not to interpose an objection and may by letter interpose an objection provisionally, in accordance with § 51.44, and advise the submitting authority that examination of the change in light of the newly raised issues will continue and that a final decision will be rendered as soon as possible.

[Order 3262–2011, 76 FR 21247, Apr. 15, 2011]

§ 51.44 Notification of decision to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose an objection. The reasons for the decision shall be stated.

(b) The submitting authority shall be advised that the Attorney General will reconsider an objection upon a request by the submitting authority.

(c) The submitting authority shall be advised further that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(d) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(e) Notice of the decision to interpose an objection will be given to interested parties registered under § 51.32.

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21247, Apr. 15, 2011]

§ 51.45 Request for reconsideration.

(a) The submitting authority may at any time request the Attorney General to reconsider an objection.

(b) Requests may be in letter or any other written form and should contain relevant information or legal argument.

(c) Notice of the request will be given to any party who commented on the submission or requested notice of the Attorney General's action thereon and to interested parties registered under § 51.32. In appropriate cases the Attorney General may request the submitting authority to give local public notice of the request.

§ 51.46 Reconsideration of objection at the instance of the Attorney General.

(a) Where there appears to have been a substantial change in operative fact or relevant law, or where it appears there may have been a misinterpretation of fact or mistake in the law, an objection may be reconsidered, if it is deemed appropriate, at the instance of the Attorney General.

(b) Notice of such a decision to reconsider shall be given to the submitting authority, to any party who commented on the submission or requested notice of the Attorney General's action thereon, and to interested parties registered under § 51.32, and the Attorney General shall decide whether to withdraw or to continue the objection only after such persons have had a reasonable opportunity to comment.

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21247, Apr. 15, 2011]

§ 51.47 Conference.

(a) A submitting authority that has requested reconsideration of an objection pursuant to § 51.45 may request a conference to produce information or legal argument in support of reconsideration.

(b) Such a conference shall be held at a location determined by the Attorney

General and shall be conducted in an informal manner.

(c) When a submitting authority requests such a conference, individuals or groups that commented on the change prior to the Attorney General's objection or that seek to participate in response to any notice of a request for reconsideration shall be notified and given the opportunity to confer.

(d) The Attorney General shall have the discretion to hold separate meetings to confer with the submitting authority and other interested groups or individuals.

(e) Such conferences will be open to the public or to the press only at the discretion of the Attorney General and with the agreement of the participating parties.

§51.48 Decision after reconsideration.

(a) It is the practice of the Attorney General to notify the submitting authority of the decision to continue or withdraw an objection within a 60-day period following receipt of a reconsideration request or following notice given under §51.46(b), except that this 60-day period shall be recommenced upon receipt of any documents or written information from the submitting authority that materially supplements the reconsideration review, irrespective of whether the submitting authority provides the documents or information at its own instance or pursuant to a request (written or oral) by the Attorney General. The 60-day reconsideration period may be extended to allow a 15-day decision period following a conference held pursuant to §51.47. The 60-day reconsideration period shall be computed in the manner specified in §51.9. Where the reconsideration is at the instance of the Attorney General, the first day of the period shall be the day after the notice required by §51.46(b) is transmitted to the submitting authority. The reasons for the reconsideration decision shall be stated.

(b) The objection shall be withdrawn if the Attorney General is satisfied that the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(c) If the objection is not withdrawn, the submitting authority shall be advised that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(d) An objection remains in effect until either it is specifically withdrawn by the Attorney General or a declaratory judgment with respect to the change in question is entered by the U.S. District Court for the District of Columbia.

(e) A copy of the notification shall be sent to any party who has commented on the submission or reconsideration or has requested notice of the Attorney General's action thereon.

(f) Notice of the decision after reconsideration will be given to interested parties registered under §51.32.

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21248, Apr. 15, 2011]

§51.49 Absence of judicial review.

The decision of the Attorney General not to object to a submitted change or to withdraw an objection is not reviewable. The preclearance by the Attorney General of a voting change does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of section 5, and, as stated in section 5, ''(n)either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.''

§51.50 Records concerning submissions.

(a) *Section 5 files*. The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence, memoranda, investigative reports, data provided on electronic

media, notations concerning conferences with the submitting authority or any interested individual or group, and copies of letters from the Attorney General concerning the submission.

(b) *Objection letters.* The Attorney General shall maintain section 5 notification letters regarding decisions to interpose, continue, or withdraw an objection.

(c) *Computer file.* Records of all submissions and their dispositions by the Attorney General shall be electronically stored.

(d) *Copies.* The contents of the section 5 submission files in paper, microfiche, electronic, or other form shall be available for obtaining copies by the public, pursuant to written request directed to the Chief, Voting Section, Civil Rights Division, United States Department of Justice, Washington, DC. Such written request may be delivered to the addresses or telefacsimile number specified in § 51.24 or by electronic mail to *Voting.Section@usdoj.gov*. It is the Attorney General's intent and practice to expedite, to the extent possible, requests pertaining to pending submissions. Those who desire copies of information that has been provided on electronic media will be provided a copy of that information in the same form as it was received. Materials that are exempt from inspection under the Freedom of Information Act, 5 U.S.C. 552(b), may be withheld at the discretion of the Attorney General. The identity of any individual or entity that provided information to the Attorney General regarding the administration of section 5 shall be available only as provided by § 51.29(d). Applicable fees, if any, for the copying of the contents of these files are contained in the Department of Justice regulations implementing the Freedom of Information Act, 28 CFR 16.10.

[Order 3262–2011, 76 FR 21248, Apr. 15, 2011]

Subpart F—Determinations by the Attorney General

§ 51.51 Purpose of the subpart.

The purpose of this subpart is to inform submitting authorities and other interested parties of the factors that the Attorney General considers relevant and of the standards by which the Attorney General will be guided in making substantive determinations under section 5 and in defending section 5 declaratory judgment actions.

§ 51.52 Basic standard.

(a) *Surrogate for the court.* Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5: whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328, 335 (1966).

(b) *No objection.* If the Attorney General determines that the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, no objection shall be interposed to the change.

(c) *Objection.* An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of both the prohibited discriminatory purpose and effect.

[Order 3262–2011, 76 FR 21248, Apr. 15, 2011]

§ 51.53 Information considered.

The Attorney General shall base a determination on a review of material presented by the submitting authority,

relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice.

§51.54 Discriminatory purpose and effect.

(a) *Discriminatory purpose.* A change affecting voting is considered to have a discriminatory purpose under section 5 if it is enacted or sought to be administered with any purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The term ''purpose'' in section 5 includes any discriminatory purpose. 42 U.S.C. 1973c. The Attorney General's evaluation of discriminatory purpose under section 5 is guided by the analysis in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

(b) *Discriminatory effect.* A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change) with respect to their effective exercise of the electoral franchise. *Beer* v. *United States*, 425 U.S. 130, 140–42 (1976).

(c) *Benchmark.* (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting standard, practice, or procedure in force or effect at the time of the submission. If the existing standard, practice, or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in the Appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (c)(4) of this section, the comparison shall be with the last legally enforceable standard, practice, or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the conditions existing at the time of the submission.

(3) The implementation and use of an unprecleared voting change subject to section 5 review does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction.

(4) Where at the time of submission of a change for section 5 review there exists no other lawful standard, practice, or procedure for use as a benchmark (*e.g.*, where a newly incorporated college district selects a method of election) the Attorney General's determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

(d) *Protection of the ability to elect.* Any change affecting voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race, color, or membership in a language minority group to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of section 5. 42 U.S.C. 1973c.

[Order 3262–2011, 76 FR 21248, Apr. 15, 2011]

§51.55 Consistency with constitutional and statutory requirements.

(a) *Consideration in general.* In making a determination under section 5, the Attorney General will consider whether the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th Amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

(b) *Section 2.* Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change demonstrates that such action is appropriate.

[52 FR 490, Jan. 6, 1987, as amended at 63 FR 24109, May 1, 1998; Order 3262–2011, 76 FR 21249, Apr. 15, 2011]

§ 51.56 Guidance from the courts.

In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts.

§ 51.57 Relevant factors.

Among the factors the Attorney General will consider in making determinations with respect to the submitted changes affecting voting are the following:

(a) The extent to which a reasonable and legitimate justification for the change exists;

(b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;

(c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;

(d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change; and

(e) The factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977):

(1) Whether the impact of the official action bears more heavily on one race than another;

(2) The historical background of the decision;

(3) The specific sequence of events leading up to the decision;

(4) Whether there are departures from the normal procedural sequence;

(5) Whether there are substantive departures from the normal factors considered; and

(6) The legislative or administrative history, including contemporaneous statements made by the decision makers.

[Order 3262–2011, 76 FR 21249, Apr. 15, 2011]

§ 51.58 Representation.

(a) *Introduction*. This section and the sections that follow set forth factors—in addition to those set forth above—that the Attorney General considers in reviewing redistrictings (see § 51.59), changes in electoral systems (see § 51.60), and annexations (see § 51.61).

(b) *Background factors*. In making determinations with respect to these changes involving voting practices and procedures, the Attorney General will consider as important background information the following factors:

(1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.

(2) The extent to which voting in the jurisdiction is racially polarized and election-related activities are racially segregated.

(3) The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

[52 FR 490, Jan. 6, 1987, as amended by Order 3262–2011, 76 FR 21249, Apr. 15, 2011]

§ 51.59 Redistricting plans.

(a) *Relevant factors*. In determining whether a submitted redistricting plan has a prohibited purpose or effect the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(1) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens;

(2) The extent to which minority voting strength is reduced by the proposed redistricting;

(3) The extent to which minority concentrations are fragmented among different districts;

(4) The extent to which minorities are over concentrated in one or more districts;

(5) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered;

(6) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and

(7) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

(b) *Discriminatory purpose.* A jurisdiction's failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.

[Order 3262–2011, 76 FR 21249, Apr. 15, 2011]

§51.60 Changes in electoral systems.

In making determinations with respect to changes in electoral systems (e.g., changes to or from the use of at-large elections, changes in the size of elected bodies) the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(a) The extent to which minority voting strength is reduced by the proposed change.

(b) The extent to which minority concentrations are submerged into larger electoral units.

(c) The extent to which available alternative systems satisfying the jurisdiction's legitimate governmental interests were considered.

§51.61 Annexations.

(a) *Coverage.* Annexations and deannexations, even of uninhabited land, are subject to section 5 preclearance to the extent that they alter or are calculated to alter the composition of a jurisdiction's electorate. *See, e.g., City of Pleasant Grove* v. *United States,* 479 U.S. 462 (1987). In analyzing annexations and deannexations under section 5, the Attorney General considers the purpose and effect of the annexations and deannexations only as they pertain to voting.

(b) *Section 5 review.* It is the practice of the Attorney General to review all of a jurisdiction's unprecleared annexations and deannexations together. *See City of Pleasant Grove* v. *United States,* C.A. No. 80–2589 (D.D.C. Oct. 7, 1981).

(c) *Relevant factors.* In making determinations with respect to annexations, the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(1) The extent to which a jurisdiction's annexations reflect the purpose or have the effect of excluding minorities while including other similarly situated persons.

(2) The extent to which the annexations reduce a jurisdiction's minority population percentage, either at the time of the submission or, in view of the intended use, for the reasonably foreseeable future.

(3) Whether the electoral system to be used in the jurisdiction fails fairly to reflect minority voting strength as it exists in the post-annexation jurisdiction. See *City of Richmond* v. *United States,* 422 U.S. 358, 367–72 (1975).

[52 FR 490, Jan. 6, 1987; 52 FR 2648, Jan. 23, 1987, as amended by Order 3262–2011, 76 FR 21249, Apr. 15, 2011]

Subpart G—Sanctions

§51.62 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including section 5. See section 12(d).

(b) Certain violations of section 5 may be subject to criminal sanctions. See section 12(a) and (c).

§51.63 Enforcement by private parties.

Private parties have standing to enforce section 5.

§51.64 Bar to termination of coverage (bailout).

(a) Section 4(a) of the Act sets out the requirements for the termination of coverage (bailout) under section 5. See §51.5. Among the requirements for bailout is compliance with section 5, as described in section 4(a), during the ten years preceding the filing of the bailout action and during its pendency.

(b) In defending bailout actions, the Attorney General will not consider as a bar to bailout under section 4(a)(1)(E) a section 5 objection to a submitted voting standard, practice, or procedure if the objection was subsequently withdrawn on the basis of a determination by the Attorney General that it had originally been interposed as a result of the Attorney General's misinterpretation of fact or mistake in the law, or if the unmodified voting standard, practice, or procedure that was the

subject of the objection received section 5 preclearance by means of a declaratory judgment from the U.S. District Court for the District of Columbia.

(c) Notice will be given to interested parties registered under § 51.32 when bailout actions are filed or decided.

Subpart H—Petition To Change Procedures

§ 51.65 Who may petition.

Any jurisdiction or interested individual or group may petition to have these procedural guidelines amended.

§ 51.66 Form of petition.

A petition under this subpart may be made by informal letter and shall state the name, address, and telephone number of the petitioner, the change requested, and the reasons for the change.

§ 51.67 Disposition of petition.

The Attorney General shall promptly consider and dispose of a petition under this subpart and give notice of the disposition, accompanied by a simple statement of the reasons, to the petitioner.

APPENDIX TO PART 51—JURISDICTIONS COVERED UNDER SECTION 4(b) OF THE VOTING RIGHTS ACT, AS AMENDED

The requirements of section 5 of the Voting Rights Act, as amended, apply in the following jurisdictions. The applicable date is the date that was used to determine coverage and the date after which changes affecting voting are subject to the preclearance requirement. Some jurisdictions, for example, Yuba County, California, are included more than once because they have been determined on more than one occasion to be covered under section 4(b).

Jurisdiction	Applicable date	FEDERAL REGISTER citation	
		Volume and page	Date
Alabama	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Alaska	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Arizona	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
California:			
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Merced County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monterey County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Florida:			
Collier County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hardee County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Hendry County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hillsborough County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monroe County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Georgia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Louisiana	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Michigan:			
Allegan County:			
Clyde Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Saginaw County:			
Buena Vista Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Mississippi	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
New Hampshire:			
Cheshire County:			
Rindge Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Coos County:			
Millsfield Township	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Pinkhams Grant	Nov. 1, 1968	39 FR 16912	May 10, 1974
Stewartstown Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Stratford Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Grafton County:			
Benton Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Hillsborough County:			
Antrim Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Merrimack County:			
Boscawen Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
Rockingham County:			
Newington Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.

Jurisdiction	Applicable date	Federal Register citation	
		Volume and page	Date
Sullivan County:			
Unity Town	Nov. 1, 1968	39 FR 16912	May 10, 1974.
New York:			
Bronx County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Bronx County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Kings County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
New York County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
North Carolina:			
Anson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Beaufort County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Bertie County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Bladen County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Camden County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Caswell County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Chowan County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cleveland County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Craven County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cumberland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Edgecombe County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Franklin County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Gaston County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Gates County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Granville County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Greene County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Guilford County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Halifax County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Harnett County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Hertford County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Hoke County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Jackson County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Lee County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Lenoir County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Martin County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Nash County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Northampton County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Onslow County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pasquotank County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Perquimans County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Person County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pitt County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Robeson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Rockingham County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Scotland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Union County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Vance County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Washington County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Wayne County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Wilson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
South Carolina	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
South Dakota:			
Shannon County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Todd County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Texas	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Virginia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

The following political subdivisions in States subject to statewide coverage are also covered individually:

Jurisdiction	Applicable date	Federal Register citation	
		Volume and page	Date
Arizona:			
Apache County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Apache County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Cochise County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Coconino County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Coconino County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Mohave County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Navajo County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Navajo County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.

Jurisdiction	Applicable date	FEDERAL REGISTER citation	
		Volume and page	Date
Pima County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Pinal County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Pinal County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Santa Cruz County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuma County	Nov. 1, 1964.	31 FR 982	Jan. 25, 1966.

The Voting Section maintains a current list of those jurisdictions that have maintained successful declaratory judgments from the United States District Court for the District of Columbia pursuant to section 4 of the Act on its Web site at *http://www.justice.gov/crt/voting*.

[Order 3262–2011, 76 FR 21250, Apr. 15, 2011]

PART 52—PROCEEDINGS BEFORE U.S. MAGISTRATE JUDGES

Sec.

52.01 Civil proceedings: Special master, pretrial, trial, appeal.
52.02 Criminal proceedings: Pretrial, trial.

§ 52.01 Civil proceedings: Special master, pretrial, trial, appeal.

(a) Sections 636 (b) and (c) of title 28 of the United States Code govern pretrial and case-dispositive civil jurisdiction of magistrate judges, as well as service by magistrate judges as special masters.

(b) It is the policy of the Department of Justice to encourage the use of magistrate judges, as set forth in this paragraph, to assist the district courts in resolving civil disputes. In conformity with this policy, the attorney for the government is encouraged to accede to a referral of an entire civil action for disposition by a magistrate judge, or to consent to designation of a magistrate judge as special master, if the attorney, with the concurrence of his or her supervisor, determines that such a referral or designation is in the interest of the United States. In making this determination, the attorney shall consider all relevant factors, including—

(1) The complexity of the matter, including involvement of significant rights of large numbers of persons;

(2) The relief sought;

(3) The amount in controversy;

(4) The novelty, importance, and nature of the issues raised;

(5) The likelihood that referral to or designation of the magistrate judge will expedite resolution of the litigation;

(6) The experience and qualifications of the magistrate judge; and

(7) The possibility of the magistrate judge's actual or apparent bias or conflict of interest.

(c)(1) In determining whether to consent to having an appeal taken to the district court rather than to the court of appeals, the attorney for the government should consider all relevant factors including—

(i) The amount in controversy;

(ii) The importance of the questions of law involved;

(iii) The desirability of expeditious review of the magistrate judge's judgment.

(2) In making a determination under paragraph (c)(1) of this section the attorney shall, except in those cases in which delegation authority has been exercised under 28 CFR 0.168, consult with the Assistant Attorney General having supervisory authority over the subject matter.

[Order No. 2012–96, 61 FR 8473, Mar. 5, 1996]

§ 52.02 Criminal proceedings: Pretrial, trial.

(a) A judge of the district court, without the parties' consent, may designate a magistrate judge to hear and determine criminal pretrial matters pending before the court, except for two named classes of motions; as to the latter, the magistrate judge may conduct a hearing and recommend a decision to the judge. 28 U.S.C. 636(b)(1) (A), (B).

(b) When specially designated by the court to exercise such jurisdiction, a magistrate judge may try, and impose sentence for, any misdemeanor if he has properly and fully advised the defendant that he has a right to elect

''trial, judgment, and sentencing by a judge of the district court and * * * may have a right to trial by jury before a district judge or magistrate judge,'' and has obtained the defendant's written consent to be tried by the magistrate judge. 18 U.S.C. 3401 (a), (b). The court may order that proceedings be conducted before a district judge rather than a magistrate judge upon its own motion or, for good cause shown upon petition by the attorney for the government. The petition should note ''the novelty, importance, or complexity of the case, or other pertinent factors * * *''. 18 U.S.C. 3401(f).

(1) If the attorney for the government determines that the public interest is better served by trial before a district judge, the attorney may petition the district court for such an order after consulting with the appropriate Assistant Attorney General as provided in paragraph (b)(2) of this section. In making this determination, the attorney shall consider all relevant factors including—

(i) The novelty of the case with respect to the facts, the statute being enforced, and the application of the statute to the facts;

(ii) The importance of the case in light of the nature and seriousness of the offense charged;

(iii) The defendant's history of criminal activity, the potential penalty upon conviction, and the purposes to be served by prosecution, including punishment, deterrence, rehabilitation, and incapacitation;

(iv) The factual and legal complexity of the case and the amount and nature of the evidence to be presented;

(v) The desirability of prompt disposition of the case; and

(vi) The experience and qualifications of the magistrate judge, and the possibility of the magistrate judge's actual or apparent bias or conflict of interest.

(2) The attorney for the government shall consult with the Assistant Attorney General having supervisory authority over the subject matter in determining whether to petition for trial before a district judge in a case involving a violation of 2 U.S.C. 192, 441j(a); 18 U.S.C. 210, 211, 242, 245, 594, 597, 599, 600, 601, 1304, 1504, 1508, 1509, 2234, 2235, 2236; or 42 U.S.C. 3631.

(3) In a case in which the government petitions for trial before a district judge, the attorney for the government shall forward a copy of the petition to the Assistant Attorney General having supervisory authority over the subject matter and, if the petition is denied, shall promptly notify the Assistant Attorney General.

(5 U.S.C. 301, 18 U.S.C. 3401(f))

[Order No. 903–80, 45 FR 50564, July 30, 1980, as amended by Order No. 2012–96, 61 FR 8473, Mar. 5, 1996]

PART 54—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.
54.100 Purpose and effective date.
54.105 Definitions.
54.110 Remedial and affirmative action and self-evaluation.
54.115 Assurance required.
54.120 Transfers of property.
54.125 Effect of other requirements.
54.130 Effect of employment opportunities.
54.135 Designation of responsible employee and adoption of grievance procedures.
54.140 Dissemination of policy.

Subpart B—Coverage

54.200 Application.
54.205 Educational institutions and other entities controlled by religious organizations.
54.210 Military and merchant marine educational institutions.
54.215 Membership practices of certain organizations.
54.220 Admissions.
54.225 Educational institutions eligible to submit transition plans.
54.230 Transition plans.
54.235 Statutory amendments.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

54.300 Admission.
54.305 Preference in admission.

54.310 Recruitment.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

54.400 Education programs or activities.
54.405 Housing.
54.410 Comparable facilities.
54.415 Access to course offerings.
54.420 Access to schools operated by LEAs.
54.425 Counseling and use of appraisal and counseling materials.
54.430 Financial assistance.
54.435 Employment assistance to students.
54.440 Health and insurance benefits and services.
54.445 Marital or parental status.
54.450 Athletics.
54.455 Textbooks and curricular material.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

54.500 Employment.
54.505 Employment criteria.
54.510 Recruitment.
54.515 Compensation.
54.520 Job classification and structure.
54.525 Fringe benefits.
54.530 Marital or parental status.
54.535 Effect of state or local law or other requirements.
54.540 Advertising.
54.545 Pre-employment inquiries.
54.550 Sex as a bona fide occupational qualification.

Subpart F—Procedures

54.600 Notice of covered programs.
54.605 Enforcement procedures.

AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: Order No. 2320–2000, 65 FR 52865, 52880, Aug. 30, 2000, unless otherwise noted.

Subpart A—Introduction

§ 54.100 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.

§ 54.105 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 the Assistant Attorney General, Civil Rights Division.

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 §§ 54.100 through 54.605.

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.

§ 54.110 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.

§ 54.115 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 § 54.110(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.

§ 54.120 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 §§ 54.205 through 54.235(a).

§ 54.125 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.

§ 54.130 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.

§ 54.135 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.

§ 54.140 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 §§ 54.300 through 54.310 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 § 54.135, 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

§ 54.200 Application.

Except as provided in §§ 54.205 through 54.235(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.

§ 54.205 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.

§ 54.210 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.

§ 54.215 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.

§ 54.220 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, §§ 54.225 and 54.230, and §§ 54.300 through 54.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 54.300 through 54.310.* Except as provided in paragraphs (d) and (e) of this section, §§ 54.300 through 54.310 apply to each recipient. A recipient to which §§ 54.300 through 54.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 54.300 through 54.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 54.300 through 54.310 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.* §§ 54.300 through 54.310 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.

§ 54.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 54.300 through 54.310 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 §§ 54.300 through 54.310.

§ 54.230 Transition plans.

(a) *Submission of plans.* An institution to which § 54.225 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 § 54.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 54.300 through 54.310 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 § 54.225 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.

§ 54.235 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

§ 54.300 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 §§ 54.300 through §§ 54.310 apply, except as provided in §§ 54.225 and §§ 54.230.

(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 §§ 54.300 through 54.310 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 §§ 54.300 through 54.310 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 § 54.235(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.

§ 54.305 Preference in admission.

A recipient to which §§ 54.300 through 54.310 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 §§ 54.300 through 54.310.

§ 54.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 54.300 through 54.310 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 § 54.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 54.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 54.300 through 54.310 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 §§ 54.300 through 54.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 54.400 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 54.400 through 54.455 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 §§ 54.300 through 54.310 do not apply, or an entity, not a recipient, to which §§ 54.300 through 54.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 54.400 through 54.455, 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.

§ 54.405 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.

§ 54.410 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.

§ 54.415 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.

§ 54.420 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.

§ 54.425 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.

§ 54.430 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 § 54.450.

§ 54.435 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 §§ 54.500 through 54.550.

§ 54.440 Health and insurance benefits and services.

Subject to § 54.235(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 §§ 54.500 through 54.550 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.

§ 54.445 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 § 54.235(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.

§ 54.450 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.

§ 54.455 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

§ 54.500 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 §§ 54.500 through 54.550, 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 §§ 54.500 through 54.550 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.

§ 54.505 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.

§ 54.510 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 §§ 54.500 through 54.550.

§ 54.515 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.

§ 54.520 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 § 54.550.

§ 54.525 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 § 54.515.

(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.

§ 54.530 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 § 54.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave*. In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 54.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements*. The obligation to comply with §§ 54.500 through 54.550 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.

§ 54.540 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.

§ 54.545 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.

§ 54.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 54.500 through 54.550 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

§ 54.600 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.

§ 54.605 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 28 CFR 42.106 through 42.111.

[Order No. 2320–2000, 65 FR 52881, Aug. 30, 2000]

PART 55—IMPLEMENTATION OF THE PROVISIONS OF THE VOTING RIGHTS ACT REGARDING LANGUAGE MINORITY GROUPS

Subpart A—General Provisions

Sec.
55.1 Definitions.
55.2 Purpose; standards for measuring compliance.
55.3 Statutory requirements.

Subpart B—Nature of Coverage

55.4 Effective date; list of covered jurisdictions.
55.5 Coverage under section 4(f)(4).
55.6 Coverage under section 203(c).
55.7 Termination of coverage.
55.8 Relationship between section 4(f)(4) and section 203(c).
55.9 Coverage of political units within a county.
55.10 Types of elections covered.

Subpart C—Determining the Exact Language

55.11 General.
55.12 Language used for written material.
55.13 Language used for oral assistance and publicity.

Subpart D—Minority Language Materials and Assistance

55.14 General.
55.15 Affected activities.
55.16 Standards and proof of compliance.
55.17 Targeting.
55.18 Provision of minority language materials and assistance.
55.19 Written materials.
55.20 Oral assistance and publicity.
55.21 Record keeping.

Subpart E—Preclearance

55.22 Requirements of section 5 of the Act.

Subpart F—Sanctions

55.23 Enforcement by the Attorney General.

Subpart G—Comment on This Part

55.24 Procedure.

APPENDIX TO PART 55—JURISDICTIONS COVERED UNDER SECTIONS 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 1973b, 1973j(d), 1973aa-1a, 1973aa-2.

SOURCE: Order No. 655–76, 41 FR 29998, July 20, 1976, unless otherwise noted.

Subpart A—General Provisions

§ 55.1 Definitions.

As used in this part—

Act means the Voting Rights Act of 1965, 79 Stat. 437, Public Law 89–110, as amended by the Civil Rights Act of 1968, 82 Stat. 73, Public Law 90–284, the Voting Rights Act Amendments of 1970, 84 Stat. 314, Public Law 91–285, the District of Columbia Delegate Act, 84 Stat. 853, Public Law 91–405, the Voting Rights Act Amendments of 1975, 89 Stat. 400, Public Law 94–73, the Voting Rights Act Amendments of 1982, 96 Stat. 131, Public Law 97–205, the Voting Rights Language Assistance Act of 1992, 106 Stat. 921, Public Law 102–344, the Fannie Lou Hamer, Rosa Parks, Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577, Public Law 109–246, and the Act to Revise the Short Title of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 122 Stat. 2428, Public Law 110–258, 42 U.S.C. 1973 *et seq.* Section numbers, such as ''section 14(c)(3),'' refer to sections of the Act.

Attorney General means the Attorney General of the United States.

Language minorities or *language minority group* is used, as defined in the Act, to refer to persons who are American

Indian, Asian American, Alaskan Natives, or of Spanish heritage. (Sections 14(c)(3) and 203(e)).

Political subdivision is used, as defined in the Act, to refer to ''any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.'' (Section 14(c)(2)).

[Order 1246–87, 53 FR 735, Jan. 12, 1988, as amended by Order No. 1752–93, 58 FR 35372, July 1, 1993; Order 3291–2011, 76 FR 54111, Aug. 31, 2011]

§55.2 Purpose; standards for measuring compliance.

(a) The purpose of this part is to set forth the Attorney General's interpretation of the provisions of the Voting Rights Act which require certain States and political subdivisions to conduct elections in the language of certain ''language minority groups'' in addition to English.

(b) In the Attorney General's view the objective of the Act's provisions is to enable members of applicable language minority groups to participate effectively in the electoral process. This part establishes two basic standards by which the Attorney General will measure compliance:

(1) That materials and assistance should be provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities; and

(2) That an affected jurisdiction should take all reasonable steps to achieve that goal.

(c) The determination of what is required for compliance with section 4(f)(4) and section 203(c) is the responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction.

(d) Jurisdictions covered under section 4(f)(4) of the Act are subject to the preclearance requirements of section 5. See part 51 of this chapter. Such jurisdictions have the burden of establishing to the satisfaction of the Attorney General or to the U.S. District Court for the District of Columbia that changes made in their election laws and procedures in order to comply with the requirements of section 4(f)(4) are not discriminatory under the terms of section 5. However, section 5 expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the changes.

(e) Jurisdictions covered solely under section 203(c) of the Act are not subject to the preclearance requirements of section 5, nor is there a Federal apparatus available for preclearance of section 203(c) compliance activities. The Attorney General will not preclear jurisdictions' proposals for compliance with section 203(c).

(f) Consideration by the Attorney General of a jurisdiction's compliance with the requirements of section 4(f)(4) occurs in the review pursuant to section 5 of the Act of changes with respect to voting, in the consideration of the need for litigation to enforce the requirements of section 4(f)(4), and in the defense of suits for termination of coverage under section 4(f)(4). Consideration by the Attorney General of a jurisdiction's compliance with the requirements of section 203(c) occurs in the consideration of the need for litigation to enforce the requirements of section 203(c).

(g) In enforcing the Act—through the section 5 preclearance review process, through litigation, and through defense of suits for termination of coverage under section 4(f)(4)—the Attorney General will follow the general policies set forth in this part.

(h) This part is not intended to preclude affected jurisdictions from taking additional steps to further the policy of the Act. By virtue of the Supremacy Clause of Art. VI of the Constitution, the provisions of the Act override any inconsistent State law.

[Order 655–76, 41 FR 29998, July 20, 1976, as amended by Order 1246–87, 53 FR 736, Jan. 12, 1988]

§55.3 Statutory requirements.

The Act's requirements concerning the conduct of elections in languages in addition to English are contained in section 4(f)(4) and section 203(c). These sections state that whenever a jurisdiction subject to their terms ''provides any registration or voting notices,

forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in * * * English. * * *''

Subpart B—Nature of Coverage

§ 55.4 Effective date; list of covered jurisdictions.

(a) The minority language provisions of the Voting Rights Act were added by the Voting Rights Act Amendments of 1975, and amended and extended in 1982, 1992, and 2006.

(1) The requirements of section 4(f)(4) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census and the Attorney General. Such determinations are not reviewable in any court. *See* section 4(b).

(2) The requirements of section 203(c) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census. Such determinations are not reviewable in any court. *See* section 203(b)(4).

(b) Jurisdictions determined to be covered under section 4(f)(4) or section 203(c) are listed, together with the language minority group with respect to which coverage was determined, in the appendix to this part. Any additional determinations of coverage under either section 4(f)(4) or section 203(c) will be published in the FEDERAL REGISTER.

[Order 655–76, 41 FR 29998, July 20, 1976, as amended by Order 1246–87, 53 FR 736, Jan. 12, 1988; Order 3291–2011, 76 FR 54111, Aug. 31, 2011]

§ 55.5 Coverage under section 4(f)(4).

(a) *Coverage formula.* Section 4(f)(4) applies to any State or political subdivision in which

(1) Over five percent of the voting-age citizens were, on November 1, 1972, members of a single language minority group,

(2) Registration and election materials were provided only in English on November 1, 1972, and

(3) Fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.

All three conditions must be satisfied before coverage exists under section 4(f)(4).[1]

(b) Coverage may be determined with regard to section 4(f)(4) on a statewide or political subdivision basis.

(1) Whenever the determination is made that the bilingual requirements of section 4(f)(4) are applicable to an entire State, these requirements apply to each of the State's political subdivisions as well as to the State. In other words, each political subdivision within a covered State is subject to the same requirements as the State.

(2) Where an entire State is not covered under section 4(f)(4), individual political subdivisions may be covered.

§ 55.6 Coverage under section 203(c).

(a) *Coverage formula.* There are four ways in which a political subdivision can become subject to section 203(c).[2]

(1) *Political subdivision approach.* A political subdivision is covered if—

(i) More than 5 percent of its voting age citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens in the political subdivision is higher than the national illiteracy rate.

(2) *State approach.* A political subdivision is covered if—

(i) It is located in a state in which more than 5 percent of the voting age citizens are members of a single language minority and are limited-English proficient;

(ii) The illiteracy rate of such language minority citizens in the state is higher than the national illiteracy rate; and

(iii) Five percent or more of the voting age citizens of the political subdivision are members of such language minority group and are limited-English proficient.

(3) *Numerical approach.* A political subdivision is covered if—

[1] Coverage is based on sections 4(b) (third sentence), 4(c), and 4(f)(3).

[2] The criteria for coverage are contained in section 203(b).

(i) More than 10,000 of its voting age citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens in the political subdivision is higher than the national illiteracy rate.

(4) *Indian reservation approach.* A political subdivision is covered if there is located within its borders all or any part of an Indian reservation—

(i) In which more than 5 percent of the voting age American Indian or Alaska Native citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens is higher than the national illiteracy rate.

(b) *Definitions.* For the purpose of determinations of coverage under section 203(c), *limited-English proficient* means unable to speak or understand English adequately enough to participate in the electoral process; *Indian reservation* means any area that is an American Indian or Alaska Native area, as defined by the Census Bureau for the purposes of the 1990 decennial census; and *illiteracy* means the failure to complete the fifth primary grade.

(c) *Determinations.* Determinations of coverage under section 203(c) are made with regard to specific language groups of the language minorities listed in section 203(e).

[Order No. 1752–93, 58 FR 35372, July 1, 1993]

§ 55.7 Termination of coverage.

(a) *Section 4(f)(4).* The requirements of section 4(f)(4) apply for a twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, which amendments became effective on July 27, 2006. See section 4(a)(8). A covered State, a political subdivision of a covered State, a separately covered political subdivision, or a political subunit of any of the above, may terminate the application of section 4(f)(4) earlier by obtaining the declaratory judgment described in section 4(a) of the Act.

(b) *Section 203(c).* The requirements of section 203(c) apply until August 6, 2032. See section 203(b). A covered jurisdiction may terminate Section 203 coverage earlier if it can prove in a declaratory judgment action in a United States district court, that the illiteracy rate of the applicable language minority group is equal to or less than the national illiteracy rate, as described in section 203(d) of the Act.

[Order 3291–2011, 76 FR 54111, Aug. 31, 2011]

§ 55.8 Relationship between section 4(f)(4) and section 203(c).

(a) The statutory requirements of section 4(f)(4) and section 203(c) regarding minority language material and assistance are essentially identical.

(b) Jurisdictions subject to the requirements of section 4(f)(4)—but not jurisdictions subject only to the requirements of section 203(c)—are also subject to the Act's special provisions, such as section 5 (regarding preclearance of changes in voting laws) and section 8 (regarding federal observers).[2] See part 51 of this chapter.

(c) Although the coverage formulas applicable to section 4(f)(4) and section 203(c) are different, a political subdivision may be included within both of the coverage formulas. Under these circumstances, a judgment terminating coverage of the jurisdiction under one provision would not have the effect of terminating coverage under the other provision.

[Order No. 655–76, 41 FR 29998, July 20, 1976, as amended by Order 3291–2011, 76 FR 54112, Aug. 31, 2011]

§ 55.9 Coverage of political units within a county.

Where a political subdivision (e.g., a county) is determined to be subject to section 4(f)(4) or section 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements as the political subdivision.

[2] In addition, a jurisdiction covered under section 203(c) but not under section 4(f)(4) is subject to the Act's special provisions if it was covered under section 4(b) prior to the 1975 Amendments to the Act.

§ 55.10 Types of elections covered.

(a) *General.* The language provisions of the Act apply to registration for and voting in any type of election, whether it is a primary, general or special election. Section 14(c)(1). This includes elections of officers as well as elections regarding such matters as bond issues, constitutional amendments and referendums. Federal, State and local elections are covered as are elections of special districts, such as school districts and water districts.

(b) *Elections for statewide office.* If an election conducted by a county relates to Federal or State offices or issues as well as county offices or issues, a county subject to the bilingual requirements must insure compliance with those requirements with respect to all aspects of the election, i.e., the minority language material and assistance must deal with the Federal and State offices or issues as well as county offices or issues.

(c) *Multi-county districts.* Regarding elections for an office representing more than one county, e.g., State legislative districts and special districts that include portions of two or more counties, the bilingual requirements are applicable on a county-by-county basis. Thus, minority language material and assistance need not be provided by the government in counties not subject to the bilingual requirements of the Act.

Subpart C—Determining the Exact Language

§ 55.11 General.

The requirements of section 4(f)(4) or section 203(c) apply with respect to the languages of language minority groups. The applicable groups are indicated in the determinations of the Attorney General or the Director of the Census. This subpart relates to the view of the Attorney General concerning the determination by covered jurisdictions of precisely the language to be employed. In enforcing the Act, the Attorney General will consider whether the languages, forms of languages, or dialects chosen by covered jurisdictions for use in the electoral process enable members of applicable language minority groups to participate effectively in the electoral process. It is the responsibility of covered jurisdictions to determine what languages, forms of languages, or dialects will be effective. For those jurisdictions covered under section 203(c), the coverage determination (indicated in the appendix) may specify the particular language minority group (in parentheses) for which the jurisdiction is covered, but does not specify the language or dialect to be used for such group.

[Order 655–76, 41 FR 29998, July 20, 1976, as amended by Order 1246–87, 53 FR 736, Jan. 12, 1988; Order 3291–2011, 76 FR 54112, Aug. 31, 2011]

§ 55.12 Language used for written material.

(a) *Language minority groups having more than one language.* Some language minority groups, for example, Filipino Americans, have more than one language other than English. A jurisdiction required to provide election materials in the language of such a group need not provide materials in more than one language other than English. The Attorney General will consider whether the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(b) *Languages with more than one written form.* Some languages, for example, Japanese, have more than one written form. A jurisdiction required to provide election materials in such a language need not provide more than one version. The Attorney General will consider whether the particular version of the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(c) *Unwritten languages.* Many of the languages used by language minority groups, for example, by some American Indians and Alaskan Natives, are unwritten. With respect to any such language, only oral assistance and publicity are required. Even though a written form for a language may exist, a language may be considered unwritten if it is not commonly used in a written

form. It is the responsibility of the covered jurisdiction to determine whether a language should be considered written or unwritten.

§55.13 Language used for oral assistance and publicity.

(a) *Languages with more than one dialect.* Some languages, for example, Chinese, have several dialects. Where a jurisdiction is obligated to provide oral assistance in such a language, the jurisdiction's obligation is to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects. (See §55.20.)

(b) *Language minority groups having more than one language.* In some jurisdictions members of an applicable language minority group speak more than one language other than English. Where a jurisdiction is obligated to provide oral assistance in the language of such a group, the jurisdiction's obligation is to ascertain the languages that are commonly used by members of that group in the jurisdiction and to provide oral assistance in such languages. (See §55.20)

[Order 655–76, 41 FR 29998, July 20, 1976, as amended by Order 1246–87, 53 FR 736, Jan. 12, 1988; Order No. 1752–93, 58 FR 35373, July 1, 1993]

Subpart D—Minority Language Materials and Assistance

§55.14 General.

(a) This subpart sets forth the views of the Attorney General with respect to the requirements of section 4(f)(4) and section 203(c) concerning the provision of minority language materials and assistance and some of the factors that the Attorney General will consider in carrying out his responsibilities to enforce section 4(f)(4) and section 203(c). Through the use of his authority under section 5 and his authority to bring suits to enforce section 4(f)(4) and section 203(c), the Attorney General will seek to prevent or remedy discrimination against members of language minority groups based on the failure to use the applicable minority language in the electoral process. The Attorney General also has the responsibility to defend against suits brought for the termination of coverage under section 4(f)(4) and section 203(c).

(b) In discharging these responsibilities the Attorney General will respond to complaints received, conduct on his own initiative inquiries and surveys concerning compliance, and undertake other enforcement activities.

(c) It is the responsibility of the jurisdiction to determine what actions by it are required for compliance with the requirements of section 4(f)(4) and section 203(c) and to carry out these actions.

§55.15 Affected activities.

The requirements of sections 4(f)(4) and 203(c) apply with regard to the provision of "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." The basic purpose of these requirements is to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities. Accordingly, the quoted language should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including, for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.

§55.16 Standards and proof of compliance.

Compliance with the requirements of section 4(f)(4) and section 203(c) is best measured by results. A jurisdiction is more likely to achieve compliance with these requirements if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group. In planning its compliance with section 4(f)(4) or section 203(c), a jurisdiction may, where alternative methods of compliance are available, use less costly methods if

they are equivalent to more costly methods in their effectiveness.

§ 55.17 Targeting.

The term ''targeting'' is commonly used in discussions of the requirements of section 4(f)(4) and section 203(c). ''Targeting'' refers to a system in which the minority language materials or assistance required by the Act are provided to fewer than all persons or registered voters. It is the view of the Attorney General that a targeting system will normally fulfill the Act's minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them.

[Order No. 655–76, 41 FR 29998, July 20, 1976, as amended by Order No. 1752–93, 58 FR 35373, July 1, 1993]

§ 55.18 Provision of minority language materials and assistance.

(a) *Materials provided by mail.* If materials provided by mail (or by some comparable form of distribution) generally to residents or registered voters are not all provided in the applicable minority language, the Attorney General will consider whether an effective targeting system has been developed. For example, a separate mailing of materials in the minority language to persons who are likely to need them or to residents of neighborhoods in which such a need is likely to exist, supplemented by a notice of the availability of minority language materials in the general mailing (in English and in the applicable minority language) and by other publicity regarding the availability of such materials may be sufficient.

(b) *Public notices.* The Attorney General will consider whether public notices and announcements of electoral activities are handled in a manner that provides members of the applicable language minority group an effective opportunity to be informed about electoral activities.

(c) *Registration.* The Attorney General will consider whether the registration system is conducted in such a way that members of the applicable language minority group have an effective opportunity to register. One method of accomplishing this is to provide, in the applicable minority language, all notices, forms and other materials provided to potential registrants and to have only bilingual persons as registrars. Effective results may also be obtained, for example, through the use of deputy registrars who are members of the applicable language minority group and the use of decentralized places of registration, with minority language materials available at places where persons who need them are most likely to come to register.

(d) *Polling place activities.* The Attorney General will consider whether polling place activities are conducted in such a way that members of the applicable language minority group have an effective opportunity to vote. One method of accomplishing this is to provide all notices, instructions, ballots, and other pertinent materials and oral assistance in the applicable minority language. If very few of the registered voters scheduled to vote at a particular polling place need minority language materials or assistance, the Attorney General will consider whether an alternative system enabling those few to cast effective ballots is available.

(e) *Publicity.* The Attorney General will consider whether a covered jurisdiction has taken appropriate steps to publicize the availability of materials and assistance in the minority language. Such steps may include the display of appropriate notices, in the minority language, at voter registration offices, polling places, etc., the making of announcements over minority language radio or television stations, the publication of notices in minority language newspapers, and direct contact with language minority group organizations.

[Order No. 655–76, 41 FR 29998, July 20, 1976, as amended by Order No. 733–77, 42 FR 35970, July 13, 1977]

§ 55.19 Written materials.

(a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to

or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and petitions.

(b) *Accuracy, completeness.* It is essential that material provided in the language of a language minority group be clear, complete and accurate. In examining whether a jurisdiction has achieved compliance with this requirement, the Attorney General will consider whether the jurisdiction has consulted with members of the applicable language minority group with respect to the translation of materials.

(c) *Ballots.* The Attorney General will consider whether a jurisdiction provides the English and minority language versions on the same document. Lack of such bilingual preparation of ballots may give rise to the possibility, or to the appearance, that the secrecy of the ballot will be lost if a separate minority language ballot or voting machine is used.

(d) *Voting machines.* Where voting machines that cannot mechanically accommodate a ballot in English and in the applicable minority language are used, the Attorney General will consider whether the jurisdiction provides sample ballots for use in the polling booths. Where such sample ballots are used the Attorney General will consider whether they contain a complete and accurate translation of the English ballots, and whether they contain or are accompanied by instructions in the minority language explaining the operation of the voting machine. The Attorney General will also consider whether the sample ballots are displayed so that they are clearly visible and at the same level as the machine ballot on the inside of the polling booth, whether the sample ballots are identical in layout to the machine ballots, and whether their size and typeface are the same as that appearing on the machine ballots. Where space limitations preclude affixing the translated sample ballots to the inside of polling booths, the Attorney General will consider whether language minority group voters are allowed to take the sample ballots into the voting booths.

§ 55.20 Oral assistance and publicity.

(a) *General.* Announcements, publicity, and assistance should be given in oral form to the extent needed to enable members of the applicable language minority group to participate effectively in the electoral process.

(b) *Assistance.* The Attorney General will consider whether a jurisdiction has given sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.

(c) *Helpers.* With respect to the conduct of elections, the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his or her own choice. The basic standard is one of effectiveness.

[Order No. 655–76, 41 FR 29998, July 20, 1976, as amended by Order No. 1752–93, 58 FR 35373, July 1, 1993]

§ 55.21 Record keeping.

The Attorney General's implementation of the Act's provisions concerning language minority groups would be facilitated if each covered jurisdiction would maintain such records and data as will document its actions under those provisions, including, for example, records on such matters as alternatives considered prior to taking such actions, and the reasons for choosing the actions finally taken.

Subpart E—Preclearance

§ 55.22 Requirements of section 5 of the Act.

For many jurisdictions, changes in voting laws and practices will be necessary in order to comply with section 4(f)(4) or section 203(c). If a jurisdiction

is subject to the preclearance requirements of section 5 (see § 55.8(b)), such changes must either be submitted to the Attorney General or be made the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. Procedures for the administration of section 5 are set forth in part 51 of this chapter.

Subpart F—Sanctions

§ 55.23 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including section 4 and section 203. See sections 12(d) and 204.

(b) Also, certain violations may be subject to criminal sanctions. See sections 12(a) and (c) and 205.

[Order No. 655–76, 41 FR 29998, July 20, 1976, as amended by Order 3291–2011, 76 FR 54112, Aug. 31, 2011]

Subpart G—Comment on This Part

§ 55.24 Procedure.

These guidelines may be modified from time to time on the basis of experience under the Act and comments received from interested parties. The Attorney General therefore invites public comments and suggestions on these guidelines. Any party who wishes to make such suggestions or comments may do so by sending them to: Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, DC 20530.

APPENDIX TO PART 55—JURISDICTIONS COVERED UNDER SECTIONS 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED [Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4) [1]	Coverage under sec. 203(c) [2]

[1] Coverage determinations for Section 4(f)(4) were published at 40 FR 43746 (Sept. 23, 1975), 40 FR 49422 (Oct. 22, 1975), 41 FR 783 (Jan. 5, 1976) (corrected at 41 FR 1503 (Jan. 8, 1976)), and 41 FR 34329 (Aug. 13, 1976). The Voting Section maintains a current list of those jurisdictions that have maintained successful declaratory judgments from the United States District Court for the District of Columbia pursuant to section 4 of the Act on its Web site at *http://www.justice.gov/crt/about/vot/*. See § 55.7 of this part.

[2] Coverage determinations for Section 203 based on 2000 Census data were published at 67 FR 48871 (July 26, 2002). Subsequent coverage determinations for Section 203 will be based on 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data. See section 203(b)(2)(A). New coverage determinations for Section 203 by the Director of the Census Bureau are forthcoming.

[Order 3291–2011, 76 FR 54112, Aug. 31, 2011]

PART 56—INTERNATIONAL ENERGY PROGRAM

Sec.
56.1 Purpose and scope.
56.2 Maintenance of records with respect to meetings held to develop voluntary agreements or plans of action pursuant to the Agreement on an International Energy Program.
56.3 Maintenance of records with respect to meetings held to develop and carry out voluntary agreements or plans of action pursuant to the Agreement on an International Energy Program.

AUTHORITY: Energy Policy and Conservation Act, Pub. L. 94–163, 89 Stat. 871 (42 U.S.C. 6201).

SOURCE: 49 FR 33998, Aug. 28, 1984, unless otherwise noted.

§ 56.1 Purpose and scope.

These regulations are promulgated pursuant to section 252(e)(2) of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. 6272(e)(2). They are being issued by the Assistant Attorney General in charge of the Antitrust Division to whom the Attorney General has delegated his authority under this section of EPCA. The requirements of this part do not apply to activities other than those for which section 252 of EPCA makes available a defense to actions brought under the Federal antitrust laws.

§56.2 Maintenance of records with respect to meetings held to develop voluntary agreements or plans of action pursuant to the Agreement on an International Energy Program.

(a) The Administrator of the Department of Energy shall keep a verbatim transcript of any meeting held pursuant to this subpart.

(b)(1) Except as provided in paragraphs (b) (2) through (4) of this section, potential participants shall keep a full and complete record of any communications (other than in a meeting held pursuant to this subpart) between or among themselves for the purpose of developing a voluntary agreement under this part. When two or more potential participants are involved in such a communication, they may agree among themselves who shall keep such record. Such record shall include the names of the parties to the communication and the organizations, if any, which they represent; the date of the communication; the means of communication; and a description of the communication in sufficient detail to convey adequately its substance.

(2) Where any communication is written (including, but not limited to, telex, telegraphic, telecopied, microfilmed and computer printout material), and where such communication demonstrates on its face that the originator or some other source furnished a copy of the communication to the Office of International Affairs, Department of Energy with the notation ''Voluntary Agreement'' marked on the first page of the document, no participant need record such a communication or send a further copy to the Department of Energy. The Department of Energy may, upon written notice to potential participants, from time to time, or with reference to particular types of documents, require deposit with other offices or officials of the Department of Energy. Where such communication demonstrates that it was sent to the Office of International Affairs, Department of Energy with the notation ''Voluntary Agreement'' marked on the first page of the document, or such other offices or officials in the Department of Energy has designated pursuant to this section it shall satisfy paragraph (c) of this section, for the purpose of deposit with the Department of Energy.

(3) To the extent that any communication is procedural, administrative or ministerial (for example, if it involves the location of a record, the place of a meeting, travel arrangements, or similar matters,) only a brief notation of the date, time, persons involved and description of the communication need be recorded.

(4) To the extent that any communication involves matters which recapitulate matters already contained in a full and complete record, the substance of such matters shall be identified, but need not be recorded in detail, provided that reference is made to the record and the portion thereof in which the substance is fully set out.

(c) Except where the Department of Energy otherwise provides, all records and transcripts prepared pursuant to paragraphs (a) and (b) of this section, shall be deposited within fifteen (15) days after the close of the month of their preparation together with any agreement resulting therefrom, with the Department of Energy, and shall be available to the Department of Justice, the Federal Trade Commission, and the Department of State. Such records and transcripts shall be available for public inspection and copying at the Department of Energy. Any person depositing material with the Department of Energy pursuant to this section shall indicate with particularity what portions, if any, the person believes are subject to disclosure to the public pursuant to 5 U.S.C. 552 and the reasons for such belief.

(Approved by the Office of Management and Budget under control number 1105–0029)

§56.3 Maintenance of records with respect to meetings held to develop and carry out voluntary agreements or plans of action pursuant to the Agreement on an International Energy Program.

(a) The Administrator of the Department of Energy or his delegate shall keep a verbatim transcript of any meeting held pursuant to this subpart except where:

(1) Due to considerations of time or other overriding circumstances, the

keeping of a verbatim transcript is not practicable, or

(2) Principal participants in the meeting are representatives of foreign governments.

If any such record other than a verbatim transcript, is kept by a designee who is not a full-time Federal employee, that record shall be submitted to the full-time Federal employee in attendance at the meeting who shall review the record, promptly make any changes he deems necessary to make the record full and complete, and shall notify the designee of such changes.

(b)(1) Except as provided in paragraphs (b) (2) through (4) of this section, participants shall keep a full and complete record of any communication (other than in a meeting held pursuant to this subpart) between or among themselves or with any other member of a petroleum industry group created by the International Energy Agency (IEA), or subgroup thereof for the purpose of carrying out a voluntary agreement or developing or carrying out a plan of action under this subpart, except that where there are several communications within the same day involving the same participants, they may keep a cumulative record for the day. The parties to a communication may agree among themselves who shall keep such record. Such record shall include the names of the parties to the communication and the organizations, if any, which they represent; the date of communication; the means of communication, and a description of the communication in sufficient detail to convey adequately its substance.

(2) Where any communication is written (including, but not limited to, telex, telegraphic, telecopied, microfilmed and computer printout material), and where such communication demonstrates on its face that the originator or some other source furnished a copy of the communication to the Office of International Affairs, Department of Energy with the notation ''Voluntary Agreement'' on the first page of the document, no participants need record such a communication or send a further copy to the Department of Energy. The Department of Energy may, upon written notice to participants, from time to time, or with reference to particular types of documents, require deposit with other offices or officials of the Department of Energy. Where such communication demonstrates that it was sent to the Office of International Affairs, Department of Energy with the notation ''Voluntary Agreement'' on the first page of the document, or such other offices or officials as the Department of Energy has designated pursuant to this section, it shall satisfy paragraph (c) of this section, for the purpose of deposit with the Department of Energy.

(3) To the extent that any communication is procedural, administrative or ministerial (for example, if it involves the location of a record, the place of a meeting, travel arrangements, or similar matters) only a brief notation of the date, time, persons involved and description of the communication need be recorded; except that during an IEA emergency allocation exercise or an allocation systems test such a non-substantive communication between members of the Industry Supply Advisory Group which occur within IEA headquarters need not be recorded.

(4) To the extent that any communication involves matters which recapitulate matters already contained in a full and complete record, the substance of such matters shall be identified, but need not be recorded in detail, provided that reference is made to the record and the portion thereof in which the substance is fully set out.

(c) Except where the Department of Energy otherwise provides, all records and transcripts prepared pursuant to paragraphs (a) and (b) of this section, shall be deposited within seven (7) days after the close of the week (ending Saturday) of their preparation during an international energy supply emergency or a test of the IEA emergency allocation system, and within fifteen (15) days after the close of the month of their preparation during periods of non-emergency, together with any agreement resulting therefrom, with the Department of Energy and shall be available to the Department of Justice, the Federal Trade Commission, and the Department of State. Such records and transcripts shall be available for public inspection and copying to the extent

set forth in 5 U.S.C. 552. Any person depositing materials pursuant to this section shall indicate with particularity what portions, if any, the person believes are not subject to disclosure to the public pursuant to 5 U.S.C. 552 and the reasons for such belief.

(d) During international oil allocation under chapter III and IV of the IEP or during an IEA allocation systems test, the Department of Justice may issue such additional guidelines amplifying the requirements of these regulations as the Department of Justice determines to be necessary and appropriate.

(Approved by the Office of Management and Budget under control number 1105–0029)

PART 57—INVESTIGATION OF DISCRIMINATION IN THE SUPPLY OF PETROLEUM TO THE ARMED FORCES

Sec.
57.1 Responsibility for the conduct of litigation.
57.2 Responsibility for the conduct of investigations.
57.3 Scope and purpose of investigation; other sources of information.
57.4 Expiration date.

AUTHORITY: Sec. 816(b)(2), Pub. L. 94–106; 89 Stat. 531.

SOURCE: Order No. 644–76, 41 FR 12302, Mar. 25, 1976, unless otherwise noted.

§57.1 Responsibility for the conduct of litigation.

(a) In accord with 28 CFR 0.45(h), civil litigation under sec. 816 of the Department of Defense Appropriation Authorization Act, 1976, 10 U.S.C.A. 2304 note (hereafter the ''Act''), shall be conducted under the supervision of the Assistant Attorney General in charge of the Civil Division.

(b) In accord with 28 CFR 0.55(a), prosecution, under section 816(f) of the Act, of criminal violations shall be conducted under the supervision of the Assistant Attorney General in charge of the Criminal Division.

§57.2 Responsibility for the conduct of investigations.

(a) When an instance of alleged ''discrimination'' in violation of section 816(b)(1) of the Act is referred to the Department of Justice by the Department of Defense, the matter shall be assigned initially to the Civil Division.

(b)(1) If the information provided by the Department of Defense indicates that a non-criminal violation may have occurred and further investigation is warranted, such investigation shall be conducted under the supervision of the Assistant Attorney General in charge of the Civil Division.

(2) If the information provided by the Department of Defense indicates that a criminal violation under section 816(f) of the Act may have occurred, the Civil Division shall refer the matter to the Criminal Division. If it is determined that further investigation of a possible criminal violation is warranted, such investigation shall be conducted under the supervision of the Assistant Attorney General in charge of the Criminal Division.

(3) If a referral from the Department of Defense is such that both civil and criminal proceedings may be warranted, responsibility for any further investigation may be determined by the Deputy Attorney General.

§57.3 Scope and purpose of investigation; other sources of information.

(a) The authority granted the Attorney General by section 816(d)(1) of the Act (e.g., authority to inspect books and records) shall not be utilized until an appropriate official has defined, in an appropriate internal memorandum, the scope and purpose of the particular investigation.

(b) There shall be no use, with respect to particular information, of the authority granted by section 816(d)(1) of the Act until an appropriate official has determined that the information in question is not available to the Department of Justice from any other Federal agency or other responsible agency (e.g., a State agency).

(c) For purposes of this section, ''appropriate official'' means the Assistant Attorney General in charge of the division conducting the investigation, or his delegate.

§57.4 Expiration date.

This part shall remain in effect until expiration, pursuant to section 816(h)

of the Act, of the Attorney General's authority under section 816 of the Act.

PART 58—REGULATIONS RELATING TO THE BANKRUPTCY REFORM ACTS OF 1978 AND 1994

Sec.
58.1 Authorization to establish panels of private trustees.
58.2 Authorization to appoint standing trustees.
58.3 Qualification for membership on panels of private trustees.
58.4 Qualifications for appointment as standing trustee and fiduciary standards.
58.5 Non-discrimination in appointment.
58.6 Procedures for suspension and removal of panel trustees and standing trustees.
58.7 Procedures for Completing Uniform Forms of Trustee Final Reports in Cases Filed Under Chapters 7, 12, and 13 of the Bankruptcy Code.
58.11 Procedures governing administrative review of a United States Trustee's decision to deny a Chapter 12 or Chapter 13 standing Trustee's claim of actual, necessary expenses.
58.12 Definitions.
58.13 Procedures all agencies shall follow when applying to become approved agencies.
58.14 Automatic expiration of agencies' status as approved agencies.
58.15 Procedures all approved agencies shall follow when applying for approval to act as an approved agency for an additional one year period.
58.16 Renewal for an additional one year period.
58.17 Mandatory duty of approved agencies to notify United States Trustees of material changes.
58.18 Mandatory duty of approved agencies to obtain prior consent of the United States Trustee before taking certain actions.
58.19 Continuing requirements for becoming and remaining approved agencies.
58.20 Minimum qualifications agencies shall meet to become and remain approved agencies.
58.21 Minimum requirements to become and remain approved agencies relating to fees.
58.22 Minimum requirements to become and remain approved agencies relating to certificates.
58.23 Minimum financial requirements and bonding and insurance requirements for agencies offering debt repayment plans.
58.24 Procedures for obtaining final agency action on United States Trustees' decisions to deny agencies' applications and to remove approved agencies from the approved list.
58.25 Definitions.
58.26 Procedures all providers shall follow when applying to become approved providers.
58.27 Automatic expiration of providers' status as approved providers.
58.28 Procedures all approved providers shall follow when applying for approval to act as an approved provider for an additional one year period.
58.29 Renewal for an additional one year period.
58.30 Mandatory duty of approved providers to notify United States Trustees of material changes.
58.31 Mandatory duty of approved providers to obtain prior consent of the United States Trustee before taking certain actions.
58.32 Continuing requirements for becoming and remaining approved providers.
58.33 Minimum qualifications providers shall meet to become and remain approved providers.
58.34 Minimum requirements to become and remain approved providers relating to fees.
58.35 Minimum requirements to become and remain approved providers relating to certificates.
58.36 Procedures for obtaining final provider action on United States Trustees' decisions to deny providers' applications and to remove approved providers from the approved list.
APPENDIX A TO PART 58—GUIDELINES FOR REVIEWING APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED UNDER 11 U.S.C. 330

AUTHORITY: 5 U.S.C. 301, 552; 11 U.S.C. 109(h), 111, 521(b), 727(a)(11), 1141(d)(3), 1202; 1302, 1328(g); 28 U.S.C. 509, 510, 586, 589b.

SOURCE: Order No. 921–80, 45 FR 82631, Dec. 16, 1980, unless otherwise noted.

§ 58.1 Authorization to establish panels of private trustees.

(a) Each U.S. Trustee is authorized to establish a panel of private trustees (the ''panel'') pursuant to 28 U.S.C. 586(a)(1).

(b) Each U.S. Trustee is authorized, with the approval of the Director, Executive Office for United States Trustees (the ''Director'') to increase or decrease the total membership of the panel. In addition, each U.S. Trustee, with the approval of the Director, is authorized to institute a system of rotation of membership or the like to

achieve diversity of experience, geographical distribution or other characteristics among the persons on the panel.

[Order No. 921–80, 45 FR 82631, Dec. 16, 1980, as amended at 62 FR 30183, June 2, 1997]

§ 58.2 Authorization to appoint standing trustees.

Each U.S. Trustee is authorized, subject to the approval of the Deputy Attorney General, or his delegate, to appoint and remove one or more standing trustees to serve in cases under chapters 12 and 13 of title 11, U.S. Code.

[Order No. 51 FR 44288, Dec. 9, 1986]

§ 58.3 Qualification for membership on panels of private trustees.

(a) To be eligible for appointment to the panel and to retain eligibility therefor, an individual must possess the qualifications described in paragraph (b) of this section in addition to any other statutory qualifications. A corporation or partnership may qualify as an entity for appointment to the private panel. However, each person who, in the opinion of the U.S. Trustee or of the Director, performs duties as trustee on behalf of a corporation or partnership must individually meet the standards described in paragraph (b) of this section, except that each U.S. Trustee, with the approval of the Director, shall have the discretion to waive the applicability of paragraph (b)(6) of this section as to any individual in a non-supervisory position. No professional corporation, partnership, or similar entity organized for the practice of law or accounting shall be eligible to serve on the panel.

(b) The qualifications for membership on the panel are as follows:

(1) Possess integrity and good moral character.

(2) Be physically and mentally able to satisfactorily perform a trustee's duties.

(3) Be courteous and accessible to all parties with reasonable inquiries or comments about a case for which such individual is serving as private trustee.

(4) Be free of prejudices against any individual, entity, or group of individuals or entities which would interfere with unbiased performance of a trustee's duties.

(5) Not be related by affinity or consanguinity within the degree of first cousin to any employee of the Executive Office for United States Trustees of the Department of Justice, or to any employee of the office of the U.S. Trustee for the district in which he or she is applying.

(6)(i) Be a member in good standing of the bar of the highest court of a state or of the District of Columbia; or

(ii) Be a certified public accountant; or

(iii) Hold a bachelor's degree from a full four-year course of study (or the equivalent) of an accredited college or university (accredited as described in part II, section III of Handbook X118 promulgated by the U.S. Office of Personnel Management) with a major in a business-related field of study or at least 20 semester-hours of business-related courses; or hold a master's or doctoral degree in a business-related field of study from a college or university of the type described above; or

(iv) Be a senior law student or candidate for a master's degree in business administration recommended by the relevant law school or business school dean and working under the direct supervision of:

(A) A member of a law school faculty; or

(B) A member of the panel of private trustees; or

(C) A member of a program established by the local bar association to provide clinical experience to students; or

(v) Have equivalent experience as deemed acceptable by the U.S. Trustee.

(7) Be willing to provide reports as required by the U.S. Trustee.

(8) Have submitted an application under oath, in the form prescribed by the Director, to the U.S. Trustee for the District in which appointment is sought: *Provided*, That this provision may be waived by the U.S. Trustee on approval of the Director.

§ 58.4 Qualifications for appointment as standing trustee and fiduciary standards.

(a) As used in this section—

(1) The term *standing trustee* means an individual appointed pursuant to 28 U.S.C. 586(b).

(2) The term *relative* means an individual who is related to the standing trustee as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or an individual whose close association to the standing trustee is the equivalent of a spousal relationship.

(3) The term *financial or ownership interest* excludes ownership of stock in a publicly-traded company if the ownership interest in not controlling.

(4) The word *region* means the geographical area defined in 28 U.S.C. 581.

(b) To be eligible for appointment as a standing trustee, an individual must have the qualifications for membership on a private panel of trustees set forth in §§ 58.3 (b)(1)–(4), (6)–(8). An individual need not be an attorney to be eligible for appointment as a standing trustee. A corporation or partnership may be appointed as standing trustee only with the approval of the Director.

(c) The United States Trustee shall not appoint as a standing trustee any individuals who, at the time of appointment, is:

(1) A relative of another standing trustee in the region in which the standing trustee is to be appointed;

(2) A relative of a standing trustee (in the region in which the standing trustee is to be appointed), who, within the preceding one-year period, died, resigned, or was removed as a standing trustee from a case;

(3) A relative of a bankruptcy judge or a clerk of the bankruptcy court in the region in which the standing trustee is to be appointed;

(4) An employee of the Department of Justice within the preceding one-year period; or

(5) A relative of a United States Trustee or an Assistant United States Trustee, a relative of an employee in any of the offices of the United States Trustee in the region in which the standing trustee is to be appointed, or a relative of an employee in the Executive Office for United States Trustees.

(d) A standing trustee must, at a minimum, adhere to the following fiduciary standards:

(1) *Employment of relatives.* (i) A standing trustee shall not employ a relative of the standing trustee.

(ii) A standing trustee shall also not employ a relative of the United States Trustee or of an Assistant United States Trustee in the region in which the trustee has been appointed or a relative of a bankruptcy court judge or of the clerk of the bankruptcy court in the judicial district in which the trustee has been appointed.

(iii)(A) Paragraphs (d)(1) (i) and (ii) of this section shall not apply to a spouse of a standing trustee who was employed by the standing trustee as of August 1, 1995.

(B) For all other relatives employed by a standing trustee as of August 1, 1995, paragraphs (d)(1) (i) and (ii) of this section shall be fully implemented by October 1, 1998, unless specifically provided below:

(*1*) The United States Trustee shall have the discretion to grant a written waiver for a period of time not to exceed 2 years upon a written showing by the standing trustee of compelling circumstances that make the continued employment of a relative necessary for a standing trustee's performance of his or her duties and written evidence that the salary to be paid is at or below market rate.

(*2*) Additional waivers, not to exceed a period of two years each, may be granted under paragraph (d)(1)(iii)(B)(*1*) of this section provided the standing trustee makes a similar written showing within 90 days prior to the expiration of a present waiver and the United States Trustee determines that the circumstances for waiver are met.

(*3*) No waivers will be granted for a relative of the United States Trustee or of an Assistant United States Trustee.

(2) *Related party transactions.* (i) A standing trustee shall not direct debtors or creditors of a bankruptcy case administered by the standing trustee to an individual or entity that provides products or services, such as insurance or financial counseling, if a standing

trustee is a relative of that individual or if the standing trustee or relative has a financial or ownership interest in the entity.

(ii) A standing trustee shall not, on behalf of the trust, contract or allocate expenses with himself or herself, with a relative, or with any entity in which the standing trustee or a relative of the standing trustee has a financial or ownership interest if the costs are to be paid as an expense out of the fiduciary expense fund.

(iii)(A) The United States Trustee may grant a waiver from compliance with paragraph (d)(2)(ii) of this section for up to three years following the appointment of a standing trustee if the newly-appointed standing trustee can demonstrate in writing that a waiver is necessary and the cost is at or below market.

(B) The United States Trustee may grant a provisional waiver from compliance with the allocation prohibition contained in paragraph (d)(2)(ii) of this section if one of the following conditions is present:

(*1*) A standing trustee has insufficient receipts to earn maximum annual compensation as determined by the Director during any one of the last three fiscal years and provides the United States Trustee with an appraisal or other written evidence that the allocation is necessary and the allocated cost is at or below market rate for that good or service, or

(*2*) A chapter 13 standing trustee also serves as a trustee in chapter 12 cases and provides the United States Trustee with an appraisal or other written evidence that the allocation is necessary and the allocated cost is at or below market rate for that good or service.

(C) Except as otherwise provided in this paragraph, a standing trustee may seek a reasonable extension of time from the United States Trustee to comply with paragraph (d)(2)(ii) of this section. To obtain an extension, a standing trustee must demonstrate by an appraisal or other written evidence, satisfactory to the United States Trustee, that the expense is necessary and at or below market rate. In no event shall an extension be granted for the use and occupation of real estate beyond October 1, 2005. For personal property and personal service contracts, no extension shall be granted beyond October 1, 1998.

(3) *Employment of other standing trustees.* A standing trustee shall not employ or contract with another standing trustee to provide personal services for compensation payable from the fiduciary expense fund. This section does not prohibit the standing trustee from reimbursing the actual, necessary expenses incurred by another standing trustee who provides necessary assistance to the standing trustee provided that the reimbursement has been preapproved by the United States Trustee.

(e) Paragraph (d) of this section is effective July 2, 1997. As to those standing trustees who are appointed as of July 2, 1997, paragraph (d) will be applicable on the first day of their next fiscal year (i.e., October 1, 1997, for chapter 13 trustees and January 1, 1998, for chapter 12 trustees).

[62 FR 30183, June 2, 1997]

§58.5 Non-discrimination in appointment.

The U.S. Trustees shall not discriminate on the basis of race, color, religion, sex, national origin or age in appointments to the private panel of trustees or of standing trustees and in this regard shall assure equal opportunity for all appointees and applicants for appointment to the private panel of trustees or as standing trustee. Each U.S. Trustee shall be guided by the policies and requirements of Executive Order 11478 of August 8, 1969, relating to equal employment opportunity in the Federal Government, section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e–16), section 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a), and the regulations of the Office of Personnel Management relating to equal employment opportunity (5 CFR part 713).

[Order No. 921–80, 45 FR 82631, Dec. 16, 1980, as amended by Order No. 960–81, 46 FR 52360, Oct. 27, 1981]

§ 58.6 Procedures for suspension and removal of panel trustees and standing trustees.

(a) A United States Trustee shall notify a panel trustee or a standing trustee in writing of any decision to suspend or terminate the assignment of cases to the trustee including, where applicable, any decision not to renew the trustee's term appointment. The notice shall state the reason(s) for the decision and should refer to, or be accompanied by copies of, pertinent materials upon which the United States Trustee has relied and any prior communications in which the United States Trustee has advised the trustee of the potential action. The notice shall be sent to the office of the trustee by overnight courier, for delivery the next business day. The reasons may include, but are in no way limited to:

(1) Failure to safeguard or to account for estate funds and assets;

(2) Failure to perform duties in a timely and consistently satisfactory manner;

(3) Failure to comply with the provisions of the Code, the Bankruptcy Rules, and local rules of court;

(4) Failure to cooperate and to comply with orders, instructions and policies of the court, the bankruptcy clerk or the United States Trustee;

(5) Substandard performance of general duties and case management in comparison to other members of the chapter 7 panel or other standing trustees;

(6) Failure to display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public;

(7) Failure to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases;

(8) Failure to file timely, accurate reports, including interim reports, final reports, and final accounts;

(9) Failure to meet the eligibility requirements of 11 U.S.C. 321 or the qualifications set forth in 28 CFR 58.3 and 58.4 and in 11 U.S.C. 322;

(10) Failure to attend in person or appropriately conduct the 11 U.S.C. 341(a) meeting of creditors;

(11) Action by or pending before a court or state licensing agency which calls the trustee's competence, financial responsibility or trustworthiness into question;

(12) Routine inability to accept assigned cases due to conflicts of interest or to the trustee's unwillingness or incapacity to serve;

(13) Change in the composition of the chapter 7 panel pursuant to a system established by the United States Trustee under 28 CFR 58.1;

(14) A determination by the United States Trustee that the interests of efficient case administration or a decline in the number of cases warrant a reduction in the number of panel trustees or standing trustees.

(b) The notice shall advise the trustee that the decision is final and unreviewable unless the trustee requests in writing a review by the Director, Executive Office for United States Trustees, no later than 20 calendar days from the date of issuance of the United States Trustee's notice (''request for review''). In order to be timely, a request for review must be received by the Office of the Director no later than 20 calendar days from the date of the United States Trustee's notice to the trustee.

(c) A decision by a United States Trustee to suspend or terminate the assignment of cases to a trustee shall take effect upon the expiration of a trustee's time to seek review from the Director or, if the trustee timely seeks such review, upon the issuance of a final written decision by the Director.

(d) Notwithstanding paragraph (c) of this section, a United States Trustee's decision to suspend or terminate the assignment of cases to a trustee may include, or may later by supplemented by an interim directive, by which the United States trustee may immediately discontinue assigning cases to a trustee during the review period. A United States Trustee may issue such an interim directive if the United States Trustee specifically finds that:

(1) A continued assignment of cases to the trustee places the safety of estate assets at risk ;

(2) The trustee appears to be ineligible to serve under applicable law, rule, or regulation;

(3) The trustee has engaged in conduct that appears to be dishonest, deceitful, fraudulent, or criminal in nature; or

(4) The trustee appears to have engaged in other gross misconduct that is unbefitting his or her position as trustee or violates the trustee's duties.

(e) If the United States Trustee issues an interim directive, the trustee may seek a stay of the interim directive from the Director if the trustee has timely filed a request for review under paragraph (b) of this section.

(f) The trustee's written request for review shall fully describe why the trustee disagrees with the United States Trustee's decision, and shall be accompanied by all documents and materials that the trustee wants the Director to consider in reviewing the decision. The trustee shall send a copy of the request for review, and the accompanying documents and materials, to the United States Trustee by overnight courier, for delivery the next business day. The trustee may request that specific documents in the possession of the United States Trustee be transmitted to the Director for inclusion in the record.

(g) The United States Trustee shall have 15 calendar days from the date of the trustee's request for review to submit to the Director a written response regarding the matters raised in the trustee's request for review. The United States Trustee shall provide a copy of this response to the trustee. Both copes shall be sent by overnight courier, for delivery the next business day.

(h) The Director may seek additional information from any party in the manner and to the extent the Director deems appropriate.

(i) Unless the trustee and the United States Trustee agree to a longer period of time, the Director shall issue a written decision no later than 30 calendar days from the receipt of the United States Trustee's response to the trustee's request for review. That decision shall determine whether the United States Trustee's decision is supported by the record and the action is an appropriate exercise of the United States Trustee's discretion, and shall adopt, modify or reject the United States Trustee's decision to suspend or terminate the assignment of future cases to the trustee. The Director's decision shall constitute final agency action.

(j) In reaching a determination, the Director may specify a person to act as a reviewing official. The reviewing official shall not be a person who was involved in the United States Trustee's decision or a Program employee who is located within the region of the United States Trustee who made the decision. The reviewing official's duties shall be specified by the Director on a case by case basis, and may include reviewing the record, obtaining additional information from the participants, providing the Director with written recommendations, or such other duties as the Director shall prescribe in a particular case.

(k) This rule does not authorize a trustee to seek review of any decision to increase the size of the chapter 7 panel or to appoint additional standing trustees in the district or region.

(l) A trustee who files a request for review shall bear his or her own costs and expenses, including counsel fees.

[62 FR 51750, Oct. 2, 1997]

§58.7 Procedures for Completing Uniform Forms of Trustee Final Reports in Cases Filed Under Chapters 7, 12, and 13 of the Bankruptcy Code.

(a) *UST Form 101–7–TFR, Chapter 7 Trustee's Final Report.* A chapter 7 trustee must complete UST Form 101–7–TFR final report (TFR) in preparation for closing an asset case. This report must be submitted to the United States Trustee after liquidating the estate's assets, but before making distribution to creditors, and before filing it with the United States Bankruptcy Court. The TFR must contain the trustee's certification, under penalty of perjury, that all assets have been liquidated or properly accounted for and that funds of the estate are available for distribution. Pursuant to 28 U.S.C. 589b(d), the TFR must also contain the following:

(1) Summary of the trustee's case administration;

(2) Copies of the estate's financial records;

(3) List of allowed claims;

(4) Fees and administrative expenses; and

(5) Proposed dividend distribution to creditors.

(b) *UST Form 101–7–NFR Chapter 7 Trustee's Notice of Trustee's Final Report.* After the TFR has been reviewed by the United States Trustee and filed with the United States Bankruptcy Court, if the net proceeds realized in an estate exceed the amounts specified in Fed. R. Bankr. P. 2002(f)(8), UST Form 101–7–NFR (NFR) must be sent to all creditors as the notice required under Fed. R. Bankr. P. 2002(f). The NFR must show the receipts, approved disbursements, and any balance identified on the TFR, as well as the information required in the TFR's Exhibit D. In addition, the NFR must identify the procedures for objecting to any fee application or to the TFR.

(c) *UST Form 101–7–TDR Chapter 7 Trustee's Final Account, Certification The Estate Has Been Fully Administered and Application of Trustee To Be Discharged.* After distributing all estate funds, a trustee must submit to the United States Trustee and file with the United States Bankruptcy Court the trustee's final account, UST Form 101–7–TDR (TDR). The TDR must contain the trustee's certification, under penalty of perjury, that the estate has been fully administered and the trustee's request to be discharged as trustee. Pursuant to 28 U.S.C. 589b(d), the TDR must also include the following:

(1) The length of time the case was pending;

(2) Assets abandoned;

(3) Assets exempted;

(4) Receipts and disbursements of the estate;

(5) Claims asserted;

(6) Claims allowed; and,

(7) Distributions to claimants and claims discharged without payment, in each case by appropriate category.

(d) *UST Form 101–7–NDR Chapter 7 Trustee's Report of No Distribution.* In cases where there is no distribution of funds the case trustee must submit to the United States Trustee and file with the United States Bankruptcy Court UST Form 101–7–NDR (NDR). The NDR must contain the trustee's certification that the estate has been fully administered, that the trustee has neither received nor disbursed any property or money on account of the estate, and that there is no property available for distribution over and above that exempted by law. In addition, the NDR must set forth the trustee's request to be discharged as trustee. Pursuant to 28 U.S.C. 589b(d), the NDR must also include the following information:

(1) The length of time the case was pending;

(2) Assets abandoned;

(3) Assets exempted;

(4) Claims asserted;

(5) Claims scheduled; and,

(6) claims scheduled to be discharged without payment.

(e) *UST Form 101–12–FR–S, Chapter 12 Standing Trustee's Final Report and Account and UST Form 101–13–FR–S, Chapter 13 Standing Trustee's Final Report and Account.* After the final distribution to creditors in a chapter 12 or 13 case in which a standing trustee has been appointed, a trustee must submit to the United States Trustee and file with the United States Bankruptcy Court either UST Form 101–12–FR–S for chapter 12 cases or UST Form 101–13–FR–S for chapter 13 cases, which are the trustee's final report and account. In these forms, a trustee must include a certification that the estate has been fully administered if not converted to another chapter and a request to be discharged as trustee. Pursuant to 28 U.S.C. 589b(d), these forms must also include the following information:

(1) The length of time the case was pending;

(2) Assets abandoned;

(3) Assets exempted;

(4) Receipts and disbursements of the estate;

(5) Expenses of administration, including for use under section 707(b), actual costs of administering cases under chapter 12 or 13 (as applicable) of title 11;

(6) Claims asserted;

(7) Claims allowed;

(8) Distributions to claimants and claims discharged without payment, in each case by appropriate category;

(9) Date of confirmation of the plan;

(10) Date of each modification thereto; and,

(11) Defaults by the debtor in performance under the plan.

(f) *UST Form 101–12–FR–C, Chapter 12 Case Trustee's Final Report and Account, and UST Form 101–13–FR–C, Chapter 13 Case Trustee's Final Report and Account.* After the final distribution to creditors in a chapter 12 or 13 case in which a case trustee has been appointed, the trustee must submit to the United States Trustee and file with the United States Bankruptcy Court either UST Form 101–12–FR–C for chapter 12 cases, or UST Form 101–13–FR–C for chapter 13 cases, which are the trustee's final report and account. In these forms, a trustee must include a certification, submitted under penalty of perjury, that the estate has been fully administered if not converted to another chapter and the trustee's request to be discharged from further duties as trustee. Pursuant to 28 U.S.C. 589b(d), these forms must also include the following information:

(1) The length of time the case was pending;

(2) Assets abandoned;

(3) Assets exempted;

(4) Receipts and disbursements of the estate;

(5) Expenses of administration, including for use under section 707(b), actual costs of administering cases under chapter 12 or 13 (as applicable) of title 11;

(6) Claims asserted;

(7) Claims allowed;

(8) Distributions to claimants and claims discharged without payment, in each case by appropriate category;

(9) Date of confirmation of the plan;

(10) Date of each modification thereto; and,

(11) defaults by the debtor in performance under the plan.

(g) *Mandatory Usage of Uniform Forms.* The Uniform Forms associated with this rule must be utilized by trustees when completing their final reports and final accounts. All trustees serving in districts where a United States Trustee is serving must use the Uniform Forms in the administration of their cases, in the same manner, and with the same content, as set forth in this rule:

(1) All Uniform Forms may be electronically or mechanically reproduced so long as all the content and the form remain consistent with the Uniform Forms as they are posted on EOUST's Web site;

(2) The Uniform Forms shall be filed via the United States Bankruptcy Courts Case Management/Electronic Case Filing System (CM/ECF) as a ''smart form'' meaning the forms are data enabled, unless the court offers an automated process that has been approved by EOUST, such as the virtual NDR event through CM/ECF.

[73 FR 58444, Oct. 7, 2008]

§58.11 Procedures governing administrative review of a United States Trustee's decision to deny a Chapter 12 or Chapter 13 standing Trustee's claim of actual, necessary expenses.

(a) The following definitions apply to this section. These terms shall have these meanings:

(1) The term *claim of actual, necessary expenses* means the request by a chapter 12 or chapter 13 standing trustee for the United States Trustee's approval of the trustee's projected expenses for each fiscal year budget, or for an amendment to the current budget when an increase in an individual expense line item is greater than both 10% of the budgeted amount and $5,000.00. Expenses for certain items require prior United States Trustee approval regardless of amount;

(2) The term *director* means the person designated or acting as the Director of the Executive Office for United States Trustees;

(3) The term *final decision* means the written determination issued by the Director based upon the review of the United States Trustee's decision to deny all or part of a trustee's claim of actual, necessary expenses;

(4) The term *notice* means the written communication from the United States Trustee to a trustee that the trustee's claim of actual, necessary expenses has been denied in whole or in part;

(5) The term *request for review* means the written communication from a trustee to the Director seeking review of the United States Trustee's decision to deny, in whole or in part, the trustee's claim of actual, necessary expenses;

(6) The term *trustee* means an individual appointed by the United States

Trustee under 28 U.S.C. 586(b) to serve as the standing trustee for chapter 12 or chapter 13 cases in a particular region; and

(7) The term *United States Trustee* means, alternatively:

(i) A United States Trustee appointed under 28 U.S.C. 581; or

(ii) A person acting as a United States Trustee under 28 U.S.C. 585.

(b) The United States Trustee may issue a decision to deny a trustee's claim of actual, necessary expenses. Reasons for denial include, but are not limited to, finding that the trustee failed to do any of the following:

(1) Provide to the United States Trustee sufficient justification for the expense;

(2) Demonstrate to the United States Trustee that the expense is a cost effective use of funds;

(3) Demonstrate to the United States Trustee that the expense is reasonably related to the duties of the trustee;

(4) Obtain authorization from the United States Trustee prior to making an expenditure that was not provided for in the current budget;

(5) Provide the United States Trustee with documents, materials, or other information pertaining to the expense;

(6) Timely submit to the United States Trustee accurate budgets or requests for amendment of budgets to cover the additional expense; or

(7) Demonstrate to the United States Trustee that the expense is directly related to office operations.

(c) Before issuing a notice of denial, the United States Trustee shall communicate in writing with the trustee in an attempt to resolve any dispute over a claim of actual, necessary expenses:

(1) For disputes involving the trustee's projected expenses for the upcoming fiscal year budget, the United States Trustee shall either resolve the dispute or issue a notice of denial no later than July 30 of the current calendar year for a chapter 12 standing trustee or October 31 of the current calendar year for a chapter 13 standing trustee, or if the United States Trustee has requested additional information, 30 calendar days from submission of the additional information if such submission is after July 1 for a chapter 12 standing trustee or October 1 for a chapter 13 standing trustee, unless the trustee and United States Trustee agree to a longer period of time. Any projected expenses not specifically disputed shall be approved in the ordinary course and the trustee's fee shall be set on an interim basis;

(2) For disputes over amendments to the current year budget, the United States Trustee shall either resolve the dispute or issue a notice of denial no later than 30 calendar days after the trustee's amendment request, or if the United States Trustee has requested additional information, 30 calendar days from submission of the additional information, unless the trustee and the United States Trustee agree to a longer period of time. Any portion of the amendment not specifically disputed shall be approved in the ordinary course;

(3) If the United States Trustee does not resolve the dispute or issue a notice of denial within the time frames identified in (c)(1) or (2) of this section, the trustee's claim of actual, necessary expenses shall be deemed denied on the next business day following expiration of the time frames identified in (c)(1) or (2) of this section.

(d) The United States Trustee shall notify a trustee in writing of any decision denying a trustee's claim of actual, necessary expenses. The notice shall state the reason(s) for the decision and shall reference any documents or communications relied upon in reaching the decision. The United States Trustee shall provide to the trustee copies of any such non-privileged documents that were not supplied to the United States Trustee by the trustee. The notice shall be sent to the trustee by overnight courier, for delivery the next business day.

(e) The notice shall advise the trustee that the decision is final and unreviewable unless the trustee requests in writing a review by the Director no later than 21 calendar days from the date of the notice to the trustee. If the United States Trustee did not issue a notice of denial, and the expenses were deemed denied under (c)(3) of this section, the trustee shall have 21 calendar days from the date on which the expenses were deemed denied to submit a request for review to the Director.

(f) The decision to deny a trustee's claim of actual, necessary expenses shall take effect upon the expiration of a trustee's time to seek review from the Director or, if the trustee timely seeks such review, upon the issuance of a final decision by the Director.

(g) The trustee's request for review shall be in writing and shall fully describe why the trustee disagrees with the United States Trustee's decision, and shall be accompanied by all documents and materials the trustee wants the Director to consider in reviewing the United States Trustee's decision. The trustee shall send the original and one copy of the request for review, including all accompanying documents and materials, to the Office of the Director by overnight courier, for delivery the next business day. In order to be timely, a request for review shall be received at the Office of the Director no later than 21 calendar days from the date of the notice to the trustee or the date the expenses were deemed denied. The trustee shall also send a copy of the request for review to the United States Trustee by overnight courier, for delivery the next business day.

(h) The United States Trustee shall have 21 calendar days from the date of the trustee's request for review to submit to the Director a written response regarding the matters raised in the trustee's request for review. The United States Trustee shall provide a copy of this response to the trustee by overnight courier, for delivery the next business day.

(i) The Director may seek additional non-privileged information from any party, in the manner and to the extent the Director deems appropriate.

(j) In reviewing the decision to deny a trustee's claim of actual, necessary expenses, the Director shall determine:

(1) Whether the decision is supported by the record; and

(2) Whether the decision constitutes an appropriate exercise of discretion.

(k) The Director shall issue a final decision no later than 90 calendar days from the receipt of the trustee's request for review, or, if the Director has requested additional information, 30 calendar days from submission of the additional information, unless the trustee agrees to a longer period of time. The Director's final decision on the trustee's request for review shall constitute final agency action.

(l) In reaching a final decision the Director may specify a person to act as a reviewing official. The reviewing official may not be under the supervision of the United States Trustee who denied the trustee's claim of actual, necessary expenses. The reviewing official's duties shall be specified by the Director on a case-by-case basis, and may include reviewing the record, obtaining additional information from the participants, providing the Director with written recommendations, and such other duties as the Director shall prescribe in a particular case.

(m) This rule does not authorize a trustee to seek review of any decision to change maximum annual compensation, to decrease or increase appointments of trustees in a region or district, to change the trustee's percentage fee, or to suspend, terminate, or remove a trustee.

(n) A trustee must exhaust all administrative remedies before seeking redress in any court of competent jurisdiction.

[76 FR 31228, May 31, 2011]

§58.12 Definitions.

(a) The following definitions apply to §§58.12 through and including 58.24 of this Part and the applications and other materials agencies submit in an effort to establish they meet the requirements necessary to become an approved nonprofit budget and credit counseling agency.

(b) These terms shall have these meanings: (1) The term ''accreditation'' means the recognition or endorsement that an accrediting organization bestows upon an agency because the accrediting organization has determined the agency meets or exceeds all the accrediting organization's standards;

(2) The term ''accrediting organization'' means either an entity that provides accreditation to agencies or provides certification to counselors, provided, however, that an accrediting organization shall:

(i) Not be an agency or affiliate of any agency; and

(ii) Be deemed acceptable by the United States Trustee;

(3) The term ''adequate counseling'' means the actual receipt by a client from an approved agency of all counseling services, and all other applicable services, rights, and protections specified in:

(i) 11 U.S.C. 109(h);

(ii) 11 U.S.C. 111; and

(iii) This part;

(4) The term ''affiliate of an agency'' includes:

(i) Every entity that is an affiliate of the agency, as the term ''affiliate'' is defined in 11 U.S.C. 101(2), except that the word ''agency'' shall be substituted for the word ''debtor'' in 11 U.S.C. 101(2);

(ii) Each of an agency's officers and each of an agency's directors; and

(iii) Every relative of an agency's officers and every relative of an agency's directors;

(5) The term ''agency'' and the term ''budget and credit counseling agency'' shall each mean a nonprofit organization that is applying under this part for United States Trustee approval to be included on a publicly available list in one or more United States district courts, as authorized by 11 U.S.C. 111(a)(1), and shall also mean, whenever appropriate, an approved agency;

(6) The term ''application'' means the application and related forms, including appendices, approved by the Office of Management and Budget as form EOUST–CC1, *Application for Approval as a Nonprofit Budget and Credit Counseling Agency*, as it shall be amended from time to time;

(7) The term ''approved agency'' means an agency currently approved by a United States Trustee under 11 U.S.C. 111 as an approved nonprofit budget and credit counseling agency eligible to be included on one or more lists maintained under 11 U.S.C. 111(a)(1);

(8) The term ''approved list'' means the list of agencies currently approved by a United States Trustee under 11 U.S.C. 111, as currently published on the United States Trustee Program's Internet site, which is located on the United States Department of Justice's Internet site;

(9) The term ''audited financial statements'' means financial reports audited by independent certified public accountants in accordance with generally accepted accounting principles as defined by the American Institute of Certified Public Accountants;

(10) The term ''certificate'' means the certificate identified in 11 U.S.C. 521(b)(1) that an approved agency shall provide to a client after the client completes counseling services;

(11) The term ''client'' means an individual who both seeks and receives (or sought and received) counseling services from an approved agency;

(12) The term ''counseling services'' means all counseling required by 11 U.S.C. 109(h) and 111, and this part including, without limitation, services that are typically of at least 60 minutes in duration and that shall at a minimum include:

(i) Performing on behalf of, and providing to, each client a written analysis of that client's current financial condition, which analysis shall include a budget analysis, consideration of all alternatives to resolve a client's credit problems, discussion of the factors that caused such financial condition, and identification of all methods by which the client can develop a plan to respond to the financial problems without incurring negative amortization of debt; and

(ii) Providing each client the opportunity to have the agency negotiate an alternative payment schedule with regard to each unsecured consumer debt under terms as set forth in 11 U.S.C. 502(k) or, if the client accepts this option and the agency is unable to provide this service, the agency shall refer the client to another approved agency in the appropriate federal judicial district that provides it;

(13) The term ''counselor certification'' means certification of a counselor by an accrediting organization because the accrediting organization has determined the counselor meets or exceeds all the accrediting organization's standards for counseling services or related areas, such as personal finance, budgeting, or credit or debt management;

(14) The term ''criminal background check'' means a report generated by a

state law enforcement authority disclosing the entire state criminal history record, if any, of the counselor for whom the criminal background check is sought, for every state where the counselor has resided or worked during any part of the immediately preceding five years. If a criminal background check is not available for, or is not authorized by state law in, each of the states where the counselor has resided or worked during any part of the immediately preceding five years, the agency shall instead obtain at least every five years a sworn statement from each counselor attesting to whether the counselor has been convicted of a felony, or a crime involving fraud, dishonesty, or false statements;

(15) The term ''debt repayment plan'' means any written document suggested, drafted, or reviewed by an approved agency that either proposes or implements any mechanism by which a client would make payments to any creditor or creditors if, during the time any such payments are being made, that creditor or those creditors would forbear from collecting or otherwise enforcing their claim or claims against the client; provided, however, that any such written document shall not constitute a debt repayment plan if the client would incur a negative amortization of debt under it;

(16) The term ''Director'' means the person designated or acting as the Director of the Executive Office for United States Trustees;

(17) The term ''entity'' shall have the meaning given that term in 11 U.S.C. 101(15);

(18) The term ''fair share'' means payments by a creditor to an approved agency for administering a debt repayment plan;

(19) The terms ''fee'' and ''fee policy'' each mean the aggregate of all fees, contributions, and payments an approved agency charges clients for providing counseling services; ''fee policy'' shall also mean the objective criteria the agency uses in determining whether to waive or reduce any fee, contribution, or payment;

(20) The term ''final decision'' means the written determination issued by the Director based upon the review of the United States Trustee's decision either to deny an agency's application or to remove an agency from the approved list;

(21) The term ''financial benefit'' means any interest equated with money or its equivalent, including, but not limited to, stocks, bonds, other investments, income, goods, services, or receivables;

(22) The term ''governmental unit'' shall have the meaning given that term in 11 U.S.C. 101(27);

(23) The term ''independent contractor'' means a person or entity who provides any goods or services to an approved agency other than as an employee and as to whom the approved agency does not:

(i) Direct or control the means or methods of delivery of the goods or services being provided;

(ii) Make financial decisions concerning the business aspects of the goods or services being provided; and

(iii) Have any common employees;

(24) The term ''languages offered'' means every language other than English in which an approved agency provides counseling services;

(25) The term ''legal advice'' shall have the meaning given that term in 11 U.S.C. 110(e)(2);

(26) The term ''limited English proficiency'' refers to individuals who:

(i) Do not speak English as their primary language; and

(ii) Have a limited ability to read, write, speak, or understand English;

(27) The term ''material change'' means, alternatively, any change:

(i) In the name, structure, principal contact, management, counselors, physical location, counseling services, fee policy, language services, or method of delivery of an approved agency; or

(ii) That renders inapplicable, inaccurate, incomplete, or misleading any statement an agency or approved agency previously made:

(A) In its application or related materials; or

(B) To the United States Trustee;

(28) The term ''method of delivery'' means one or more of the three methods by which an approved agency can provide some component of counseling services to its clients, including:

(i) ''In person'' delivery, which applies when a client primarily receives counseling services at a physical location with a credit counselor physically present in that location, and with the credit counselor providing oral and/or written communication to the client at the facility;

(ii) ''Telephone'' delivery, which applies when a client primarily receives counseling services by telephone; and

(iii) ''Internet'' delivery, which applies when a client primarily receives counseling services through an Internet Web site;

(29) The term ''nonprofit'' means, alternatively:

(i) An entity validly organized as a not-for-profit entity under applicable state or federal law, if that entity operates as a not-for-profit entity in full compliance with all applicable state and federal laws; or

(ii) A qualifying governmental unit;

(30) The term ''notice'' in § 58.24 means the written communication from the United States Trustee to an agency that its application to become an approved agency has been denied or to an approved agency that it is being removed from the approved list;

(31) The term ''potential client'' means an individual who seeks, but does not receive, counseling services from an approved agency.

(32) The term ''qualifying government unit'' means any governmental unit that, were it not a governmental unit, would qualify for tax-exempt status under 26 U.S.C. 501(c)(3), or would qualify as a nonprofit entity under applicable state law;

(33) The term ''referral fees'' means money or any other valuable consideration paid or transferred between an approved agency and another entity in return for that entity, directly or indirectly, identifying, referring, securing, or in any other way encouraging any client or potential client to receive counseling services from the approved agency; provided, however, that ''referral fees'' shall not include fees paid to the agency under a fair share agreement;

(34) The term ''relative'' shall have the meaning given that term in 11 U.S.C. 101(45);

(35) The term ''request for review'' means the written communication from an agency to the Director seeking review of the United States Trustee's decision either to deny the agency's application or to remove the agency from the approved list;

(36) The term ''state'' means state, commonwealth, district, or territory of the United States;

(37) The term ''tax waiver'' means a document sufficient to permit the Internal Revenue Service to release directly to the United States Trustee information about an agency;

(38) The term ''trust account'' means an account with a federally insured depository institution that is separated and segregated from operating accounts, which an approved agency shall maintain in its fiduciary capacity for the purpose of receiving and holding client funds entrusted to the approved agency; and

(39) The term ''United States Trustee'' means, alternatively:

(i) The Executive Office for United States Trustees;

(ii) A United States Trustee appointed under 28 U.S.C. 581;

(iii) A person acting as a United States Trustee;

(iv) An employee of a United States Trustee; or

(v) Any other entity authorized by the Attorney General to act on behalf of the United States under this part.

[78 FR 16150, Mar. 14, 2013]

§ 58.13 Procedures all agencies shall follow when applying to become approved agencies.

(a) An agency applying to become an approved agency shall obtain an application, including appendices, from the United States Trustee.

(b) The agency shall complete the application, including its appendices, and attach the required supporting documents requested in the application.

(c) The agency shall submit the original of the completed application, including completed appendices and the required supporting documents, to the United States Trustee at the address specified on the application form.

(d) The application shall be signed by an agency representative who is authorized under applicable law to sign on behalf of the applying agency.

(e) The signed application, completed appendices, and required supporting documents shall be accompanied by a writing, signed by the signatory of the application and executed on behalf of the signatory and the agency, certifying the application does not:

(1) Falsify, conceal, or cover up by any trick, scheme or device a material fact;

(2) Make any materially false, fictitious, or fraudulent statement or representation; or

(3) Make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

(f) The United States Trustee shall not consider an application, and it may be returned if:

(1) It is incomplete;

(2) It fails to include the completed appendices or all of the required supporting documents; or

(3) It is not accompanied by the certification identified in paragraph (e) of this section.

(g) The United States Trustee shall not consider an application on behalf of an agency, and it shall be returned if:

(1) It is submitted by any entity other than the agency; or

(2) Either the application or the accompanying certification is executed by any entity other than an agency representative who is authorized under applicable law to sign on behalf of the agency.

(h) By the act of submitting an application, an agency consents to the release and disclosure of its name, contact information, and non-confidential business information relating to the services it provides on the approved list should its application be approved.

[78 FR 16150, Mar. 14, 2013]

§58.14 Automatic expiration of agencies' status as approved agencies.

(a) Except as provided in §58.15(c), if an approved agency was not an approved agency immediately prior to the date it last obtained approval to be an approved agency, such an approved agency shall cease to be an approved agency six months from the date on which it was approved unless the United States Trustee approves an additional one year period.

(b) Except as provided in §58.15(c), if an approved agency was an approved agency immediately prior to the date it last obtained approval to be an approved agency, such an agency shall cease to be an approved agency one year from the date on which it was last approved to be an approved agency unless the United States Trustee approves an additional one year period.

[78 FR 16150, Mar. 14, 2013]

§58.15 Procedures all approved agencies shall follow when applying for approval to act as an approved agency for an additional one year period.

(a) To be considered for approval to act as an approved agency for an additional one year term, an approved agency shall reapply by complying with all the requirements specified for agencies under 11 U.S.C. 109(h) and 111, and under this part.

(b) Such an agency shall apply no later than 45 days prior to the expiration of its six month probationary period or annual period to be considered for approval for an additional one year period, unless a written extension is granted by the United States Trustee.

(c) An approved agency that has complied with all prerequisites for applying to act as an approved agency for an additional one year period may continue to operate as an approved agency while its application is under review by the United States Trustee, so long as either the application for an additional one year period is timely submitted, or an agency receives a written extension from the United States Trustee.

[78 FR 16152, Mar. 14, 2013]

§58.16 Renewal for an additional one year period.

If an approved agency's application for an additional one year period is approved, such renewal period shall begin to run from the later of:

(a) The day after the expiration date of the immediately preceding approval period; or

(b) The actual date of approval of such renewal by the United States Trustee.

[78 FR 16152, Mar. 14, 2013]

§ 58.17 Mandatory duty of approved agencies to notify United States Trustees of material changes.

(a) An approved agency shall immediately notify the United States Trustee in writing of any material change.

(b) An approved agency shall immediately notify the United States Trustee in writing of any failure by the approved agency to comply with any standard or requirement specified in 11 U.S.C. 109(h) or 111, this part, or the terms under which the United States Trustee approved it to act as an approved agency.

(c) An approved agency shall immediately notify the United States Trustee in writing of any of the following events:

(1) Notification by the Internal Revenue Service or by a state or local taxing authority that the approved agency has been selected for audit or examination regarding its tax-exempt status, or any notification of a compliance check by the Internal Revenue Service or by a state or local taxing authority;

(2) Revocation or termination of the approved agency's tax-exempt status by any governmental unit or by any judicial officer;

(3) Cessation of business by the approved agency or by any office of the agency, or withdrawal from any federal judicial district(s) where the approved agency is approved;

(4) Any investigation of, or any administrative or judicial action brought against, the approved agency by any governmental unit;

(5) Termination or cancellation of any surety bond or fidelity insurance;

(6) Any administrative or judicial action brought by any entity that seeks recovery against a surety bond or fidelity insurance;

(7) Any action by a governmental unit or a court to suspend or revoke the approved agency's articles of incorporation, or any license held by the approved agency, or any authorization necessary to engage in business;

(8) A suspension, or action to suspend, any accreditation held by the approved agency, or any withdrawal by the approved agency of any application for accreditation, or any denial of any application of the approved agency for accreditation;

(9) A change in the approved agency's nonprofit status under any applicable law;

(10) Any change in the banks or financial institutions used by the agency; and

(11) [Reserved]

(d) An agency shall notify the United States Trustee in writing if any of the changes identified in paragraphs (a) through (c) of this section occur while its application to become an approved agency is pending before the United States Trustee.

(e) An approved agency whose name or other information appears incorrectly on the approved list shall immediately submit a written request to the United States Trustee asking that the information be corrected.

[78 FR 16152, Mar. 14, 2013]

§ 58.18 Mandatory duty of approved agencies to obtain prior consent of the United States Trustee before taking certain actions.

(a) By accepting the designation to act as an approved agency, an agency agrees to obtain approval from the United States Trustee, prior to making any of the following changes:

(1) Cancellation or change in the amount of the surety bond or employee fidelity bond or insurance;

(2) The engagement of an independent contractor to provide counseling services or to have access to, possession of, or control over client funds;

(3) Any increase in the fees, contributions, or payments received from clients for counseling services or a change in the agency's fee policy;

(4) Expansion into additional federal judicial districts;

(5) Any changes to the method of delivery the approved agency employs to provide counseling services; or

(6) Any changes in the approved agency's counseling services.

(b) An agency applying to become an approved agency shall also obtain approval from the United States Trustee before taking any action specified in

paragraph (a) of this section. It shall do so by submitting an amended application. The agency's amended application shall be accompanied by a contemporaneously executed writing, signed by the signatory of the application, that makes the certifications specified in § 58.13(e).

(c) An approved agency shall not transfer or assign its United States Trustee approval to act as an approved agency.

[78 FR 16153, Mar. 14, 2013]

§ 58.19 Continuing requirements for becoming and remaining approved agencies.

(a) To become an approved agency, an agency must affirmatively establish, to the satisfaction of the United States Trustee, that the agency at the time of approval:

(1) Satisfies every requirement of this part; and

(2) Provides adequate counseling to its clients.

(b) To remain an approved agency, an approved agency shall affirmatively establish, to the satisfaction of the United States Trustee, that the approved agency:

(1) Has satisfied every requirement of this part;

(2) Has provided adequate counseling to its clients; and

(3) Would continue to satisfy both paragraphs (b)(1) and (2) of this section in the future.

[78 FR 16153, Mar. 14, 2013]

§ 58.20 Minimum qualifications agencies shall meet to become and remain approved agencies.

To meet the minimum qualifications set forth in § 58.19, and in addition to the other requirements set forth in this part, agencies and approved agencies shall comply with paragraphs (a) through (p) of this section on a continuing basis:

(a) *Compliance with all laws.* An agency shall comply with all applicable laws and regulations of the United States and each state in which the agency provides counseling services including, without limitation, all laws governing licensing and registration.

(b) *Prohibition on legal advice.* An agency shall not provide legal advice.

(c) *Structure and organization.* An agency shall:

(1) Be lawfully organized and operated as a nonprofit entity; and

(2) Have a board of directors, the majority of which:

(i) Are not relatives;

(ii) Are not employed by such agency; and

(iii) Will not directly or indirectly benefit financially from the outcome of the counseling services provided by such agency.

(d) *Ethical standards.* An agency shall:

(1) Not engage in any conduct or transaction, other than counseling services, that generates a direct or indirect financial benefit for any member of the board of directors or trustees, officer, supervisor, or any relative thereof;

(2) Ensure no member of the board of directors or trustees, officer, or supervisor receives any commissions, incentives, bonuses, or benefits (monetary or non-monetary) of any kind that are directly or indirectly based on the financial or legal decisions any client makes after requesting counseling services;

(3) Ensure no member of the board of directors or trustees, officer or supervisor is a relative of an employee of the United States Trustee, a trustee appointed under 28 U.S.C. 586(a)(1) or (b) for any federal judicial district where the agency is providing or is applying to provide counseling services, a federal judge in any federal judicial district where the agency is providing or is applying to provide counseling services, a federal court employee in any federal judicial district where the agency is providing or is applying to provide counseling services, or a certified public accountant that audits the agency's trust account;

(4) Not enter into any referral agreement or receive any financial benefit that involves the agency paying to or receiving from any entity or person referral fees for the referral of clients to or by the agency, except payments under a fair share agreement;

(5) Not enter into agreements involving counseling services that create a conflict of interest; and

(6) Not provide counseling services to a client with whom the agency has a lender-borrower relationship.

(e) *Use of credit counselors.* An agency shall have a credit counselor provide the counseling services to each of the agency's clients. The credit counselor shall interact with the client regarding the accuracy of the information obtained from the client and the alternatives available to the client for dealing with his or her current financial situation, including the plan developed to address such financial situation.

(f) *Credit counselor training, certification and experience.* An agency shall:

(1) Use only counselors who possess adequate experience providing credit counseling, which shall mean that each counselor either:

(i) Holds a counselor certification and who has complied with all continuing education requirements necessary to maintain his or her counselor certification; or

(ii) Has successfully completed a course of study and worked a minimum of six months in a related area such as personal finance, budgeting, or credit or debt management. A course of study shall include training in counseling skills, personal finance, budgeting, or credit or debt management. A counselor shall also receive annual continuing education in the areas of counseling skills, personal finance, budgeting, or credit or debt management;

(2) Demonstrate adequate experience, background, and quality in providing credit counseling, which shall mean that, at a minimum, the agency shall either:

(i) Have experience in providing credit counseling for the two years immediately preceding the relevant application date; or

(ii) For each office providing counseling services, employ at least one supervisor who has met the qualifications in paragraph (f)(2)(i) of this section for no fewer than two of the five years preceding the relevant application date;

(3) If offering any component of counseling services by a telephone or Internet method of delivery, use only counselors who, in addition to all other requirements, demonstrate sufficient experience and proficiency in providing such counseling services by those methods of delivery, including proficiency in employing verification procedures to ensure the person receiving the counseling services is the client, and to determine whether the client has completely received counseling services.

(g) *No variation in services.* An agency shall ensure that the type and quality of services do not vary based on a client's decision whether to obtain a certificate in lieu of other options that may or may not be suggested by the agency.

(h) *Use of the telephone and the Internet to deliver a component of client services.* An agency shall:

(1) Not provide any client diminished counseling services because the client receives any portion of those counseling services by telephone or Internet;

(2) Confirm the identity of the client before receiving counseling services by telephone or Internet by:

(i) Obtaining one or more unique personal identifiers from the client and assigning an individual access code, user ID, or password at the time of enrollment; and

(ii) Requiring the client to provide the appropriate access code, user ID, or password, and also one or more of the unique personal identifiers during the course of delivery of the counseling services.

(i) *Services to hearing and hearing-impaired clients and potential clients.* An agency shall furnish toll-free telephone numbers for both hearing and hearing-impaired clients and potential clients whenever telephone communication is required. The agency shall provide telephone amplification, sign language services, or other communication methods for hearing-impaired clients or potential clients.

(j) [Reserved]

(k) *Services to clients and potential clients with special needs.* An agency that provides any portion of its counseling in person shall comply with all federal, state and local laws governing facility accessibility. An agency shall also provide or arrange for communication assistance for clients or potential clients with special needs who have difficulty making their service needs known.

(l) *Mandatory disclosures to clients and potential clients.* Prior to providing any

information to or obtaining any information from a client or potential client, and prior to rendering any counseling service, an agency shall disclose:

(1) The agency's fee policy, including any fees associated with generation of the certificate;

(2) The agency's policies enabling clients to obtain counseling services for free or at reduced rates based upon the client's lack of ability to pay. To the extent an agency publishes information concerning its fees on the Internet, such fee information must include the agency's policies enabling clients to obtain counseling for free or at reduced rates based upon the client's lack of ability to pay;

(3) The agency's policy to provide free bilingual counseling services or professional interpreter assistance to any limited English proficient client;

(4) The agency's funding sources;

(5) The counselors' qualifications;

(6) The potential impacts on credit reports of all alternatives the agency may discuss with the client;

(7) The agency's policy prohibiting it from paying or receiving referral fees for the referral of clients, except under a fair share agreement;

(8) The agency's obligation to provide a certificate to the client promptly upon the completion of counseling services;

(9) A statement that the client has the opportunity to negotiate an alternative payment schedule with regard to each unsecured consumer debt under terms as set forth in 11 U.S.C. 502(k), and a statement whether or not the agency will provide this service. If the agency does not provide this service, it shall disclose that it may refer the client to another approved agency, and shall disclose that clients may incur additional fees in connection with such a referral;

(10) The fact that the agency might disclose client information to the United States Trustee in connection with the United States Trustee's oversight of the agency, or during the investigation of complaints, during onsite visits, or during quality of service reviews;

(11) The fact that the United States Trustee has reviewed only the agency's credit counseling services (and, if applicable, its services as a provider of a personal financial management instructional course pursuant to 11 U.S.C. 111(d)), and the fact that the United States Trustee has neither reviewed nor approved any other services the agency provides to clients; and

(12) The fact that a client will receive a certificate only if the client completes counseling services.

(m) *Complaint Procedures.* An agency shall employ complaint procedures that adequately respond to clients' concerns.

(n) *Background checks.* An agency shall:

(1) Conduct a criminal background check at least every five years for each person providing credit counseling, and

(2) Not employ anyone as a counselor who has been convicted of any felony, or any crime involving fraud, dishonesty, or false statements, unless the United States Trustee determines circumstances warrant a waiver of this prohibition against employment.

(o) *Agency records.* An agency shall prepare and retain records that enable the United States Trustee to evaluate whether the agency is providing adequate counseling and acting in compliance with all applicable laws and this part. All records, including documents bearing original signatures, shall be maintained in either hard copy form or electronically in a format widely available commercially. Records that the agency shall prepare and retain for a minimum of two years, and permit review by the United States Trustee upon request, shall include:

(1) Upon the filing of an application for probationary approval, all information requested by the United States Trustee as an estimate, projected to the end of the probationary period, in the form requested by the United States Trustee;

(2) After probationary or annual approval, and for so long as the agency remains on the approved list, semi-annual reports of historical data (for the periods ending June 30 and December 31 of each year), of the type and in the form requested by the United States Trustee; these reports shall be submitted within 30 days of the end of the applicable periods specified in this paragraph;

(3) Annual audited financial statements, including the audited balance sheet, statement of income and retained earnings, and statement of changes in financial condition;

(4) Books, accounts, and records to provide a clear and readily understandable record of all business conducted by the agency, including, without limitation, copies of all correspondence with or on behalf of the client, including the contract between the agency and the client and any amendments thereto;

(5) Records concerning the delivery of services to clients and potential clients with limited English proficiency and special needs, and to hearing-impaired clients and potential clients, including records:

(i) Of the number of such clients and potential clients, and the methods of delivery used with respect to such clients and potential clients;

(ii) Of which languages are offered or requested and the type of language support used or requested by such clients or potential clients (e.g., bilingual instructor, in-person or telephone interpreter, translated web instruction);

(iii) Detailing the agency's provision of services to such clients and potential clients; and

(iv) Supporting any justification if the agency did not provide services to such potential clients, including the number of potential clients not served, the languages involved, and the number of referrals provided;

(6) Records concerning the delivery of counseling services to clients for free or at reduced rates based upon the client's lack of ability to pay, including records of the number of clients for whom the agency waived all of its fees under § 58.21(b)(1)(i), the number of clients for whom the agency waived all or part of its fees under § 58.21(b)(1)(ii), and the number of clients for whom the agency voluntarily waived all or part of its fees under § 58.21(c);

(7) Records of complaints and the agency's responses thereto;

(8) Records that enable the agency to verify the authenticity of certificates their clients file in bankruptcy cases; and

(9) Records that enable the agency to issue replacement certificates.

(p) *Additional minimum requirements.* An agency shall:

(1) Provide records to the United States Trustee upon request;

(2) Cooperate with the United States Trustee by allowing scheduled and unscheduled on-site visits, complaint investigations, or other reviews of the agency's qualifications to be an approved agency;

(3) Cooperate with the United States Trustee by promptly responding to questions or inquiries from the United States Trustee;

(4) Assist the United States Trustee in identifying and investigating suspected fraud and abuse by any party participating in the credit counseling or bankruptcy process;

(5) Not exclude any client or creditor from a debt repayment plan because the creditor declines to make a fair share contribution to the agency;

(6) Take no action that would limit, inhibit, or prevent a client from bringing an action or claim for damages against an agency, as provided in 11 U.S.C. 111(g)(2);

(7) Refer clients and prospective clients for counseling services only to agencies that have been approved by a United States Trustee to provide such services;

(8) Comply with the United States Trustee's directions on approved advertising, including without limitation those set forth in Appendix A to the application;

(9) Not disclose or provide to a credit reporting agency any information concerning whether a client has received or sought instruction concerning credit counseling or personal financial management from an agency;

(10) Not expose the client to commercial advertising as part of or during the client's receipt of any counseling services, and never market or sell financial products or services during the counseling session provided, however, this provision does not prohibit an agency from generally discussing all available financial products and services;

(11) Not sell information about any client or potential client to any third party without the client or potential client's prior written permission;

(12) If the agency is tax-exempt, submit a completed and signed tax waiver

permitting and directing the Internal Revenue Service to provide the United States Trustee with access to the Internal Revenue Service's files relating to the agency;

(13) Comply with the requirements elsewhere in this part concerning fees for credit counseling services and fee waiver policies; and

(14) Comply with the requirements elsewhere in this part concerning certificates.

[78 FR 16153, Mar. 14, 2013]

§58.21 Minimum requirements to become and remain approved agencies relating to fees.

(a) If a fee for, or relating to, credit counseling services is charged by an agency, such fee shall be reasonable:

(1) A fee of $50 or less for credit counseling services is presumed to be reasonable and an agency need not obtain prior approval of the United States Trustee to charge such a fee;

(2) A fee exceeding $50 for credit counseling services is not presumed to be reasonable and an agency must obtain prior approval from the United States Trustee to charge such a fee. The agency bears the burden of establishing that its proposed fee is reasonable. At a minimum, the agency must demonstrate that its cost for delivering such services justify the fee. An agency that previously received permission to charge a higher fee need not reapply for permission to charge that fee during the agency's annual review. Any new requests for permission to charge more than previously approved, however, must be submitted to EOUST for approval; and

(3) The United States Trustee shall review the amount of the fee set forth in paragraphs (a)(1) and (2) of this section one year after the effective date of this part and then periodically, but not less frequently than every four years, to determine the reasonableness of the fee. Fee amounts and any revisions thereto shall be determined by current costs, using a method of analysis consistent with widely accepted accounting principles and practices, and calculated in accordance with the provisions of federal law as applicable. Fee amounts and any revisions thereto shall be published in the FEDERAL REGISTER.

(b)(1) An agency shall waive the fee in whole or in part whenever a client demonstrates a lack of ability to pay the fee.

(i) A client presumptively lacks the ability to pay the fee if the client's household current income is less than 150 percent of the poverty guidelines updated periodically in the FEDERAL REGISTER by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2), as adjusted from time to time, for a household or family of the size involved in the fee determination.

(ii) The presumption shall be rebutted, and the agency may charge the client a reduced fee, if the agency determines, based on income information the client submits in connection with counseling services, that the client is able to pay the fee in a reduced amount. Nothing in this section requires an agency to charge a fee to clients whose household income exceeds the amount set forth in paragraph (b)(1)(i) of this section, or who are able to demonstrate ability to pay based on income as described in this section.

(iii) An agency shall disclose its fee policy, including the criteria on which it relies in determining a client's eligibility for reduced fees, and the agency's policy for collecting fees pursuant to paragraph (b)(1)(ii) of this section, in accordance with §58.20(l)(2).

(2) The United States Trustee shall review the basis for the mandatory fee waiver policy set forth in paragraph (b)(1) of this section one year after the effective date of this part and then periodically, but not less frequently than every four years, to determine the impact of that fee waiver policy on clients and agencies. Any revisions to the mandatory fee waiver policy set forth in paragraph (b)(1) of this section shall be published in the FEDERAL REGISTER.

(c) Notwithstanding the requirements of paragraph (b) of this section, an agency may also waive fees based upon other considerations, including, but not limited to:

(1) The client's net worth;

(2) The percentage of the client's income from government assistance programs;

(3) Whether the client is receiving *pro bono* legal services in connection with a filed or anticipated bankruptcy case; or

(4) If the combined current monthly income, as defined in 11 U.S.C. 101(10A), of the client and his or her spouse, when multiplied times twelve, is equal to or less than the amounts set forth in 11 U.S.C. 707(b)(7).

(d) An agency shall not require a client to purchase counseling services in connection with the purchase of any other service offered by the agency.

[78 FR 16153, Mar. 14, 2013]

§ 58.22 Minimum requirements to become and remain approved agencies relating to certificates.

(a) An approved agency shall send a certificate only to the client who took and completed the counseling services, except that an approved agency shall instead send a certificate to the attorney of a client who took and completed counseling services if the client specifically directs the agency to do so. In the case of Internet counseling and automated telephone counseling, counseling is not complete until the client has engaged in interaction with a counselor, whether by electronic mail, live chat, or telephone, following the automated portion of the counseling session.

(b) An approved agency shall attach to the certificate the client's debt repayment plan (if any).

(c) An approved agency shall send a certificate to a client no later than one business day after the client completed counseling services. If a client has completed counseling services, an agency may not withhold certificate issuance for any reason. An agency may not consider counseling services incomplete based solely on the client's failure to pay the fee.

(d) If an approved agency provides other financial counseling in addition to counseling services, and such other financial counseling satisfies the requirements for counseling services specified in 11 U.S.C. 109(h) and 111, and this part, a person completing such other financial counseling is a client and the approved agency shall send a certificate to the client no later than one business day after the client's request. The approved agency shall not charge the client any additional fee except any separate fee charged for the issuance of the certificate, in accordance with § 58.20(l)(1).

(e) An approved agency shall issue certificates only in the form approved by the United States Trustee, and shall generate the form using the Certificate Generating System maintained by the United States Trustee, except under exigent circumstances with notice to the United States Trustee.

(f) An approved agency shall have sufficient computer capabilities to issue certificates from the United States Trustee's Certificate Generating System.

(g) An approved agency shall issue a certificate to each client who completes counseling services. Spouses receiving counseling services jointly shall each receive a certificate.

(h) An approved agency shall issue a replacement certificate to a client who requests one.

(i) An approved agency shall not file certificates with the court.

(j) Only an authorized officer, supervisor or employee of an approved agency shall issue a certificate, and an approved agency shall not transfer or delegate authority to issue certificates to any other entity.

(k) An approved agency shall implement internal controls sufficient to prevent unauthorized issuance of certificates.

(l) An approved agency shall ensure the signature affixed to a certificate is that of an officer, supervisor or employee authorized to issue the certificate, in accordance with paragraph (j) of this section, which signature shall be either:

(1) An original signature; or

(2) In a format approved for electronic filing with the court (most typically in the form/s/name of counselor).

(m) An approved agency shall affix to the certificate the exact name under which the approved agency is incorporated or organized.

(n) An approved agency shall identify on the certificate:

(1) The specific federal judicial district requested by the client;

(2) Whether counseling services were provided in person, by telephone or via the Internet;

(3) The date and time (including the time zone) on which counseling services were completed by the client; and

(4) The name of the counselor that provided the counseling services.

(o) An approved agency shall affix the client's full, accurate name to the certificate. If the counseling services are obtained by a client through a duly authorized representative, the certificate also shall set forth the name of the legal representative and legal capacity of that representative.

(p) If an individual enters into a debt repayment plan after completing credit counseling, upon the client's request after the completion or termination of the debt repayment plan, the approved agency shall:

(1) Provide such additional credit counseling as is necessary at such time to comply with the requirements specified in 11 U.S.C. 109(h) and 111, and this part, including reviewing the client's current financial condition and counseling the client regarding the alternatives to resolve the client's credit problems;

(2) Send a certificate to the client no later than one business day after the client completed such additional counseling; and

(3) Not charge the client any additional fee except any separate fee charged for the issuance of the certificate, in accordance with § 58.20(l)(1).

[78 FR 16153, Mar. 14, 2013]

§ 58.23 Minimum financial requirements and bonding and insurance requirements for agencies offering debt repayment plans.

If an agency offers or has offered debt repayment plans, an agency shall possess adequate financial resources to provide continuing support services for such plans over the life of any debt repayment plan, and provide for the safekeeping of client funds, which shall include:

(a) Depositing all client funds into a deposit account, held in trust, at a federally insured depository institution. Each such trust account shall be established in a fiduciary capacity and shall be in full compliance with federal law such that each client's funds shall be protected by federal deposit insurance up to the maximum amount allowable by federal law.

(b) Keeping and maintaining books, accounts, and records to provide a clear and readily understandable record of all business conducted by the agency, including without limitation, all of the following:

(1) Separate files for each client's account that include copies of all correspondence with or on behalf of the client, including:

(i) All agreements with all entities, including the contract between the agency and the client and any amendments thereto;

(ii) The analysis of the client's budget;

(iii) Correspondence between the agency and the client's creditors;

(iv) The notice given to creditors of any debt repayment plan; and

(v) All written statements of account provided to the client and subsidiary ledgers concerning any debt repayment plan;

(2) A trust account general ledger reflecting all deposits to and disbursements from all trust accounts, which shall be kept current at all times;

(3) A reconciliation of the trust accounts, prepared at least once a month; and

(4) An operating account general ledger reflecting all of the agency's financial transactions involving the agency's operating account, which shall be kept current at least on a monthly basis.

(c) Allowing an independent certified public accounting firm to audit the trust accounts annually in accordance with generally accepted accounting principles as defined by the American Institute of Certified Public Accountants and any Statement of Work prepared by the United States Trustee, which audit shall include:

(1) A report of all trust account activity including:

(i) The balance of each trust account at the beginning and end of the period;

(ii) The total of all receipts from clients and disbursements to creditors during the reporting period;

(iii) The total of all disbursements to the agency; and

(iv) The reconciliation of each trust account;

(2) A report of all exceptions (e.g., discrepancies, irregularities, and errors) found, regardless of materiality; and

(3) An evaluation of the agency's trust account internal controls and its computer operations to determine whether it provides a reasonable assurance that the trust funds are safeguarded against loss from unauthorized use or disposition.

(d) Obtaining a surety bond payable to the United States, as follows:

(1) Subject to the minimum amount of $5,000, the amount of such surety bond shall be the lesser of:

(i) Two percent of the agency's disbursements made during the twelve months immediately prior to submission of the application from all trust accounts attributable to the federal judicial districts (or, if not feasible to determine, the states) in which the agency seeks approval from the United States Trustee; or

(ii) Equal to the average daily balance maintained for the six months immediately prior to submission of the application in all trust accounts attributable to the federal judicial districts (or, if not feasible to determine, the states) in which the agency seeks approval from the United States Trustee;

(2) The agency may receive an offset or credit against the surety bond amount determined under paragraph (d)(1) of this section if:

(i) The agency has previously obtained a surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit in compliance with the licensing requirements of the state in which the agency seeks approval from the United States Trustee;

(ii) Such surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit provides protection for the clients of the agency;

(iii) Such surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit, is written in favor of the state or the appropriate state agency; and

(iv) The amount of the offset or credit shall be the lesser of:

(A) The principal amount of such surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit; or

(B) The surety bond amount determined under paragraph (d)(1) of this section;

(3) If an agency has contracted with an independent contractor to administer any part of its debt repayment plans:

(i) Except as provided in paragraphs (d)(3)(ii) and (d)(3)(iii) of this section, the independent contractor shall:

(A) Be an approved agency; or

(B) If the independent contractor is not an approved agency, then the independent contractor shall:

(*1*) Be specifically covered under the agency's surety bond required under paragraph (d)(1) of this section; or

(*2*) Have a surety bond that meets the requirements of paragraph (d)(1) of this section; and

(*3*) Agree in writing to allow the United States Trustee to audit the independent contractor's trust accounts for the debt repayment plans administered on behalf of the agency and to review the independent contractor's internal controls and administrative procedures;

(ii) If the independent contractor holds funds for transmission for five days or less, then the amount of the required surety bond under paragraph (d)(3)(i)(B) of this section shall be $500,000;

(iii) If the independent contractor performs only electronic fund transfers on the agency's behalf, then the independent contractor need not satisfy the requirements of paragraph (d)(3)(i) of this section during such time as the independent contractor is authorized by the National Automated Clearing House Association to participate in the Automated Clearing House system.

(e) Obtaining either adequate employee bonding or fidelity insurance, as follows:

(1) Subject to the minimum amount set forth below, the amount of such bonding or fidelity insurance shall be 50 percent of the surety bond amount calculated under paragraph (d)(1) of

this section, prior to any offset or credit that the agency may receive under paragraph (d)(2) of this section; provided, however, that at a minimum, the employee bond or fidelity insurance must be $5,000;

(2) An agency may receive an offset or credit against the employee bond or fidelity insurance amount determined under paragraph (e)(1) of this section if:

(i) The agency has previously obtained an employee bond or fidelity insurance in compliance with the requirements of a state in which the agency seeks approval from the United States Trustee; and

(ii) The deductible does not exceed a reasonable amount considering the financial resources of the agency; and

(iii) The amount of the offset or credit shall be the lesser of:

(A) The principal amount of such employee bond or fidelity insurance; or

(B) The employee bond or fidelity insurance amount determined under paragraph (e)(1) of this section.

(f) An agency that ceases to offer debt repayment plans to individuals who receive counseling from such agency pursuant to 11 U.S.C. 109(h) shall, concerning any debt repayment plans it services that remain in existence with respect to such individuals as of the date it ceases to offer debt repayment plans to new clients, continue to comply with all of the requirements of this section.

(1) The agency may seek a waiver of the bonding and insurance requirements set forth in paragraphs (d) and (e) of this section if:

(i) The agency has in effect, as of the date it ceases to offer debt repayment plans, a written agreement to transfer all such debt repayment plans to another approved agency for servicing, provided that:

(A) Transfers to another approved agency pursuant to such agreements must be completed within 60 days of the date the agency ceases to offer debt repayment plans to individuals who receive counseling from such agency pursuant to 11 U.S.C. § 109(h); and

(B) The agency provides written notice to clients whose debt repayment plans it intends to transfer within the time described in paragraph (f)(1)(i)(A) of this section, identifying the approved agency to which the clients' plans will be transferred, any fees associated with servicing by the approved agency, and any fees associated with the transfer; or

(ii) In the reasonable determination of the United States Trustee, taking into account the facts and circumstances surrounding the agency's business and the terms of the bond, compliance with the bonding and insurance requirements set forth in paragraphs (d) and (e) of this section would impose an undue hardship on the agency.

[78 FR 16153, Mar. 14, 2013]

§ 58.24 Procedures for obtaining final agency action on United States Trustees' decisions to deny agencies' applications and to remove approved agencies from the approved list.

(a) The United States Trustee shall remove an approved agency from the approved list whenever an approved agency requests its removal in writing.

(b) The United States Trustee may issue a decision to remove an approved agency from the approved list, and thereby terminate the approved agency's authorization to provide counseling services, at any time.

(c) The United States Trustee may issue a decision to deny an agency's application or to remove an agency from the approved list whenever the United States Trustee determines that the agency has failed to comply with the standards or requirements specified in 11 U.S.C. 109(h) or 111, this part, or the terms under which the United States Trustee designated it to act as an approved agency, including, but not limited to, finding any of the following:

(1) The agency is not employing adequate procedures for safekeeping of client funds or paying client funds, which could result in a loss to a client;

(2) The agency's surety bond has been canceled;

(3) Any entity has revoked the agency's nonprofit status, even if that revocation is subject to further administrative or judicial litigation, review or appeal;

(4) Any entity has suspended or revoked the agency's license to do business in any jurisdiction; or

(5) Any United States district court has removed the agency under 11 U.S.C. § 111(e).

(d) If the Internal Revenue Service revokes an agency's tax exempt status, the United States Trustee shall promptly commence an investigation to determine whether any of the factors set forth in paragraphs (c)(1) through (5) of this section exist.

(e) The United States Trustee shall provide to the agency in writing a notice of any decision either to:

(1) Deny the agency's application; or

(2) Remove the agency from the approved list.

(f) The notice shall state the reason(s) for the decision and shall reference any documents or communications relied upon in reaching the denial or removal decision. To the extent authorized by law, the United States Trustee shall provide to the agency copies of any such documents that were not supplied to the United States Trustee by the agency. The notice shall be sent to the agency by overnight courier, for delivery the next business day.

(g) Except as provided in paragraph (i) of this section, the notice shall advise the agency that the denial or removal decision shall become final agency action, and unreviewable, unless the agency submits in writing a request for review by the Director no later than 21 calendar days from the date of the notice to the agency.

(h) Except as provided in paragraph (i) of this section, the decision to deny an agency's application or remove an agency from the approved list shall take effect upon:

(1) The expiration of the agency's time to seek review from the Director, if the agency fails to timely seek review of a denial or removal decision; or

(2) The issuance by the Director of a final decision, if the agency timely seeks such review.

(i) The United States Trustee may provide that a decision to remove an agency from the approved list is effective immediately and deny the agency the right to provide counseling services whenever the United States Trustee finds any of the factors set forth in paragraphs (c)(1) through (5) of this section.

(j) An agency's request for review shall be in writing and shall fully describe why the agency disagrees with the denial or removal decision, and shall be accompanied by all documents and materials the agency wants the Director to consider in reviewing the denial or removal decision. The agency shall send the original and one copy of the request for review, including all accompanying documents and materials, to the Office of the Director by overnight courier, for delivery the next business day. To be timely, a request for review shall be received at the Office of the Director no later than 21 calendar days from the date of the notice to the agency.

(k) The United States Trustee shall have 21 calendar days from the date of the agency's request for review to submit to the Director a written response regarding the matters raised in the agency's request for review. The United States Trustee shall provide a copy of this response to the agency by overnight courier, for delivery the next business day.

(l) The Director may seek additional information from any party in the manner and to the extent the Director deems appropriate.

(m) In reviewing the decision to deny an agency's application or remove an agency from the approved list, the Director shall determine:

(1) Whether the denial or removal decision is supported by the record; and

(2) Whether the denial or removal decision constitutes an appropriate exercise of discretion.

(n) Except as provided in paragraph (o) of this section, the Director shall issue a final decision no later than 60 calendar days from the receipt of the agency's request for review, unless the agency agrees to a longer period of time or the Director extends the deadline. The Director's final decision on the agency's request for review shall constitute final agency action.

(o) Whenever the United States Trustee provides under paragraph (i) of this section that a decision to remove an agency from the approved list is effective immediately, the Director shall issue a written decision no later than 15 calendar days from the receipt of the agency's request for review, unless the

agency agrees to a longer period of time. The decision shall:

(1) Be limited to deciding whether the determination that the removal decision should take effect immediately was supported by the record and an appropriate exercise of discretion;

(2) Constitute final agency action only on the issue of whether the removal decision should take effect immediately; and

(3) Not constitute final agency action on the ultimate issue of whether the agency should be removed from the approved list; after issuing the decision, the Director shall issue a final decision by the deadline set forth in paragraph (n) of this section.

(p) In reaching a decision under paragraphs (n) and (o) of this section, the Director may specify a person to act as a reviewing official. The reviewing official's duties shall be specified by the Director on a case-by-case basis, and may include reviewing the record, obtaining additional information from the participants, providing the Director with written recommendations, and such other duties as the Director shall prescribe in a particular case.

(q) An agency that files a request for review shall bear its own costs and expenses, including counsel fees.

(r) When a decision to remove an agency from the approved list takes effect, the agency shall:

(1) Immediately cease providing counseling services to clients and shall not provide counseling services to potential clients;

(2) No later than three business days after the date of removal, send all certificates to all clients who completed counseling services prior to the agency's removal from the approved list;

(3) No later than three business days after the date of removal, return all fees to clients and potential clients who had paid for counseling services, but had not completely received them; and

(4) Transfer any debt repayment plans that the agency is administering to another approved agency.

(s) An agency must exhaust all administrative remedies before seeking redress in any court of competent jurisdiction.

[78 FR 16153, Mar. 14, 2013]

§ 58.25 Definitions.

(a) The following definitions apply to §§ 58.25 through and including 58.36 of this part, as well as the applications and other materials providers submit in an effort to establish they meet the requirements necessary to become an approved provider of a personal financial management instructional course.

(b) These terms shall have these meanings:

(1) The term ''accreditation'' means the recognition or endorsement that an accrediting organization bestows upon a provider because the accrediting organization has determined the provider meets or exceeds all the accrediting organization's standards;

(2) The term ''accrediting organization'' means either an entity that provides accreditation to providers or provides certification to instructors, provided, however, that an accrediting organization shall:

(i) Not be a provider or affiliate of any provider; and

(ii) Be deemed acceptable by the United States Trustee;

(3) The term ''affiliate'' means:

(i) Every entity that is an affiliate of the provider, as the term ''affiliate'' is defined in 11 U.S.C. 101(2), except that the word ''provider'' shall be substituted for the word ''debtor'' in 11 U.S.C. 101(2);

(ii) Each of a provider's officers and each of a provider's directors; and

(iii) Every relative of a provider's officers and every relative of a provider's directors;

(4) The term ''application'' means the application and related forms, including appendices, approved by the Office of Management and Budget as form EOUST–DE1, *Application for Approval as a Provider of a Personal Financial Management Instructional Course*, as it shall be amended from time to time;

(5) The term ''approved list'' means the list of providers currently approved by a United States Trustee under 11 U.S.C. 111 as currently published on the United States Trustee Program's Internet site, which is located on the United States Department of Justice's Internet site;

(6) The term ''approved provider'' means a provider currently approved by a United States Trustee under 11

U.S.C. 111 as an approved provider of a personal financial management instructional course eligible to be included on one or more lists maintained under 11 U.S.C. 111(a)(1);

(7) The term ''certificate'' means the document an approved provider shall provide to a debtor after the debtor completes an instructional course, if the approved provider does not notify the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure that a debtor has completed the instructional course;

(8) The term ''debtor'' shall have the meaning given that term in 11 U.S.C. 101(13), to the extent that individual has sought an instructional course from an approved provider;

(9) The term ''Director'' means the person designated or acting as the Director of the Executive Office for United States Trustees;

(10) The term ''effective instruction'' means the actual receipt of an instructional course by a debtor from an approved provider, and all other applicable services, rights, and protections specified in:

(i) 11 U.S.C. 111; and

(ii) this part;

(11) The term ''entity'' shall have the meaning given that term in 11 U.S.C. 101(15);

(12) The terms ''fee'' and ''fee policy'' each mean the aggregate of all fees an approved provider charges debtors for providing an instructional course, including the fees for any materials; ''fee policy'' shall also mean the objective criteria the provider uses in determining whether to waive or reduce any fee, contribution, or payment;

(13) The term ''final decision'' means the written determination issued by the Director based upon the review of the United States Trustee's decision either to deny a provider's application or to remove an approved provider from the approved list;

(14) The term ''financial benefit'' means any interest equated with money or its equivalent, including, but not limited to, stocks, bonds, other investments, income, goods, services, or receivables;

(15) The term ''governmental unit'' shall have the meaning given that term in 11 U.S.C. 101(27);

(16) The term ''independent contractor'' means a person or entity who provides any goods or services to an approved provider other than as an employee and as to whom the approved provider does not:

(i) Direct or control the means or methods of delivery of the goods or services being provided;

(ii) Make financial decisions concerning the business aspects of the goods or services being provided; and

(iii) Have any common employees;

(17) The term ''instructional course'' means a course in personal financial management that is approved by the United States Trustee under 11 U.S.C. 111 and this part, including the learning materials and methodologies in § 58.33(f), which is to be taken and completed by the debtor after the filing of a bankruptcy petition and before receiving a discharge under 11 U.S.C. 727(a)(11), 1141(d)(3) or 1328(g)(1);

(18) The term ''instructor'' means an individual who teaches, presents or explains substantive instructional course materials to debtors, whether provided in person, by telephone, or through the Internet;

(19) The term ''languages offered'' means every language other than English in which an approved provider offers an instructional course;

(20) The term ''legal advice'' shall have the meaning given that term in 11 U.S.C. 110(e)(2);

(21) The term ''limited English proficiency'' refers to individuals who:

(i) Do not speak English as their primary language; and

(ii) Have a limited ability to read, write, speak, or understand English;

(22) The term ''material change'' means, alternatively, any change:

(i) In the name, structure, principal contact, management, instructors, physical location, instructional course, fee policy, language services, or method of delivery of an approved provider; or

(ii) That renders inapplicable, inaccurate, incomplete, or misleading any statement a provider previously made:

(A) In its application or related materials; or

(B) To the United States Trustee;

(23) The term ''method of delivery'' means one or more of the three methods by which an approved provider can provide some component of an instructional course to debtors, including:

(i) ''In person'' delivery, which applies when a debtor primarily receives an instructional course at a physical location with an instructor physically present in that location, and with the instructor providing oral and/or written communication to the debtor at the facility;

(ii) ''Telephone'' delivery, which applies when a debtor primarily receives an instructional course by telephone; and

(iii) ''Internet'' delivery, which applies when a debtor primarily receives an instructional course through an Internet Web site;

(24) The term ''notice'' in §58.36 means the written communication from the United States Trustee to a provider that its application to become an approved provider has been denied or to an approved provider that it is being removed from the approved list;

(25) The term ''provider'' shall mean any entity that is applying under this part for United States Trustee approval to be included on a publicly available list in one or more United States district courts, as authorized by 11 U.S.C. 111(a)(1), and shall also mean, whenever appropriate, an approved provider;

(26) The term ''referral fees'' means money or any other valuable consideration paid or transferred between an approved provider and another entity in return for that entity, directly or indirectly, identifying, referring, securing, or in any other way encouraging any debtor to receive an instructional course from the approved provider;

(27) The term ''relative'' shall have the meaning given that term in 11 U.S.C. 101(45);

(28) The term ''request for review'' means the written communication from a provider to the Director seeking review of the United States Trustee's decision either to deny the provider's application or to remove the provider from the approved list;

(29) The term ''state'' means state, commonwealth, district, or territory of the United States;

(30) The term ''United States Trustee'' means, alternatively:

(i) The Executive Office for United States Trustees;

(ii) A United States Trustee appointed under 28 U.S.C. 581;

(iii) A person acting as a United States Trustee;

(iv) An employee of a United States Trustee; or

(v) Any other entity authorized by the Attorney General to act on behalf of the United States under this part.

[78 FR 16170, Mar. 14, 2013]

§58.26 Procedures all providers shall follow when applying to become approved providers.

(a) A provider applying to become an approved provider shall obtain an application, including appendices, from the United States Trustee.

(b) The provider shall complete the application, including its appendices, and attach the required supporting documents requested in the application.

(c) The provider shall submit the original of the completed application, including completed appendices and the required supporting documents, to the United States Trustee at the address specified on the application form.

(d) The application shall be signed by a representative of the provider who is authorized under applicable law to sign on behalf of the applying provider.

(e) The signed application, completed appendices, and required supporting documents shall be accompanied by a writing, signed by the signatory of the application and executed on behalf of the signatory and the provider, certifying the application does not:

(1) Falsify, conceal, or cover up by any trick, scheme or device a material fact;

(2) Make any materially false, fictitious, or fraudulent statement or representation; or

(3) Make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

(f) The United States Trustee shall not consider an application, and it may be returned if:

(1) It is incomplete;

(2) It fails to include the completed appendices or all of the required supporting documents; or

(3) It is not accompanied by the certification identified in the preceding subsection.

(g) The United States Trustee shall not consider an application on behalf of a provider, and it shall be returned if:

(1) It is submitted by any entity other than the provider; or

(2) Either the application or the accompanying certification is executed by any entity other than a representative of the provider who is authorized under applicable law to sign on behalf of the provider.

(h) By the act of submitting an application, a provider consents to the release and disclosure of its name, contact information, and non-confidential business information relating to the services it provides on the approved list should its application be approved.

[78 FR 16170, Mar. 14, 2013]

§ 58.27 Automatic expiration of providers' status as approved providers.

(a) Except as provided in § 58.28(c), if an approved provider was not an approved provider immediately prior to the date it last obtained approval to be an approved provider, such an approved provider shall cease to be an approved provider six months from the date on which it was approved unless the United States Trustee approves an additional one year period.

(b) Except as provided in § 58.28(c), if an approved provider was an approved provider immediately prior to the date it last obtained approval to be an approved provider, such a provider shall cease to be an approved provider one year from the date on which it was last approved to be an approved provider unless the United States Trustee approves an additional one year period.

[78 FR 16170, Mar. 14, 2013]

§ 58.28 Procedures all approved providers shall follow when applying for approval to act as an approved provider for an additional one year period.

(a) To be considered for approval to act as an approved provider for an additional one year term, an approved provider shall reapply by complying with all the requirements specified for providers under 11 U.S.C. 111, and under this part.

(b) Such a provider shall apply no later than 45 days prior to the expiration of its six month probationary period or annual period to be considered for approval for an additional one year period, unless a written extension is granted by the United States Trustee.

(c) An approved provider that has complied with all prerequisites for applying to act as an approved provider for an additional one year period may continue to operate as an approved provider while its application is under review by the United States Trustee, so long as either the application for an additional one year period is timely submitted, or a provider receives a written extension from the United States Trustee.

[78 FR 16172, Mar. 14, 2013]

§ 58.29 Renewal for an additional one year period.

If an approved provider's application for an additional one year period is approved, such renewal period shall begin to run from the later of:

(a) The day after the expiration date of the immediately preceding approval period; or

(b) The actual date of approval of such renewal by the United States Trustee.

[78 FR 16172, Mar. 14, 2013]

§ 58.30 Mandatory duty of approved providers to notify United States Trustees of material changes.

(a) An approved provider shall immediately notify the United States Trustee in writing of any material change.

(b) An approved provider shall immediately notify the United States Trustee in writing of any failure by the approved provider to comply with any standard or requirement specified in 11 U.S.C. 111, this part, or the terms under which the United States Trustee approved it to act as an approved provider.

(c) An approved provider shall immediately notify the United States Trustee in writing of any of the following events:

(1) Cessation of business by the approved provider or by any office of the provider, or withdrawal from any federal judicial district(s) where the approved provider is approved;

(2) Any investigation of, or any administrative or judicial action brought against, the approved provider by any governmental unit;

(3) Any action by a governmental unit or a court to suspend or revoke the approved provider's articles of incorporation, or any license held by the approved provider, or any authorization necessary to engage in business; or

(4) A suspension, or action to suspend, any accreditation held by the approved provider, or any withdrawal by the approved provider of any application for accreditation, or any denial of any application of the approved provider for accreditation; or

(5) [Reserved]

(d) A provider shall notify the United States Trustee in writing if any of the changes identified in paragraphs (a) through (c) of this section occur while its application to become an approved provider is pending before the United States Trustee.

(e) An approved provider whose name or other information appears incorrectly on the approved list shall immediately submit a written request to the United States Trustee asking that the information be corrected.

[78 FR 16172, Mar. 14, 2013]

§ 58.31 Mandatory duty of approved providers to obtain prior consent of the United States Trustee before taking certain actions.

(a) By accepting the designation to act as an approved provider, a provider agrees to obtain approval from the United States Trustee, prior to making any of the following changes:

(1) The engagement of an independent contractor to provide an instructional course;

(2) Any increase in the fees received from debtors for an instructional course or a change in the provider's fee policy;

(3) Expansion into additional federal judicial districts;

(4) Any changes to the method of delivery the approved provider employs to provide an instructional course; or

(5) Any changes in the approved provider's instructional course.

(b) A provider applying to become an approved provider shall also obtain approval from the United States Trustee before taking any action specified in paragraph (a) of this section. It shall do so by submitting an amended application. The provider's amended application shall be accompanied by a contemporaneously executed writing, signed by the signatory of the application, that makes the certifications specified in § 58.26(e).

(c) An approved provider shall not transfer or assign its United States Trustee approval to act as an approved provider.

[78 FR 16172, Mar. 14, 2013]

§ 58.32 Continuing requirements for becoming and remaining approved providers.

(a) To become an approved provider, a provider must affirmatively establish, to the satisfaction of the United States Trustee, that the provider at the time of approval:

(1) Satisfies every requirement of this part; and

(2) Provides effective instruction to its debtors.

(b) To remain an approved provider, an approved provider shall affirmatively establish, to the satisfaction of the United States Trustee, that the approved provider:

(1) Has satisfied every requirement of this part;

(2) Has provided effective instruction to its debtors; and

(3) Will continue to satisfy both paragraphs (b)(1) and (2) of this section in the future.

[78 FR 16172, Mar. 14, 2013]

§ 58.33 Minimum qualifications providers shall meet to become and remain approved providers.

To meet the minimum qualifications set forth in § 58.32, and in addition to the other requirements set forth in this part, providers and approved providers shall comply with paragraphs (a) through (n) of this section on a continuing basis:

(a) *Compliance with all laws.* A provider shall comply with all applicable laws and regulations of the United

States and each state in which the provider provides an instructional course including, without limitation, all laws governing licensing and registration.

(b) *Prohibition on legal advice.* A provider shall not provide legal advice.

(c) *Ethical standards.* A provider shall:

(1) Ensure no member of the board of directors or trustees, officer or supervisor is a relative of an employee of the United States Trustee, a trustee appointed under 28 U.S.C. 586(a)(1) for any federal judicial district where the provider is providing or is applying to provide an instructional course, a federal judge in any federal judicial district where the provider is providing or is applying to provide an instructional course, or a federal court employee in any federal judicial district where the provider is providing or is applying to provide an instructional course;

(2) Not enter into any referral agreement or receive any financial benefit that involves the provider paying to or receiving from any entity or person referral fees for the referral of debtors to or by the provider; and

(3) Not enter into agreements involving an instructional course that create a conflict of interest; and

(4) Not contact any debtor utilizing the United States Postal Service, or other mail carrier, or electronic mail for the purpose of soliciting debtors to utilize the provider's instructional course, unless:

(i) Any such solicitations include the phrase ''This is an advertisement for services'' or ''This is a solicitation;''

(ii) Prominently displayed at the beginning of each page of the solicitation;

(iii) In a font size larger than or equal to the largest font size otherwise used in the solicitation;

(iv) Any such solicitations include only logos, seals, or similar marks that are substantially dissimilar to the logo, seal, or similar mark of any agency or court of the United States government, including but not limited to the United States Trustee Program.

(d) *Instructor training, certification and experience.* A provider shall:

(1) Use only instructors who possess adequate experience providing an instructional course, which shall mean that each instructor either:

(i) Holds one of the certifications listed below and who has complied with all continuing education requirements necessary to maintain that certification:

(A) Certified as a Certified Financial Planner;

(B) Certified as a credit counselor by an accrediting organization;

(C) Registered as a Registered Financial Consultant; or

(D) Certified as a Certified Public Accountant; or

(ii) Has successfully completed a course of study or worked a minimum of six months in a related area such as personal finance, budgeting, or credit or debt management. A course of study must include training in personal finance, budgeting, or credit or debt management. An instructor shall also receive annual continuing education in the areas of personal finance, budgeting, or credit or debt management;

(2) Demonstrate adequate experience, background, and quality in providing an instructional course, which shall mean that, at a minimum, the provider shall either:

(i) Have experience in providing an instructional course for the two years immediately preceding the relevant application date; or

(ii) For each office providing an instructional course, employ at least one supervisor who has met the qualifications in paragraph (d)(2)(i) of this section for no fewer than two of the five years preceding the relevant application date; and

(iii) If offering any component of an instructional course by a telephone or Internet method of delivery, use only instructors who, in addition to all other requirements, demonstrate sufficient experience and proficiency in providing such an instructional course by those methods of delivery, including proficiency in employing verification procedures to ensure the person receiving the instructional course is the debtor, and to determine whether the debtor has completely received an instructional course.

(e) *Use of the telephone and the Internet to deliver a component of an instructional course.* A provider shall:

(1) Not provide any debtor a diminished instructional course because the

debtor receives any portion of the instructional course by telephone or Internet;

(2) Confirm the identity of the debtor before commencing an instructional course by telephone or Internet by:

(i) Obtaining one or more unique personal identifiers from the debtor and assigning an individual access code, user ID, or password at the time of enrollment;

(ii) Requiring the debtor to provide the appropriate access code, user ID, or password, and also one or more of the unique personal identifiers during the course of delivery of the instructional course; and

(iii) Employing adequate means to measure the time spent by the debtor to complete the instructional course.

(f) *Learning materials and methodologies.* A provider shall provide learning materials to assist debtors in understanding personal financial management and that are consistent with 11 U.S.C. 111, and this part, which include written information and instruction on all of the following topics:

(1) Budget development, which consists of the following:

(i) Setting short-term and long-term financial goals, as well as developing skills to assist in achieving these goals;

(ii) Calculating gross monthly income and net monthly income; and

(iii) Identifying and classifying monthly expenses as fixed, variable, or periodic;

(2) Money management, which consists of the following:

(i) Keeping adequate financial records;

(ii) Developing decision-making skills required to distinguish between wants and needs, and to comparison shop for goods and services;

(iii) Maintaining appropriate levels of insurance coverage, taking into account the types and costs of insurance; and

(iv) Saving for emergencies, for periodic payments, and for financial goals;

(3) Wise use of credit, which consists of the following:

(i) Identifying the types, sources, and costs of credit and loans;

(ii) Identifying debt warning signs;

(iii) Discussing appropriate use of credit and alternatives to credit use; and

(iv) Checking a credit rating;

(4) Consumer information, which consists of the following:

(i) Identifying public and nonprofit resources for consumer assistance; and

(ii) Identifying applicable consumer protection laws and regulations, such as those governing correction of a credit record and protection against consumer fraud; and

(5) Coping with unexpected financial crisis, which consists of the following:

(i) Identifying alternatives to additional borrowing in times of unanticipated events; and

(ii) Seeking advice from public and private service agencies for assistance.

(g) *Course procedures.*

(1) Generally, a provider shall:

(i) Ensure the instructional course contains sufficient learning materials and teaching methodologies so that the debtor receives a minimum of two hours of instruction, regardless of the method of delivery of the course;

(ii) Use its best efforts to collect from each debtor a completed course evaluation at the end of the instructional course. At a minimum, the course evaluation shall include the information contained in Appendix E of the application to evaluate the effectiveness of the instructional course;

(2) For an instructional course delivered in person, the provider shall:

(i) Ensure that an instructor is present to instruct and interact with debtors; and

(ii) Limit class size to ensure an effective presentation of the instructional course materials;

(3) For instructional courses delivered by the telephone, the provider shall:

(i) Ensure an instructor is telephonically present to instruct and interact with debtors;

(ii) Provide learning materials to debtors before the telephone instructional course session;

(iii) Incorporate tests into the curriculum that support the learning materials, ensure completion of the course, and measure comprehension;

(iv) Ensure review of tests prior to the completion of the instructional course; and

(v) Ensure direct oral communication from an instructor by telephone or in person with all debtors who fail to complete the test in a satisfactory manner or who receive less than a 70 percent score;

(4) For instructional courses delivered through the Internet, the provider shall:

(i) Comply with § 58.33(g)(3)(iii), (iv), and (v); provided, however, that to the extent instruction takes place by Internet, the provider may comply with § 58.33(g)(3)(v) by ensuring direct communication from an instructor by electronic mail, live chat, or telephone; and

(ii) Respond to a debtor's questions or comments within one business day.

(h) *Services to hearing and hearing-impaired debtors.* A provider shall furnish toll-free telephone numbers for both hearing and hearing-impaired debtors whenever telephone communication is required. The provider shall provide telephone amplification, sign language services, or other communication methods for hearing-impaired debtors.

(i) [Reserved]

(j) *Services to debtors with special needs.* A provider that provides any portion of its instructional course in person shall comply with all federal, state and local laws governing facility accessibility. A provider shall also provide or arrange for communication assistance for debtors with special needs who have difficulty making their service needs known.

(k) *Mandatory disclosures to debtors.* Prior to providing any information to or obtaining any information from a debtor, and prior to delivering an instructional course, a provider shall disclose:

(1) The provider's fee policy, including any fees associated with generation of the certificate;

(2) The provider's policies enabling debtors to obtain an instructional course for free or at reduced rates based upon the debtor's lack of ability to pay. To the extent an approved provider publishes information concerning its fees on the Internet, such fee information must include the provider's policies enabling debtors to obtain an instructional course for free or at reduced rates based upon the debtor's lack of ability to pay;

(3) The provider's policy to provide free bilingual instruction or professional interpreter assistance to any limited English proficient debtor;

(4) The instructors' qualifications;

(5) The provider's policy prohibiting it from paying or receiving referral fees for the referral of debtors;

(6) The provider's obligation to provide a certificate to the debtor promptly upon the completion of an instructional course;

(7) The fact that the provider might disclose debtor information to the United States Trustee in connection with the United States Trustee's oversight of the provider, or during the investigation of complaints, during onsite visits, or during quality of service reviews;

(8) The fact that the United States Trustee has reviewed only the provider's instructional course (and, if applicable, its services as a credit counseling agency pursuant to 11 U.S.C. 111(c)), and the fact that the United States Trustee has neither reviewed nor approved any other services the provider provides to debtors; and

(9) The fact that a debtor will only receive a certificate if the debtor completes an instructional course.

(l) *Complaint Procedures.* A provider shall employ complaint procedures that adequately respond to debtors' concerns.

(m) *Provider records.* A provider shall prepare and retain records that enable the United States Trustee to evaluate whether the provider is providing effective instruction and acting in compliance with all applicable laws and this part. All records, including documents bearing original signatures, shall be maintained in either hard copy form or electronically in a format widely available commercially. Records that the provider shall prepare and retain for a minimum of two years, and permit review of by the United States Trustee upon request, shall include:

(1) Upon the filing of an application for probationary approval, all information requested by the United States Trustee as an estimate, projected to

the end of the probationary period, in the form requested by the United States Trustee;

(2) After probationary or annual approval, and for so long as the provider remains on the approved list, semi-annual reports of historical data (for the periods ending June 30 and December 31 of each year), of the type and in the form requested by the United States Trustee; these reports shall be submitted within 30 days of the end of the applicable periods specified in this paragraph;

(3) Records concerning the delivery of services to debtors with limited English proficiency and special needs, and to hearing-impaired debtors, including records:

(i) Of the number of such debtors, and the methods of delivery used with respect to such debtors;

(ii) Of which languages are offered or requested, and the type of language support used or requested by such debtors (e.g., bilingual instructor, in-person or telephone interpreter, translated Web instruction);

(iii) Detailing the provider's provision of services to such debtors; and

(iv) Supporting any justification if the provider did not provide services to such debtors, including the number of debtors not served, the languages involved, and the number of referrals provided;

(4) Records concerning the delivery of an instructional course to debtors for free or at reduced rates based upon the debtor's lack of ability to pay, including records of the number of debtors for whom the provider waived all of its fees under § 58.34(b)(1)(i), the number of debtors for whom the provider waived all or part of its fees under § 58.34(b)(1)(ii), and the number of debtors for whom the provider voluntarily waived all or part of its fees under § 58.34(c);

(5) Records of complaints and the provider's responses thereto;

(6) Records that enable the provider to verify the authenticity of certificates their debtors file in bankruptcy cases; and

(7) Records that enable the provider to issue replacement certificates.

(n) *Additional minimum requirements.* A provider shall:

(1) Provide records to the United States Trustee upon request;

(2) Cooperate with the United States Trustee by allowing scheduled and unscheduled on-site visits, complaint investigations, or other reviews of the provider's qualifications to be an approved provider;

(3) Cooperate with the United States Trustee by promptly responding to questions or inquiries from the United States Trustee;

(4) Assist the United States Trustee in identifying and investigating suspected fraud and abuse by any party participating in the instructional course or bankruptcy process;

(5) Take no action that would limit, inhibit, or prevent a debtor from bringing an action or claim for damages against a provider, as provided in 11 U.S.C. 111(g)(2);

(6) Refer debtors seeking an instructional course only to providers that have been approved by a United States Trustee to provide such services;

(7) Comply with the United States Trustee's directions on approved advertising, including without limitation those set forth in Appendix A to the application;

(8) Not disclose or provide to a credit reporting agency any information concerning whether a debtor has received or sought instruction concerning personal financial management from a provider;

(9) Not expose the debtor to commercial advertising as part of or during the debtor's receipt of an instructional course, and never market or sell financial products or services during the instructional course provided, however, this provision does not prohibit a provider from generally discussing all available financial products and services;

(10) Not sell information about any debtor to any third party without the debtor's prior written permission;

(11) Comply with the requirements elsewhere in this part concerning fees for the instructional course and fee waiver policies; and

(12) Comply with the requirements elsewhere in this part concerning certificates.

[78 FR 16172, Mar. 14, 2013]

§ 58.34 Minimum requirements to become and remain approved providers relating to fees.

(a) If a fee for, or relating to, an instructional course is charged by a provider, such fee shall be reasonable:

(1) A fee of $50 or less for an instructional course is presumed to be reasonable and a provider need not obtain prior approval of the United States Trustee to charge such a fee;

(2) A fee exceeding $50 for an instructional course is not presumed to be reasonable and a provider must obtain prior approval from the United States Trustee to charge such a fee. The provider bears the burden of establishing that its proposed fee is reasonable. At a minimum, the provider must demonstrate that its cost for delivering the instructional course justifies the fee. A provider that previously received permission to charge a higher fee need not reapply for permission to charge that fee during the provider's annual review. Any new requests for permission to charge more than previously approved, however, must be submitted to EOUST for approval; and

(3) The United States Trustee shall review the amount of the fee set forth in paragraphs (a)(1) and (2) of this section one year after the effective date of this part and then periodically, but not less frequently than every four years, to determine the reasonableness of the fee. Fee amounts and any revisions thereto shall be determined by current costs, using a method of analysis consistent with widely accepted accounting principles and practices, and calculated in accordance with the provisions of federal law as applicable. Fee amounts and any revisions thereto shall be published in the FEDERAL REGISTER.

(b)(1) A provider shall waive the fee in whole or in part whenever a debtor demonstrates a lack of ability to pay the fee.

(i) A debtor presumptively lacks the ability to pay the fee if the debtor's household current income is less than 150 percent of the poverty guidelines updated periodically in the FEDERAL REGISTER by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2), as adjusted from time to time, for a household or family of the size involved in the fee determination.

(ii) The presumption shall be rebutted, and the provider may charge the debtor a reduced fee, if the provider determines, based on income information the debtor submits to the provider, that the debtor is able to pay the fee in a reduced amount. Nothing in this subsection requires an provider to charge a fee to debtors whose household income exceeds the amount set forth in paragraph (b)(1)(i) of this section, or who are able to demonstrate ability to pay based on income as described in this subsection.

(iii) A provider shall disclose its fee policy, including the criteria on which it relies in determining a debtor's eligibility for reduced fees, and the provider's policy for collecting fees pursuant to paragraph (b)(1)(ii) of this section, in accordance with § 58.33(k)(2).

(2) The United States Trustee shall review the basis for the mandatory fee waiver policy set forth in paragraph (b)(1) of this section one year after the effective date of this part and then periodically, but not less frequently than every four years, to determine the impact of that fee waiver policy on debtors and providers. Any revisions to the mandatory fee waiver policy set forth in paragraph (b)(1) of this section shall be published in the FEDERAL REGISTER.

(c) Notwithstanding the requirements of paragraph (b) of this section, a provider also may waive fees based upon other considerations, including, but not limited to:

(1) The debtor's net worth;

(2) The percentage of the debtor's income from government assistance programs;

(3) Whether the debtor is receiving pro bono legal services in connection with a bankruptcy case; or

(4) If the combined current monthly income, as defined in 11 U.S.C. 101(10A), of the debtor and his or her spouse, when multiplied times twelve, is equal to or less than the amounts set forth in 11 U.S.C. 707(b)(7).

(d) A provider shall not require a debtor to purchase an instructional course in connection with the purchase of any other service offered by the provider.

(e) A provider who is also a chapter 13 standing trustee may only provide the instructional course to debtors in cases in which the trustee is appointed to serve and may not charge any fee to those debtors for the instructional course. A standing chapter 13 trustee may not require debtors in cases administered by the trustee to obtain the instructional course from the trustee. Employees and affiliates of the standing trustee are also bound by the restrictions in this section.

[78 FR 16172, Mar. 14, 2013]

§ 58.35 Minimum requirements to become and remain approved providers relating to certificates.

(a) An approved provider shall send a certificate only to the debtor who took and completed the instructional course, except that an approved provider shall instead send a certificate to the attorney of a debtor who took and completed an instructional course if the debtor specifically directs the provider to do so. In lieu of sending a certificate to the debtor or the debtor's attorney, an approved provider may notify the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure that a debtor has completed the instructional course.

(b) An approved provider shall send a certificate to a debtor, or notify the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure, that a debtor has completed the instructional course no later than three business days after the debtor completed an instructional course and after completion of a debtor course evaluation form that evaluates the effectiveness of the instructional course. The approved provider shall not withhold the issuance of a certificate or notice of course completion to the appropriate bankruptcy court because of a debtor's failure to submit an evaluation form, though the provider should make reasonable effort to ensure that debtors complete and submit course evaluation forms.

(c) If a debtor has completed instruction, a provider may not withhold certificate issuance or notice of course completion to the appropriate bankruptcy court for any reason, including, without limitation, a debtor's failure to obtain a passing grade on a quiz, examination, or test. A provider may not consider instructional services incomplete based solely on the debtor's failure to pay the fee. Although a test may be incorporated into the curriculum to evaluate the effectiveness of the course and to ensure that the course has been completed, the approved provider cannot deny a certificate to a debtor or notice of course completion to the appropriate bankruptcy court if the debtor has completed the course as designed.

(d) An approved provider shall issue certificates only in the form approved by the United States Trustee, and shall generate the form using the Certificate Generating System maintained by the United States Trustee, except under exigent circumstances with notice to the United States Trustee.

(e) An approved provider shall have sufficient computer capabilities to issue certificates from the United States Trustee's Certificate Generating System.

(f) An approved provider shall issue a certificate, or provide notice of course completion to the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure, with respect to each debtor who completes an instructional course. Spouses receiving an instructional course jointly shall each receive a certificate or notice of course completion to the appropriate bankruptcy court shall be made for both individuals.

(g) An approved provider shall issue a replacement certificate to a debtor who requests one.

(h) Only an authorized officer, supervisor or employee of an approved provider shall issue a certificate, or provide notice of course completion to the appropriate bankruptcy court, and an approved provider shall not transfer or delegate authority to issue a certificate or provide notice of course completion to any other entity.

(i) An approved provider shall implement internal controls sufficient to prevent unauthorized issuance of certificates.

(j) An approved provider shall ensure the signature affixed to a certificate is

that of an officer, supervisor or employee authorized to issue the certificate, in accordance with paragraph (h) of this section, which signature shall be either:

(1) An original signature; or

(2) In a format approved for electronic filing with the court (most typically in the form /s/ name of instructor).

(k) An approved provider shall affix to the certificate the exact name under which the approved provider is incorporated or organized.

(l) An approved provider shall identify on the certificate:

(1) The specific federal judicial district requested by the debtor;

(2) Whether an instructional course was provided in person, by telephone or via the Internet;

(3) The date and time (including the time zone) when instructional services were completed by the debtor; and

(4) The name of the instructor that provided the instructional course.

(m) An approved provider shall affix the debtor's full, accurate name to the certificate. If the instructional course is obtained by a debtor through a duly authorized representative, the certificate shall also set forth the name of the legal representative and legal capacity of that representative.

[78 FR 16172, Mar. 14, 2013]

§ 58.36 Procedures for obtaining final provider action on United States Trustees' decisions to deny providers' applications and to remove approved providers from the approved list.

(a) The United States Trustee shall remove an approved provider from the approved list whenever an approved provider requests its removal in writing.

(b) The United States Trustee may issue a decision to remove an approved provider from the approved list, and thereby terminate the approved provider's authorization to provide an instructional course, at any time.

(c) The United States Trustee may issue a decision to deny a provider's application or to remove a provider from the approved list whenever the United States Trustee determines that the provider has failed to comply with the standards or requirements specified in 11 U.S.C. 111, this part, or the terms under which the United States Trustee designated it to act as an approved provider, including, but not limited to, finding any of the following:

(1) If any entity has suspended or revoked the provider's license to do business in any jurisdiction; or

(2) Any United States district court has removed the provider under 11 U.S.C. 111(e).

(d) The United States Trustee shall provide to the provider in writing a notice of any decision either to:

(1) Deny the provider's application; or

(2) Remove the provider from the approved list.

(e) The notice shall state the reason(s) for the decision and shall reference any documents or communications relied upon in reaching the denial or removal decision. To the extent authorized by law, the United States Trustee shall provide to the provider copies of any such documents that were not supplied to the United States Trustee by the provider. The notice shall be sent to the provider by overnight courier, for delivery the next business day.

(f) Except as provided in paragraph (h) of this section, the notice shall advise the provider that the denial or removal decision shall become final agency action, and unreviewable, unless the provider submits in writing a request for review by the Director no later than 21 calendar days from the date of the notice to the provider.

(g) Except as provided in paragraph (h) of this section, the decision to deny a provider's application or to remove a provider from the approved list shall take effect upon:

(1) The expiration of the provider's time to seek review from the Director, if the provider fails to timely seek review of a denial or removal decision; or

(2) The issuance by the Director of a final decision, if the provider timely seeks such review.

(h) The United States Trustee may provide that a decision to remove a provider from the approved list is effective immediately and deny the provider the right to provide an instructional course whenever the United

States Trustee finds any of the factors set forth in paragraphs (c)(1) or (2) of this section.

(i) A provider's request for review shall be in writing and shall fully describe why the provider disagrees with the denial or removal decision, and shall be accompanied by all documents and materials the provider wants the Director to consider in reviewing the denial or removal decision. The provider shall send the original and one copy of the request for review, including all accompanying documents and materials, to the Office of the Director by overnight courier, for delivery the next business day. To be timely, a request for review shall be received at the Office of the Director no later than 21 calendar days from the date of the notice to the provider.

(j) The United States Trustee shall have 21 calendar days from the date of the provider's request for review to submit to the Director a written response regarding the matters raised in the provider's request for review. The United States Trustee shall provide a copy of this response to the provider by overnight courier, for delivery the next business day.

(k) The Director may seek additional information from any party in the manner and to the extent the Director deems appropriate.

(l) In reviewing the decision to deny a provider's application or to remove a provider from the approved list, the Director shall determine:

(1) Whether the denial or removal decision is supported by the record; and

(2) Whether the denial or removal decision constitutes an appropriate exercise of discretion.

(m) Except as provided in paragraph (n) of this section, the Director shall issue a final decision no later than 60 calendar days from the receipt of the provider's request for review, unless the provider agrees to a longer period of time or the Director extends the deadline. The Director's final decision on the provider's request for review shall constitute final agency action.

(n) Whenever the United States Trustee provides under paragraph (h) of this section that a decision to remove a provider from the approved list is effective immediately, the Director shall issue a written decision no later than 15 calendar days from the receipt of the provider's request for review, unless the provider agrees to a longer period of time. The decision shall:

(1) Be limited to deciding whether the determination that the removal decision should take effect immediately was supported by the record and an appropriate exercise of discretion;

(2) Constitute final agency action only on the issue of whether the removal decision should take effect immediately; and

(3) Not constitute final agency action on the ultimate issue of whether the provider should be removed from the approved list; after issuing the decision, the Director shall issue a final decision by the deadline set forth in paragraph (m) of this section.

(o) In reaching a decision under paragraphs (m) or (n) of this section, the Director may specify a person to act as a reviewing official. The reviewing official's duties shall be specified by the Director on a case-by-case basis, and may include reviewing the record, obtaining additional information from the participants, providing the Director with written recommendations, and such other duties as the Director shall prescribe in a particular case.

(p) A provider that files a request for review shall bear its own costs and expenses, including counsel fees.

(q) When a decision to remove a provider from the approved list takes effect, the provider shall:

(1) Immediately cease providing an instructional course to debtors;

(2) No later than three business days after the date of removal, send all certificates to all debtors who completed an instructional course prior to the provider's removal from the approved list; and

(3) No later than three business days after the date of removal, return all fees to debtors who had paid for an instructional course, but had not completely received the instructional course.

(r) A provider must exhaust all administrative remedies before seeking redress in any court of competent jurisdiction.

[78 FR 16172, Mar. 14, 2013]

APPENDIX A TO PART 58—GUIDELINES FOR REVIEWING APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED UNDER 11 U.S.C. 330

(a) *General Information.* (1) The Bankruptcy Reform Act of 1994 amended the responsibilities of the United States Trustees under 28 U.S.C. 586(a)(3)(A) to provide that, whenever they deem appropriate, United States Trustees will review applications for compensation and reimbursement of expenses under section 330 of the Bankruptcy Code, 11 U.S.C. 101, *et seq.* (''Code''), in accordance with procedural guidelines (''Guidelines'') adopted by the Executive Office for United States Trustees (''Executive Office''). The following Guidelines have been adopted by the Executive Office and are to be uniformly applied by the United States Trustees except when circumstances warrant different treatment.

(2) The United States Trustees shall use these Guidelines in all cases commenced on or after October 22, 1994.

(3) The Guidelines are not intended to supersede local rules of court, but should be read as complementing the procedures set forth in local rules.

(4) Nothing in the Guidelines should be construed:

(i) To limit the United States Trustee's discretion to request additional information necessary for the review of a particular application or type of application or to refer any information provided to the United States Trustee to any investigatory or prosecutorial authority of the United States or a state;

(ii) To limit the United States Trustee's discretion to determine whether to file comments or objections to applications; or

(iii) To create any private right of action on the part of any person enforceable in litigation with the United States Trustee or the United States.

(5) Recognizing that the final authority to award compensation and reimbursement under section 330 of the Code is vested in the Court, the Guidelines focus on the disclosure of information relevant to a proper award under the law. In evaluating fees for professional services, it is relevant to consider various factors including the following: the time spent; the rates charged; whether the services were necessary to the administration of, or beneficial towards the completion of, the case at the time they were rendered; whether services were performed within a reasonable time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and whether compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases. The Guidelines thus reflect standards and procedures articulated in section 330 of the Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure for awarding compensation to trustees and to professionals employed under section 327 or 1103. Applications that contain the information requested in these Guidelines will facilitate review by the Court, the parties, and the United States Trustee.

(6) Fee applications submitted by trustees are subject to the same standard of review as are applications of other professionals and will be evaluated according to the principles articulated in these Guidelines. Each United States Trustee should establish whether and to what extent trustees can deviate from the format specified in these Guidelines without substantially affecting the ability of the United States Trustee to review and comment on their fee applications in a manner consistent with the requirements of the law.

(b) *Contents of Applications for Compensation and Reimbursement of Expenses.* All applications should include sufficient detail to demonstrate compliance with the standards set forth in 11 U.S.C. §330. The fee application should also contain sufficient information about the case and the applicant so that the Court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents. The following will facilitate review of the application.

(1) Information about the Applicant and the Application. The following information should be provided in every fee application:

(i) Date the bankruptcy petition was filed, date of the order approving employment, identity of the party represented, date services commenced, and whether the applicant is seeking compensation under a provision of the Bankruptcy Code other than section 330.

(ii) Terms and conditions of employment and compensation, source of compensation, existence and terms controlling use of a retainer, and any budgetary or other limitations on fees.

(iii) Names and hourly rates of all applicant's professionals and paraprofessionals who billed time, explanation of any changes in hourly rates from those previously charged, and statement of whether the compensation is based on the customary compensation charged by comparably skilled practitioners in cases other than cases under title 11.

(iv) Whether the application is interim or final, and the dates of previous orders on interim compensation or reimbursement of expenses along with the amounts requested and the amounts allowed or disallowed, amounts of all previous payments, and amount of any allowed fees and expenses remaining unpaid.

(v) Whether the person on whose behalf the applicant is employed has been given the opportunity to review the application and

whether that person has approved the requested amount.

(vi) When an application is filed less than 120 days after the order for relief or after a prior application to the Court, the date and terms of the order allowing leave to file at shortened intervals.

(vii) Time period of the services or expenses covered by the application.

(2) Case Status. The following information should be provided to the extent that it is known to or can be reasonably ascertained by the applicant:

(i) In a chapter 7 case, a summary of the administration of the case including all moneys received and disbursed in the case, when the case is expected to close, and, if applicant is seeking an interim award, whether it is feasible to make an interim distribution to creditors without prejudicing the rights of any creditor holding a claim of equal or higher priority.

(ii) In a chapter 11 case, whether a plan and disclosure statement have been filed and, if not yet filed, when the plan and disclosure statement are expected to be filed; whether all quarterly fees have been paid to the United States Trustee; and whether all monthly operating reports have been filed.

(iii) In every case, the amount of cash on hand or on deposit, the amount and nature of accrued unpaid administrative expenses, and the amount of unencumbered funds in the estate.

(iv) Any material changes in the status of the case that occur after the filing of the fee application should be raised, orally or in writing, at the hearing on the application or, if a hearing is not required, prior to the expiration of the time period for objection.

(3) Summary Sheet. All applications should contain a summary or cover sheet that provides a synopsis of the following information:

(i) Total compensation and expenses requested and any amount(s) previously requested;

(ii) Total compensation and expenses previously awarded by the court;

(iii) Name and applicable billing rate for each person who billed time during the period, and date of bar admission for each attorney;

(iv) Total hours billed and total amount of billing for each person who billed time during billing period; and

(v) Computation of blended hourly rate for persons who billed time during period, excluding paralegal or other paraprofessional time.

(4) Project Billing Format. (i) To facilitate effective review of the application, all time and service entries should be arranged by project categories. The project categories set forth in exhibit A should be used to the extent applicable. A separate project category should be used for administrative matters and, if payment is requested, for fee application preparation.

(ii) The United States Trustee has discretion to determine that the project billing format is not necessary in a particular case or in a particular class of cases. Applicants should be encouraged to consult with the United States Trustee if there is a question as to the need for project billing in any particular case.

(iii) Each project category should contain a narrative summary of the following information:

(A) a description of the project, its necessity and benefit to the estate, and the status of the project including all pending litigation for which compensation and reimbursement are requested;

(B) identification of each person providing services on the project; and

(C) a statement of the number of hours spent and the amount of compensation requested for each professional and paraprofessional on the project.

(iv) Time and service entries are to be reported in chronological order under the appropriate project category.

(v) Time entries should be kept contemporaneously with the services rendered in time periods of tenths of an hour. Services should be noted in detail and not combined or ''lumped'' together, with each service showing a separate time entry; however, tasks performed in a project which total a de minimis amount of time can be combined or lumped together if they do not exceed .5 hours on a daily aggregate. Time entries for telephone calls, letters, and other communications should give sufficient detail to identify the parties to and the nature of the communication. Time entries for court hearings and conferences should identify the subject of the hearing or conference. If more than one professional from the applicant firm attends a hearing or conference, the applicant should explain the need for multiple attendees.

(5) Reimbursement for Actual, Necessary Expenses. Any expense for which reimbursement is sought must be actual and necessary and supported by documentation as appropriate. Factors relevant to a determination that the expense is proper include the following:

(i) Whether the expense is reasonable and economical. For example, first class and other luxurious travel mode or accommodations will normally be objectionable.

(ii) Whether the requested expenses are customarily charged to non-bankruptcy clients of the applicant.

(iii) Whether applicant has provided a detailed itemization of all expenses including the date incurred, description of expense (e.g., type of travel, type of fare, rate, destination), method of computation, and, where relevant, name of the person incurring

the expense and purpose of the expense. Itemized expenses should be identified by their nature (e.g., long distance telephone, copy costs, messengers, computer research, airline travel, etc,) and by the month incurred. Unusual items require more detailed explanations and should be allocated, where practicable, to specific projects.

(iv) Whether applicant has prorated expenses where appropriate between the estate and other cases (e.g., travel expenses applicable to more than one case) and has adequately explained the basis for any such proration.

(v) Whether expenses incurred by the applicant to third parties are limited to the actual amounts billed to, or paid by, the applicant on behalf of the estate.

(vi) Whether applicant can demonstrate that the amount requested for expenses incurred in-house reflect the actual cost of such expenses to the applicant. The United States Trustee may establish an objection ceiling for any in-house expenses that are routinely incurred and for which the actual cost cannot easily be determined by most professionals (e.g., photocopies, facsimile charges, and mileage).

(vii) Whether the expenses appear to be in the nature nonreimbursable overhead. Overhead consists of all continuous administrative or general costs incident to the operation of the applicant's office and not particularly attributable to an individual client or case. Overhead includes, but is not limited to, word processing, proofreading, secretarial and other clerical services, rent, utilities, office equipment and furnishings, insurance, taxes, local telephones and monthly car phone charges, lighting, heating and cooling, and library and publication charges.

(viii) Whether applicant has adhered to allowable rates for expenses as fixed by local rule or order of the Court.

EXHIBIT A—PROJECT CATEGORIES

Here is a list of suggested project categories for use in most bankruptcy cases. Only one category should be used for a given activity. Professionals should make their best effort to be consistent in their use of categories, whether within a particular firm or by different firms working on the same case. It would be appropriate for all professionals to discuss the categories in advance and agree generally on how activities will be categorized. This list is not exclusive. The application may contain additional categories as the case requires. They are generally more applicable to attorneys in chapter 7 and chapter 11, but may be used by all professionals as appropriate.

Asset Analysis and Recovery: Identification and review of potential assets including causes of action and non-litigation recoveries.

Asset Disposition: Sales, leases (§ 365 matters), abandonment and related transaction work.

Business Operations: Issues related to debtor-in-possession operating in chapter 11 such as employee, vendor, tenant issues and other similar problems.

Case Administration: Coordination and compliance activities, including preparation of statement of financial affairs; schedules; list of contracts; United States Trustee interim statements and operating reports; contacts with the United States Trustee; general creditor inquiries.

Claims Administration and Objections: Specific claim inquiries; bar date motions; analyses, objections and allowances of claims.

Employee Benefits/Pensions: Review issues such as severance, retention, 401K coverage and continuance of pension plan.

Fee/Employment Applicants: Preparation of employment and fee applications for self or others; motions to establish interim procedures.

Fee/Employment Objections: Review of and objections to the employment and fee applications of others.

Financing: Matters under §§ 361, 363 and 364 including cash collateral and secured claims; loan document analysis.

Litigation: There should be a separate category established for each matter (e.g., XYZ Litigation).

Meetings of Creditors: Preparing for and attending the conference of creditors, the § 341(a) meeting and other creditors' committee meetings.

Plan and Disclosure Statement: Formulation, presentation and confirmation; compliance with the plan confirmation order, related orders and rules; disbursement and case closing activities, except those related to the allowance and objections to allowance of claims.

Relief From Stay Proceedings: Matters relating to termination or continuation of automatic stay under § 362.

The following categories are generally more applicable to accountants and financial advisors, but may be used by all professionals as appropriate.

Accounting/Auditing: Activities related to maintaining and auditing books of account, preparation of financial statements and account analysis.

Business Analysis: Preparation and review of company business plan; development and review of strategies; preparation and review of cash flow forecasts and feasibility studies.

Corporate Finance: Review financial aspects of potential mergers, acquisitions and disposition of company or subsidiaries.

Data Analysis: Management information systems review, installation and analysis, construction, maintenance and reporting of significant case financial data, lease rejection, claims, etc.

Litigation Consulting: Providing consulting and expert witness services relating to various bankruptcy matters such as insolvency, feasibility, avoiding actions, forensic accounting, etc.

Reconstruction Accounting: Reconstructing books and records from past transactions and bringing accounting current.

Tax Issues: Analysis of tax issues and preparation of state and federal tax returns.

Valuation: Appraise or review appraisals of assets.

[61 FR 24890, May 17, 1996]

PART 59—GUIDELINES ON METHODS OF OBTAINING DOCUMENTARY MATERIALS HELD BY THIRD PARTIES

Sec.
59.1 Introduction.
59.2 Definitions.
59.3 Applicability.
59.4 Procedures.
59.5 Functions and authorities of the Deputy Assistant Attorneys General.
59.6 Sanctions.

AUTHORITY: Sec. 201, Pub. L. 96–440, 94 Stat. 1879 (42 U.S.C. 2000aa–11).

SOURCE: Order No. 942–81, 46 FR 22364, Apr. 17, 1981, unless otherwise noted.

§59.1 Introduction.

(a) A search for documentary materials necessarily involves intrusions into personal privacy. First, the privacy of a person's home or office may be breached. Second, the execution of such a search may require examination of private papers within the scope of the search warrant, but not themselves subject to seizure. In addition, where such a search involves intrusions into professional, confidential relationships, the privacy interests of other persons are also implicated.

(b) It is the responsibility of federal officers and employees to recognize the importance of these personal privacy interests, and to protect against unnecessary intrusions. Generally, when documentary materials are held by a disinterested third party, a subpoena, administrative summons, or governmental request will be an effective alternative to the use of a search warrant and will be considerably less intrusive. The purpose of the guidelines set forth in this part is to assure that federal officers and employees do not use search and seizure to obtain documentary materials in the possession of disinterested third parties unless reliance on alternative means would substantially jeopardize their availability (*e.g.*, by creating a risk of destruction, etc.) or usefulness (*e.g.*, by detrimentally delaying the investigation, destroying a chain of custody, etc.). Therefore, the guidelines in this part establish certain criteria and procedural requirements which must be met before a search warrant may be used to obtain documentary materials held by disinterested third parties. The guidelines in this part are not intended to inhibit the use of less intrusive means of obtaining documentary materials such as the use of a subpoena, summons, or formal or informal request.

§59.2 Definitions.

As used in this part—

(a) The term *attorney for the government* shall have the same meaning as is given that term in Rule 54(c) of the Federal Rules of Criminal Procedure;

(b) The term *disinterested third party* means a person or organization not reasonably believed to be—

(1) A suspect in the criminal offense to which the materials sought under these guidelines relate; or

(2) Related by blood or marriage to such a suspect;

(c) The term *documentary materials* means any materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, films or negatives, audio or video tapes, or materials upon which information is electronically or magnetically recorded, *but does not include* materials which constitute contraband, the fruits or instrumentalities of a crime, or things otherwise criminally possessed;

(d) The term *law enforcement officer* shall have the same meaning as the term ''federal law enforcement officer'' as defined in Rule 41(h) of the Federal Rules of Criminal Procedure; and

(e) The term *supervisory official of the Department of Justice* means the supervising attorney for the section, office, or branch within the Department of Justice which is responsible for the investigation or prosecution of the offense at issue, or any of his superiors.

§ 59.3 Applicability.

(a) The guidelines set forth in this part apply, pursuant to section 201 of the Privacy Protection Act of 1980 (Sec. 201, Pub. L. 96–440, 94 Stat. 1879, (42 U.S.C. 2000aa–11)), to the procedures used by any federal officer or employee, in connection with the investigation or prosecution of a criminal offense, to obtain documentary materials in the private possession of a disinterested third party.

(b) The guidelines set forth in this part do not apply to:

(1) Audits, examinations, or regulatory, compliance, or administrative inspections or searches pursuant to federal statute or the terms of a federal contract;

(2) The conduct of foreign intelligence or counterintelligence activities by a government authority pursuant to otherwise applicable law;

(3) The conduct, pursuant to otherwise applicable law, of searches and seizures at the borders of, or at international points of entry into, the United States in order to enforce the customs laws of the United States;

(4) Governmental access to documentary materials for which valid consent has been obtained; or

(5) Methods of obtaining documentary materials whose location is known but which have been abandoned or which cannot be obtained through subpoena or request because they are in the possession of a person whose identity is unknown and cannot with reasonable effort be ascertained.

(c) The use of search and seizure to obtain documentary materials which are believed to be possessed for the purpose of disseminating to the public a book, newspaper, broadcast, or other form of public communication is subject to title I of the Privacy Protection Act of 1980 (Sec. 101, *et seq.*, Pub. L. 96–440, 94 Stat. 1879 (42 U.S.C. 2000aa, *et seq.*)), which strictly prohibits the use of search and seizure to obtain such materials except under specified circumstances.

(d) These guidelines are not intended to supersede any other statutory, regulatory, or policy limitations on access to, or the use or disclosure of particular types of documentary materials, including, but not limited to, the provisions of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401, *et seq.*), the Drug Abuse Office and Treatment Act of 1972, as amended (21 U.S.C. 1101, *et seq.*), and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, as amended (42 U.S.C. 4541, *et seq.*). For the use of a warrant to obtain information from, or records of, members of the news media, see the Department's statement of policy set forth in § 50.10 of this chapter.

[Order No. 942–81, 46 FR 22364, Apr. 17, 1981, as amended by AG Order No. 3420–2014, 79 FR 10994, Feb. 27, 2014]

§ 59.4 Procedures.[1]

(a) *Provisions governing the use of search warrants generally.* (1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought, and the application for the warrant has been authorized as provided in paragraph (a)(2) of this section.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party unless the application for the warrant has been authorized by an attorney for the government. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of an attorney for the government, the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency, if the appropriate U.S. Attorney (or where the case

[1] Notwithstanding the provisions of this section, any application for a warrant to search for evidence of a criminal tax offense under the jurisdiction of the Tax Division must be specifically approved in advance by the Tax Division pursuant to section 6–2.330 of the U.S. Attorneys' Manual.

is not being handled by a U.S. Attorney's Office, the appropriate supervisory official of the Department of Justice) is notified of the authorization and the basis for justifying such authorization under this part within 24 hours of the authorization.

(b) *Provisions governing the use of search warrants which may intrude upon professional, confidential relationships.* (1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party physician,[2] lawyer, or clergyman, under circumstances in which the materials sought, or other materials likely to be reviewed during the execution of the warrant, contain confidential information on patients, clients, or parishioners which was furnished or developed for the purposes of professional counseling or treatment, unless—

(i) It appears that the use of a subpoena, summons, request or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought;

(ii) Access to the documentary materials appears to be of substantial importance to the investigation or prosecution for which they are sought; and

(iii) The application for the warrant has been approved as provided in paragraph (b)(2) of this section.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party physician, lawyer, or clergyman under the circumstances described in paragraph (b)(1) of this section, unless, upon the recommendation of the U.S. Attorney (or where a case is not being handled by a U.S. Attorney's Office, upon the recommendation of the appropriate supervisory official of the Department of Justice), an appropriate Deputy Assistant Attorney General has authorized the application for the warrant. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of a Deputy Assistant Attorney General, the application may be authorized by the U.S. Attorney (or where the case is not being handled by a U.S. Attorney's Office, by the appropriate supervisory official of the Department of Justice) if an appropriate Deputy Assistant Attorney General is notified of the authorization and the basis for justifying such authorization under this part within 72 hours of the authorization.

(3) Whenever possible, a request for authorization by an appropriate Deputy Assistant Attorney General of a search warrant application pursuant to paragraph (b)(2) of this section shall be made in writing and shall include:

(i) The application for the warrant; and

(ii) A brief description of the facts and circumstances advanced as the basis for recommending authorization of the application under this part.

If a request for authorization of the application is made orally or if, in an emergency situation, the application is authorized by the U.S. Attorney or a supervisory official of the Department of Justice as provided in paragraph (b)(2) of this section, a written record of the request including the materials specified in paragraphs (b)(3) (i) and (ii) of this section shall be transmitted to an appropriate Deputy Assistant Attorney General within 7 days. The Deputy Assistant Attorneys General shall keep a record of the disposition of all requests for authorizations of search warrant applications made under paragraph (b) of this section.

(4) A search warrant authorized under paragraph (b)(2) of this section shall be executed in such a manner as to minimize, to the greatest extent practicable, scrutiny of confidential materials.

(5) Although it is impossible to define the full range of additional doctor-like therapeutic relationships which involve the furnishing or development of private information, the U.S. Attorney (or where a case is not being handled

[2] Documentary materials created or compiled by a physician, but retained by the physician as a matter of practice at a hospital or clinic shall be deemed to be in the private possession of the physician, unless the clinic or hospital is a suspect in the offense.

by a U.S. Attorney's Office, the appropriate supervisory official of the Department of Justice) should determine whether a search for documentary materials held by other disinterested third party professionals involved in such relationships (*e.g.* psychologists or psychiatric social workers or nurses) would implicate the special privacy concerns which are addressed in paragraph (b) of this section. If the U.S. Attorney (or other supervisory official of the Department of Justice) determines that such a search would require review of extremely confidential information furnished or developed for the purposes of professional counseling or treatment, the provisions of this subsection should be applied. Otherwise, at a minimum, the requirements of paragraph (a) of this section must be met.

(c) *Considerations bearing on choice of methods.* In determining whether, as an alternative to the use of a search warrant, the use of a subpoena or other less intrusive means of obtaining documentary materials would substantially jeopardize the availability or usefulness of the materials sought, the following factors, among others, should be considered:

(1) Whether it appears that the use of a subpoena or other alternative which gives advance notice of the government's interest in obtaining the materials would be likely to result in the destruction, alteration, concealment, or transfer of the materials sought; considerations, among others, bearing on this issue may include:

(i) Whether a suspect has access to the materials sought;

(ii) Whether there is a close relationship of friendship, loyalty, or sympathy between the possessor of the materials and a suspect;

(iii) Whether the possessor of the materials is under the domination or control of a suspect;

(iv) Whether the possessor of the materials has an interest in preventing the disclosure of the materials to the government;

(v) Whether the possessor's willingness to comply with a subpoena or request by the government would be likely to subject him to intimidation or threats of reprisal;

(vi) Whether the possessor of the materials has previously acted to obstruct a criminal investigation or judicial proceeding or refused to comply with or acted in defiance of court orders; or

(vii) Whether the possessor has expressed an intent to destroy, conceal, alter, or transfer the materials;

(2) The immediacy of the government's need to obtain the materials; considerations, among others, bearing on this issue may include:

(i) Whether the immediate seizure of the materials is necessary to prevent injury to persons or property;

(ii) Whether the prompt seizure of the materials is necessary to preserve their evidentiary value;

(iii) Whether delay in obtaining the materials would significantly jeopardize an ongoing investigation or prosecution; or

(iv) Whether a legally enforceable form of process, other than a search warrant, is reasonably available as a means of obtaining the materials.

The fact that the disinterested third party possessing the materials may have grounds to challenge a subpoena or other legal process is not in itself a legitimate basis for the use of a search warrant.

§ 59.5 Functions and authorities of the Deputy Assistant Attorneys General.

The functions and authorities of the Deputy Assistant Attorneys General set out in this part may at any time be exercised by an Assistant Attorney General, the Associate Attorney General, the Deputy Attorney General, or the Attorney General.

§ 59.6 Sanctions.

(a) Any federal officer or employee violating the guidelines set forth in this part shall be subject to appropriate disciplinary action by the agency or department by which he is employed.

(b) Pursuant to section 202 of the Privacy Protection Act of 1980 (sec. 202, Pub. L. 96–440, 94 Stat. 1879 (42 U.S.C. 2000aa–12)), an issue relating to the compliance, or the failure to comply, with the guidelines set forth in this part may not be litigated, and a court may not entertain such an issue as the

basis for the suppression or exclusion of evidence.

PART 60—AUTHORIZATION OF FEDERAL LAW ENFORCEMENT OFFICERS TO REQUEST THE ISSUANCE OF A SEARCH WARRANT

Sec.
60.1 Purpose.
60.2 Authorized categories.
60.3 Agencies with authorized personnel.

AUTHORITY: Rule 41(h), Fed. R. Crim. P (18 U.S.C. appendix).

§60.1 Purpose.

This regulation authorizes certain categories of federal law enforcement officers to request the issuance of search warrants under Rule 41, Fed. R. Crim. P., and lists the agencies whose officers are so authorized. Rule 41(a) provides in part that a search warrant may be issued ''upon the request of a federal law enforcement officer,'' and defines that term in Rule 41(h) as ''any government agent, * * * who is engaged in the enforcement of the criminal laws and is within the category of officers authorized by the Attorney General to request the issuance of a search warrant.'' The publication of the categories and the listing of the agencies is intended to inform the courts of the personnel who are so authorized. It should be noted that only in the very rare and emergent case is the law enforcement officer permitted to seek a search warrant without the concurrence of the appropriate U.S. Attorney's office. Further, in all instances, military agents of the Department of Defense must obtain the concurrence of the appropriate U.S. Attorney's Office before seeking a search warrant.

[Order No. 826–79, 44 FR 21785, Apr. 12, 1979, as amended by Order No. 1026–83, 48 FR 37377, Aug. 18, 1983]

§60.2 Authorized categories.

The following categories of federal law enforcement officers are authorized to request the issuance of a search warrant:

(a) Any person authorized to execute search warrants by a statute of the United States.

(b) Any person who has been authorized to execute search warrants by the head of a department, bureau, or agency (or his delegate, if applicable) pursuant to any statute of the United States.

(c) Any peace officer or customs officer of the Virgin Islands, Guam, or the Canal Zone.

(d) Any officer of the Metropolitan Police Department, District of Columbia.

(e) Any person authorized to execute search warrants by the President of the United States.

(f) Any civilian agent of the Department of Defense not subject to military direction who is authorized by statute or other appropriate authority to enforce the criminal laws of the United States.

(g) Any civilian agent of the Department of Defense who is authorized to enforce the Uniform Code of Military Justice.

(h) Any military agent of the Department of Defense who is authorized to enforce the Uniform Code of Military Justice.

(i) Any special agent of the Office of Inspector General, Department of Transportation.

(j) Any special agent of the Investigations Division of the Office of Inspector General, Small Business Administration.

(k) Any special agent of the Office of Investigations and the Office of Labor Racketeering of the Office of Inspector General, Department of Labor.

(l) Any special agent of the Office of Investigations of the Office of Inspector General, General Services Administration.

(m) Any special agent of the Office of Inspector General, Department of Housing and Urban Development.

(n) Any special agent of the Office of Inspector General, Department of Interior.

(o) Any special agent of the Office of Inspector General, Veterans Administration.

(p) Any special agent of the Office of Inspector General, Social Security Administration.

(q) Any special agent of the Office of Inspector General, Department of Health and Human Services.

[Order No. 826–79, 44 FR 21785, Apr. 12, 1979, as amended by Order No. 1026–83, 48 FR 37377, Aug. 18, 1983; Order No. 1143–86, 51 FR 26878, July 28, 1986; Order No. 1188–87, 52 FR 19138, May 21, 1987; Order No. 1327–89, 54 FR 9431, Mar. 7, 1989; Order No. 2000–95, 60 FR 62734, Dec. 7, 1995]

§ 60.3 Agencies with authorized personnel.

The following agencies have law enforcement officers within the categories listed in § 60.2 of this part:

(a) *National Law Enforcement Agencies:*

(1) Department of Agriculture:
National Forest Service
Office of the Inspector General

(2) Department of Defense:
Defense Investigative Service Criminal Investigation Command, U.S. Army
Naval Investigative Service, U.S. Navy
Office of Assistant Inspector General for Investigations, Office of Defense Inspector General
Office of Special Investigation, U.S. Air Force

(3) Department of Health and Human Services:
Center for Disease Control
Food and Drug Administration
Office of Investigations, Office of the Inspector General

(4) Department of the Interior:
Bureau of Indian Affairs
Bureau of Sport Fisheries and Wildlife
National Park Service

(5) Department of Justice:
Drug Enforcement Administration
Federal Bureau of Investigation
Immigration and Naturalization Service
U.S. Marshals Service

(6) Department of Transportation:
U.S. Coast Guard
Office of Inspector General, Department of Transportation

(7) Department of the Treasury:
Bureau of Alcohol, Tobacco, and Firearms
Executive Protective Service
Internal Revenue Service
Criminal Investigation Division
Internal Security Division, Inspection Service
U.S. Customs Service
U.S. Secret Service

(8) U.S. Postal Service:
Inspection Service
Office of Inspector General

(9) Department of Commerce: Office of Export Enforcement

(10) Small Business Administration: Investigations Division of the Office of Inspector General

(11) Department of State: Diplomatic Security Service

(12) Department of Labor: Office of Investigations and Office of Labor Racketeering of the Office of Inspector General

(13) General Services Administration: Office of Inspector General

(14) Department of Housing and Urban Development: Office of Inspector General

(15) Department of the Interior: Office of Inspector General

(16) Veterans Administration: Office of Inspector General

(17) Environmental Protection Agency: Office of Criminal Investigations

(18) Social Security Administration, Office of Inspector General

(b) *Local Law Enforcement Agencies:*

(1) District of Columbia Metropolitan Police Department

(2) Law Enforcement Forces and Customs Agencies of Guam, The Virgin Islands, and the Canal Zone.

[Order No. 826–79, 44 FR 21785, Apr. 12, 1979]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 60.3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

PART 61—PROCEDURES FOR IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Subpart A—General

Sec.
61.1 Background.
61.2 Purpose.
61.3 Applicability.
61.4 Major federal action.

Subpart B—Implementing Procedures

61.5 Typical classes of action.
61.6 Consideration of environmental documents in decisionmaking.
61.7 Legislative proposals.
61.8 Classified proposals.

61.9 Emergencies.
61.10 Ensuring Department NEPA compliance.
61.11 Environmental information.
APPENDIX A TO PART 61—BUREAU OF PRISONS PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT
APPENDIX B TO PART 61—DRUG ENFORCEMENT ADMINISTRATION PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT
APPENDIX C TO PART 61—IMMIGRATION AND NATURALIZATION SERVICE PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT
APPENDIX D TO PART 61—OFFICE OF JUSTICE ASSISTANCE, RESEARCH, AND STATISTICS PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT
APPENDIX E TO PART 61—UNITED STATES MARSHALS SERVICE PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

AUTHORITY: 28 U.S.C. 509, 510; 5 U.S.C. 301; Executive Order No. 11991.

SOURCE: Order No. 927–81, 46 FR 7953, Jan. 26, 1981, unless otherwise noted.

Subpart A—General

§61.1 Background.

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

(b) Executive Order No. 11991 of May 24, 1977, directed the Council on Environmental Quality (CEQ) to issue regulations to implement the procedural provisions of NEPA. Accordingly, CEQ issued final NEPA regulations, 40 CFR parts 1500–1508, (''The NEPA regulations''). These regulations provide that each federal agency shall, as necessary, adopt implementing procedures to supplement the regulations. The NEPA regulations identify those sections of the regulations which must be addressed in agency procedures.

§61.2 Purpose.

The purpose of this part is to establish Department of Justice procedures which supplement the relevant provisions of the NEPA regulations and to provide for the implementation of those provisions identified in 40 CFR 1507.3(b).

§61.3 Applicability.

The procedures set forth in this part, with the exception of the appendices, apply to all organizational elements of the Department of Justice. Internal procedures applicable, respectively, to the Bureau of Prisons, the Drug Enforcement Administration, the Immigration and Naturalization Service, and the Office of Justice Assistance, Research and Statistics are set forth in the appendices to this part, for informational purposes.

§61.4 Major federal action.

The NEPA regulations define ''major federal action.'' ''Major federal action'' does not include action taken by the Department of Justice within the framework of judicial or administrative enforcement proceedings or civil or criminal litigation, including but not limited to the submission of consent or settlement agreements and investigations. Neither does ''major federal action'' include the rendering of legal advice.

Subpart B—Implementing Procedures

§61.5 Typical classes of action.

(a) The NEPA regulations require agencies to establish three typical classes of action for similar treatment under NEPA. These classes are: actions normally requiring environmental impact statements (EIS), actions normally not requiring assessments or EIS, and actions normally requiring assessments but not necessarily EIS. Typical Department of Justice actions falling within each class have been identified as follows:

(1) *Actions normally requiring EIS.* None, except as noted in the appendices to this part.

(2) *Actions normally not requiring assessments or EIS.* Actions not significantly affecting the human environment.

(3) *Actions normally requiring assessments but not necessarily EIS.* (i) Proposals for major federal action;

(ii) Proposals for legislation developed by or with the significant cooperation and support of the Department of Justice and for which the Department has primary responsibility for the subject matter.

(b) The Department of Justice shall independently determine whether an EIS or an environmental assessment is required where:

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

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

§ 61.6 Consideration of environmental documents in decisionmaking.

The NEPA regulations contain requirements to ensure adequate consideration of environmental documents in agency decisionmaking. To implement these requirements, the Department of Justice shall:

(a) Consider from the earliest possible point in the process all relevant environmental documents in evaluating proposals for Department action;

(b) Ensure that all relevant environmental documents, comments and responses accompany the proposal through existing Department review processes;

(c) Consider those alternatives encompassed by the range of alternatives discussed when evaluating proposals for Department action, or if it is desirable to consider substantially different alternatives, first supplement the environmental document to include analysis of the additional alternatives;

(d) Where an EIS has been prepared, consider the specific alternatives analyzed in the EIS when evaluating the proposal which is the subject of the EIS.

§ 61.7 Legislative proposals.

(a) Each subunit of the Department of Justice which develops or significantly cooperates and supports a bill or legislative proposal to Congress which may have an effect on the environment shall, in the early stages of development of the bill or proposal, undertake an assessment to determine whether the legislation will significantly affect the environment. The Office of Legislative Affairs shall monitor legislative proposals to assure that Department procedures for legislation are complied with. Requests for appropriations need not be so analyzed.

(b) If the Department of Justice has primary responsibility for the subject matter involved and if the subunit affected finds that the bill or legislative proposal has a significant impact on the environment, that subunit shall prepare a legislative environmental impact statement in compliance with 40 CFR 1506.8.

§ 61.8 Classified proposals.

If an environmental document includes classified matter, a version containing only unclassified material shall be prepared unless the head of the office, board, bureau or division determines that preparation of an unclassified version is not feasible.

§ 61.9 Emergencies.

CEQ shall be consulted when emergency circumstances make it necessary to take a major federal action with significant environmental impact without following otherwise applicable procedural requirements under NEPA.

§ 61.10 Ensuring Department NEPA compliance.

The Land and Natural Resources Division shall have final responsibility for ensuring compliance with the requirements of the procedures set forth in this part.

§ 61.11 Environmental information.

Interested persons may contact the Land and Natural Resources Division for information regarding Department Justice compliance with NEPA.

APPENDIX A TO PART 61—BUREAU OF PRISONS PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

1. *Authority: (CEQ Regulations)* NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977.)

2. *Purpose:* This guide shall apply to efforts associated with the leasing, purchase, design, construction, management, operation and maintenance of new and existing Bureau of Prisons facilities as well as the closing of existing Bureau of Prisons institutions. These procedures shall be used by the Regional Facilities Administration staff as well as the Central Office of Facilities Development and Operations staff. Activities concerning Bureau of Prisons compliance with NEPA shall be handled by and coordinated with these staff members and coordinated by Central Office Personnel. (Reference shall be made to Part 1507—Agency Compliance of the CEQ Regulations.)

3. *Agency Description:* The Bureau of Prisons, a component of the U.S. Department of Justice, is responsible for providing custody and care to committed Federal offenders in an integrated system of correctional institutions across the nation.

The Bureau of Prisons performs its mission of protecting society by implementing the judgments of the Federal courts and safeguarding Federal offenders committed to the custody of the Attorney General.

The administration of the Federal Prison System consists of six divisions. The central office in Washington, DC, is supplemented by five regional offices located in Atlanta, San Francisco, Dallas, Kansas City, and Philadelphia.

4. (*Reference: §1501.2(d)(1)—CEQ Regulations*) The Bureau of Prisons shall make available the necessary technical staff to review proposals and prepare feasibility studies for facilities under consideration for possible use as Federal offenders committed to the custody of the Attorney General. (*Reference: §1501.2(d)(2)—CEQ Regulations*) At the appropriate time after project funding approval, the Bureau of Prisons, having identified a preferred general area for a new facility, will inform the members of Congress representing the affected locale of the intent to pursue the establishment of a Federal correctional institution in the area. This activation might include but not be limited to: (1) The construction of a new facility; (2) or Surplus Federal, state, or local facility to the Bureau of Prisons for prior use. The Bureau of Prisons shall advise and inform interested parties concerning proposed plans which might result in implementation of the NEPA regulations. After initial informal contacts have been made, the Bureau of Prisons will with the aid of local area officials, begin to identify desired locations for the proposed new facility. In the event of proposed activation of an existing facility for prison use, the Bureau of Prisons shall seek initial involvement among local officials and advice on alternative courses of action.

In either case, if the issues appear significantly controversial, an informal public hearing will be held to present the issues to the community and seek their involvement in the planning process. Upon completion of the preliminary groundwork described above, the Bureau of Prisons will issue an A–95 letter of intent to (1) either file an EIS; (2) file an EIA; or (3) discontinue the efforts of locating a facility in the proposed area.

5. *Public Involvement: (Reference: Part 1506.6(3)—CEQ Regulations)* Information regarding the policies of the Bureau of Prisons for implementing the NEPA process can be obtained from: Bureau of Prisons Facilities Development and Operations Office, 320 First Street, NW., Washington, DC 20534.

6. *Supplemental Statements: (Reference: Part 1502.9(c)(3)—CEQ Regulations)* If it is necessary to prepare a supplement to a Draft or Final Environmental Impact Statement, the supplement shall be introduced into the project administrative record.

7. *Bureau of Prisons Decisionmaking Procedures: (Reference: Part 1501.1 (a) through (e)—CEQ Regulations)* Major decision points likely to involve the NEPA process:

(1) Construction of a new Federal correctional institution.

(2) Closing of an existing Federal correctional institution.

(3) Activation of a surplus facility for conversion to a Federal correctional institution.

(4) Significant change from the original mission of a Federal correctional institution.

(5) New construction at an existing Federal correctional institution which might significantly impact upon the existing community environment.

When the inclusion of certain voluminous data in environmental documents would prove impractical, the Bureau of Prisons will summarize the data and retain the original material as a part of its administrative record for the project. This material will be made available to the public in a central place to be designated in Environmental Impact Statements, and upon written request or court order copies of specified material will be provided. A charge may be made for copying, in accordance with current Department of Justice guidelines for reproduction of records.

Decisionmakers shall verify the consideration of all available options in the EIS with a comparative analysis of the alternatives to be considered in the decisionmaking process.

8. *Those Actions Which Normally Do Require Environmental Impact Statements: (Reference: §1507.3(b)(2)(ii)—CEQ Regulations)* (1) New Federal correctional institution construction projects.

(2) Acquisition of surplus facilities for conversion to Federal correctional institutions, if the impact upon the quality of the human environment is likely to be significant.

(3) The closing of an existing Federal correctional institution, if that is likely to have a significant impact upon the quality of the human environment.

(4) Significant change from the original mission of a Federal correctional institution when the issue is likely to have an impact upon the quality of the human environment.

(5) New construction at an existing Federal correctional institution which would significantly affect the physical capacity, when the action is likely to have an impact upon the quality of the human environment.

(6) New construction at an existing Federal correctional institution which would significantly impact upon the quality of the community environment.

9. *Those Actions Which Normally do not Require Either an Environmental Impact Statement or an Environmental Assessment: (Reference: Part 1507.3(b)(2)(ii) and Part 1508.4—CEQ Regulations)* (1) Increase or decrease in population of a facility, above or below its physical capacity.

(2) Construction projects for existing facilities, including but not limited to: additions and remodeling; replacement of building systems and components; maintenance and operations, repairs, and general improvements; when such projects do not significantly alter the program of the facility or significantly impact upon the quality of the environment in the community.

(3) Contracts for halfway houses, community corrections centers, comprehensive sanction centers, community detention centers, or other similar facilities.

10. *Those Actions Which Normally Require Environmental Assessments but not Necessarily Environmental Impact Statements: (Reference: §1507.3(b)(2)(iii)—CEQ Regulations)* (1) Acquisition of surplus facilities for conversion to Federal correctional institution.

(2) Construction of additional facilities at an existing institution when the impact on the local environment is not seen to be significant, but when the alteration of programs or operations may be controversial.

(3) The closing of an institution or significant reduction in population of an institution when the impact on the local environment is not seen to be significant.

11. *Emergency Actions: (Reference: Part 1506.11—CEQ Regulations).* After consultation with the Council on Environmental Quality regarding alternative courses of action, the Bureau of Prisons may take action without observing the provisions of the CEQ Regulations and these Bureau of Prisons Procedures in the following cases:

(1) When the replacement of suddenly unavailable local utilities services, and/or resources, due to circumstances beyond the control of the Bureau of Prisons, is vital to the lives and safety of inmates and staff or protection of U.S. Government property.

(2) When unforeseen circumstances, such as greatly increased judicial commitments, suddenly dictate the activation of facilities to house increased numbers of Federal offenders and detainees significantly above the physical capacity of the combined Bureau of Prisons facilities in order to insure the lives and safety of inmates and staff or protection of U.S. Government property.

(3) When the sudden destruction of or damage to institutions dictates immediate replacement in order to protect the lives and safety of inmates and staff and protection of U.S. Government property.

12. Review.

(1) If a proposed action is not covered by Sections 8 through 10 of this appendix, the Bureau of Prisons will independently determine whether to prepare either an environmental impact statement or an environmental assessment.

(2) When a proposed action that could be classified as a categorical exclusion under Section 9 of this appendix involves extraordinary circumstances that may affect the environment, the Bureau shall conduct appropriate environmental studies to determine if the categorical exclusion classification is proper for that proposed action.

[Order No. 927–81, 46 FR 7953, Jan. 26, 1981, as amended by Order No. 2142–98, 63 FR 11121, Mar. 6, 1998]

APPENDIX B TO PART 61—DRUG ENFORCEMENT ADMINISTRATION PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

1. Applicability.
2. Typical Classes of Action Requiring Similar Treatment Under NEPA.
3. Environmental Information.

1. *Applicability.*

This part applies to all organizational elements of the Drug Enforcement Administration [DEA].

2. *Typical Classes of Action Requiring Similar Treatment Under NEPA.*

(a) Section 1507.3(c)(2) in conjunction with §1508.4 requires agencies to establish three typical classes of action for similar treatment under NEPA. These typical classes of action are set forth below:

(1) Actions normally requiring EIS	(2) Actions normally not requiring environmental assessments or EIS (Categorical exclusions)	(3) Actions normally requiring environmental assessments but not necessarily EIS
None	Scheduling of drugs as controlled substances Establishing quotas for controlled substances. Registration of persons authorized to handle controlled substances. Storage and destruction of controlled substances. Manual eradication of plant species from which controlled substances may be extracted.	Chemical eradication of plant species from which controlled substances may be extracted.

(b) For the principal DEA program requiring environmental review, the following chart identifies the point at which the NEPA process begins, the point at which it ends, and the key agency officials or offices required to consider environmental documents in their decisionmaking.

Principal program	Start of NEPA process	Completion of NEPA process	Key officials or offices required to consider environmental documents
Eradication of plant species from which controlled substances may be extracted.	Prepare an environmental assessment.	Final review of environmental assessment or Environmental Impact Statement.	Office of Science and Technology.

(c) The DEA shall independently determine whether an EIS or an environmental assessment is required where:

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

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

3. *Environmental Information*

Interested persons may contact the Office of Science and Technology for information regarding the DEA compliance with NEPA.

APPENDIX C TO PART 61—IMMIGRATION AND NATURALIZATION SERVICE PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

1. *General*. These procedures are published pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*). Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

2. *Purpose*. These procedures shall apply to efforts associated with the leasing, purchase, design, construction, and maintenance of new and existing INS facilities. All activities concerning the Immigration and Naturalization Service's compliance with NEPA shall be coordinated with Central Office Engineering staff.

3. *Agency Description*. The INS administers and enforces the immigration and nationality laws. This includes determining the admissibility of persons seeking entry into the United States and adjudicating requests for benefits and privileges under the immigration and nationality laws. The enforcement actions of INS involve the prevention of illegal entry of persons into the United States and the investigation and apprehension of aliens already in the country who because of inadmissibility at entry or misconduct committed following entry may be subject to deportation.

In carrying out its statutory enforcement responsibilities. the INS is authorized to arrest and detain aliens believed to be deportable and to effectuate removal from the U.S. of aliens found deportable after hearing.

4. *Designation of Responsible Official*. The Chief Engineer, Facilities and Engineering Branch shall be the liaison official for INS with the Council on Environmental Quality, the Environmental Protection Agency, and the other departments and agencies concerning environmental matters. Duties of the Chief Engineer include:

(a) Insuring compliance with the requirements of NEPA and that the actions with respect to the fulfillment of NEPA are coordinated;

(b) Providing for procedural and substantive training on environmental issues, policy, procedures and clearance requirements;

(c) Providing guidance in the preparation and processing of Environmental Impact Statements; and

(d) Participating in policy formulation, as necessary, in the application of the requirements of the National Environmental Policy Act of 1969.

5. *NEPA and INS Planning.* (a) INS will make available to the public proposals and feasibility studies for facilities under consideration for possible use as INS facilities.

(b) Interested parties identified as such by the local clearinghouse (as established by the Office of Management and Budget Circular No. A–95) will be advised and informed concerning proposed plans which might involve NEPA regulations.

(c) Upon completion of the preliminary groundwork described above, INS will issue an A–95 Letter of Intent to:

(1) File an Environmental Impact Assessment (EIA);

(2) File an Environmental Impact Statement (EIS). (Reference: 1501.2—CEQ Regulations.)

6. *Public Involvement.* Information regarding the policies of INS for implementing the NEPA process can be obtained from: Immigration and Naturalization Service, Facilities and Engineering Branch, 425 I Street NW., Washington, DC 20536. (Reference: Part 1506.6(3)—CEQ Regulations.)

7. *Supplemental Statements.* If it is necessary to prepare a supplement to a draft or a Final Environmental Impact Statement, the supplement shall be introduced into the administrative record pertaining to the project. (Reference: Part 1502.9(c)(3)—CEQ Regulations.)

8. *INS Decisionmaking Procedure.* (a) *Policy*—(1) The Chief Engineer will consider all practical means, including the ''no-action'' alternative and other alternatives to the proposed action, which will enhance, protect, and preserve the quality of the environment, restore environmental quality previously lost, and minimize and mitigate unavoidable adverse effects. He will analyze and study the environment together with engineering, economic, social and other considerations to insure balanced decisionmaking in the overall public interest.

(2) During INS project planning and the related decisonmaking process, environmental effects will be weighed together with the engineering, economic and social and other considerations affecting the public interest.

(b) *Preparation of the environmental impact statements.* (1) Situations where Environmental Impact Statements (EIS) are required are described in section 102(2)(C) of NEPA. EIS constitute an integral of the plan formulation process and serve as a summation and evaluation of the effects, both beneficial and adverse, that each alternative action would have on the environment, and as an explanation and objective evaluation of the plan which is finally recommended.

(2) Should the Chief Engineer determine in assessing the impact of a minor action that an environmental statement is not required, the determination to that effect will be placed in the project file. This negative determination shall be made available to the public as required in §1506.6 of the CEQ regulations and shall include a statement of the facts and the basis for the decision.

(3) When inclusion of certain voluminous data in an EIS would prove to be impractical, INS will summarize the data and retain the original material as a part of its administrative record for the project. This material will be made available to the public in a central place to be designated in the EIS, and upon written request or court order, copies of specified material will be provided. A charge for the reproduction of records may be made in accordance with current Department of Justice guidelines. (Reference: Part 1505 CEQ Regulations.)

9. *Actions Which Normally Do Require Environmental Impact Statements:* (a) Construction of a new INS facility which would have a significant impact upon the environment.

(b) Construction of a new addition to an existing INS facility which would significantly affect the physical capacity and which would have a significant impact upon the environment. (Reference: §1507.3(b)(2)(i)—CEQ Regulations.)

10. *Actions Which Normally Do Not Require Either An Environmental Impact Statement Or An Environmental Assessment:* (a) Construction projects for existing facilities including but not limited to: Remodeling; replacement of building systems and components; maintenance and operations repairs and general improvements when such projects do not significantly alter the initial occupancy and program of the facility or significantly impact upon the environment.

(b) Increase or decrease in population of a facility within its physical capacity. (Reference: Part 1507.3(b)(2)(ii) and Part 1508.4—CEQ Regulations.)

11. *Actions Which Normally Require An Environmental Assessment But Not Necessarily Environmental Impact Statements:*

(a) Construction of a new addition to an existing INS facility which may affect the physical capacity and may have some impact upon the environment.

(b) Closing of an INS facility which may have some impact on the environment. (Reference: §1507.3(b)(2)(iii)—CEQ Regulations.)

APPENDIX D TO PART 61—OFFICE OF JUSTICE ASSISTANCE, RESEARCH, AND STATISTICS PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

1. AUTHORITY

These procedures are issued pursuant to the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321, *et seq.*, Regulations of the Council on Environmental Quality, 40 CFR part 1500, *et seq.*, the Environmental Quality Improvement Act of 1970, as amended, 42 U.S.C. 4371, *et seq.*, Section 309 of the Clean Air Act, as amended, 42 U.S.C. 7609, and Executive Order 11514, ''Protection and Enhancement of Environmental Quality,'' March 5, 1970, as amended by Executive Order 11991, March 24, 1977.

2. PURPOSE

It is the purpose of these procedures to supplement the procedures of the Department of Justice so as to insure compliance with NEPA. These procedures supersede the regulations contained in 28 CFR part 19.

3. AGENCY DESCRIPTION

The Office of Justice Assistance, Research, and Statistics (OJARS) assists State and local units of government in strengthening and improving law enforcement and criminal justice by providing financial assistance and funding research and statistical programs. OJARS will coordinate the activities and provide the staff support for three Department of Justice Federal financial assistance offices: the Law Enforcement Assistance Administration, the National Institute of Justice, and the Bureau of Justice Statistics. Each of the assistance offices has the authority to award grants, contracts and cooperative agreements pursuant to the Justice System Improvement Act of 1979, Public Law 96–157 (December 27, 1979).

4. TYPICAL CLASSES OF ACTION UNDERTAKEN

(a) Actions which normally require an environmental impact statement.

(1) None.

(b) Actions which normally do not require either an environmental impact statement or an environmental assessment.

(1) The bulk of the funded efforts; training programs, court improvement projects, research, and gathering statistical data.

(2) Minor renovation projects or remodeling.

(c) Actions which normally require environmental assessments but not necessarily environmental impact statements.

(1) Renovations which change the basic prior use of a facility or significantly change the size.

(2) New construction.

(3) Research and technology whose anticipated and future application could be expected to have an effect on the environment.

(4) Implementation of programs involving the use of chemicals.

(5) Other actions in which it is determined by the Administrator, Law Enforcement Assistance Administration; the Director, Bureau of Justice Statistics; or the Director, National Institute of Justice, to be necessary and appropriate.

5. AGENCY PROCEDURES

An environmental coordinator shall be designated in the Bureau of Justice Statistics, the Law Enforcement Assistance Administration, and in the National Institute of Justice. Duties of the environmental coordinator shall include:

(a) Insuring that adequate environmental assessments are prepared at the earliest possible time by applicants on all programs or projects that may have a significant impact on the environment. The assessments shall contain documentation from independent parties with expertise in the particular environmental matter when deemed appropriate. The coordinator shall return assessments that are found to be inadequate.

(b) Reviewing the environmental assessments and determining whether an Environmental Impact Statement is required or preparing a ''Finding of No Significant Impact.''

(c) Coordinating the efforts for the preparation of an Environmental Impact Statement consistent with the requirements of 40 CFR part 1502.

(d) Cooperating and coordinating efforts with other Federal agencies.

(e) Providing for agency training on environmental matters.

6. COMPLIANCE WITH OTHER ENVIRONMENTAL STATUTES

To the extent possible an environmental assessment, as well as an environmental impact statement, shall include information necessary to assure compliance with the following:

Fish and Wildlife Coordination Act, 16 U.S.C. 661, *et seq.;* the National Historic Preservation Act of 1966, 16 U.S.C. 470, *et seq.;* Flood Disaster Protection Act of 1973, 42 U.S.C. 400, *et seq.;* Clean Air Act and Federal Water Pollution Control Act, 42 U.S.C. 1857, *et seq.;* 33 U.S.C. 1251, *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300, *et seq.;* Wild and Scenic Rivers Act, 16 U.S.C. 1271, *et seq.;* the Coastal Zone Management Act of 1972, 16 U.S.C. 1451, *et seq.;* and other environmental review laws and executive orders.

7. ACTIONS PLANNED BY PRIVATE APPLICANTS OR OTHER NON-FEDERAL ENTITIES

Where actions are planned by private applicants or other non-Federal entities before Federal involvement:

(a) The Policy and Management Planning Staff, Office of Criminal Justice Programs, LEAA, Room 1158B, 633 Indiana Ave., Washington, DC 20531, Telephone: 202/724–7659, will be available to advise potential applicants of studies or other information foreseeably required for later Federal action;

(b) OJARS will consult early with appropriate State and local agencies and with interested private persons and organizations when its own involvement is reasonably foreseeable;

(c) OJARS will commence its NEPA process at the earliest possible time (Ref. §1501.2(d) CEQ Regulations).

8. SUPPLEMENTING AN EIS

If it is necessary to prepare a supplement to a draft or a final EIS, the supplement shall be introduced into the administrative record pertaining to the project. (Ref. §1502.9(c)(3) CEQ Regulations).

9. AVAILABILITY OF INFORMATION

Information regarding status reports on EIS's and other elements of the NEPA process and policies of the agencies can be obtained from: Policy and Management Planning Staff, Office of Criminal Justice Programs, LEAA, Room 1158B, 633 Indiana Avenue, Washington, DC 20531, Telephone: 202/724–7659.

APPENDIX E TO PART 61—UNITED STATES MARSHALS SERVICE PROCEDURES RELATING TO THE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

1. AUTHORITY

These procedures are issued pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.*, regulations of the Council on Environmental Quality (CEQ), 40 CFR part 1500, *et seq.*, regulations of the Department of Justice (DOJ), 28 CFR part 61, *et seq.*, the Environmental Quality Improvement Act of 1970, as amended, 42 U.S.C. 4371, *et seq.*, Section 309 of the Clean Air Act, as amended, 42 U.S.C. 7609, and Executive Order 11514, ''Protection and Enhancement of Environmental Quality,'' March 5, 1970, as amended by Executive Order 11991, May 24, 1977.

2. PURPOSE

These provisions supplement existing DOJ and CEQ regulations and outline internal USMS procedures to ensure compliance with NEPA. Through these provisions, the USMS shall promote the environment by minimizing the use of natural resources, and by improving planning and decision-making processes to avoid excess pollution and environmental degradation.

The USMS' Environmental Assessments (EAs) and Environmental Impact Statements (EISs) shall be as concise as possible and EISs should be limited to approximately 150 pages in normal circumstances or 300 pages for proposals of unusual scope or complexity. The USMS shall, whenever possible, jointly prepare documents with State and local governments and, when appropriate, avoid duplicative work by adopting, or incorporating by reference, existing USMS and other agencies' analyses and documentation.

In developing an EA or EIS, the USMS shall comply with CEQ regulations, observing that EAs and EISs should (1) Be analytic, rather than encyclopedic, (2) be written in plain language, (3) follow a clear, standard format in accordance with CEQ regulations, (4) follow a scoping process to distinguish the significant issues from the insignificant issues, (5) include a brief summary, (6) emphasize the more useful sections of the document, such as the discussions of alternatives and their environmental consequences, while minimizing the discussion of less useful background information, (7) scrutinize existing NEPA documentation for relevant analyses of programs, policies, or other proposals that guide future action to eliminate repetition, (8) where appropriate, incorporate material by reference, with citations and brief descriptions, to avoid excessive length, and (9) integrate NEPA requirements with other environmental review and consultation requirements mandated by law, Executive Order, Department of Justice policy, or USMS policy. When preparing an EA or EIS, the USMS shall request comments to be as specific as possible.

To ensure compliance with NEPA, the USMS shall make efforts to prevent and reduce delay. The USMS will follow the procedures outlined in the CEQ regulations including, (1) Integrating the NEPA process in the early stages of planning to ensure that decisions reflect environmental values, and to head off potential conflicts and/or delays, (2) emphasizing inter-agency cooperation before the environmental analysis and documentation is prepared, (3) ensuring the swift and fair resolution of any dispute over the designation of the lead agency, (4) employing the scoping process to distinguish the significant issues requiring consideration in the NEPA analysis, (5) setting deadlines for the NEPA process as appropriate for individual proposed actions, (6) initiating the NEPA analysis as early as possible to coincide with the agency's consideration of a proposal by another party, and (7) using accelerated procedures, as described in the CEQ regulations, for legislative proposals.

3. AGENCY DESCRIPTION

The USMS is a Federal law enforcement agency. The agency performs numerous law enforcement activities, including judicial security, warrant investigations, witness protection, custody of individuals arrested by Federal agencies, prisoner transportation, management of seized assets, and other law enforcement missions.

4. TYPICAL CLASSES OF USMS ACTIONS

(a) The general types of proposed actions and projects that the USMS undertakes are as follows:

(1) Operational concepts and programs, including logistics procurement, personnel assignment, real property and facility management, and environmental programs,

(2) Transfers or disposal of equipment or property,

(3) Leases or entitlement for use, including donation or exchange,

(4) Federal contracts, actions, or agreements for detentions services. A detention facility may be a facility (A) owned and/or operated by a contractor, or (B) owned and/or operated by a State or local government, and

(5) General law enforcement activities that are exempt from NEPA analysis under CEQ regulation 40 CFR 1508.18 that involve bringing judicial, administrative, civil, or criminal enforcement actions.

(b) Scope of Analysis.

(1) Some USMS projects, contracts, and agreements may propose a USMS action that is one component of a larger project involving a private action or an action by a local or State government. The USMS' NEPA analysis and document (*e.g.*, the EA or EIS) should address the impact of the specific USMS activity and those portions of the entire project over which the USMS has sufficient control and responsibility to warrant Federal review.

(2) The USMS has control and responsibility for portions of a project beyond the limits of USMS jurisdiction where the environmental consequences of the larger project are essentially products of USMS specific action. This control turns an otherwise nonfederal project into a Federal action.

(3) Sufficient control and responsibility for a facility is a site-specific determination based on the extent to which an entire project will be within the agency's jurisdiction and on other factors that determine the extent of Federal control and responsibility. For example, for construction of a facility, other factors would include, but not be limited to, the length of the contract for construction or use of the facility, the extent of government control and funding in the construction or use of the facility, whether the facility is being built solely for Federal requirements, the extent to which the costs of construction or use will be paid with Federal funds, the extent to which the facility will be used for non-Federal purposes, and whether the project should proceed without USMS action.

(4) Some USMS projects, contracts, and agreements may propose a USMS action that is one component of a larger project involving actions by other Federal agencies. Federal control and responsibility determines whether the total Federal involvement of the USMS and other Federal agencies is sufficient to grant legal control over additional portions of the project. NEPA review would be extended to an entire project when the environmental consequences of the additional portions of the project are essentially products of Federal financing, assistance, direction, regulation, or approval. The USMS shall contact the other Federal agencies involved in the action to determine their respective roles (*i.e.*, whether to be a lead or cooperating agency).

(5) Once the scope of analysis has been defined, the NEPA analysis for an action should include direct, indirect, and cumulative impacts of all Federal proposals within the purview of NEPA. Whenever practicable, the USMS can incorporate by reference, and rely upon, the environmental analyses and reviews of other Federal, tribal, State, and local agencies.

5. ENVIRONMENTAL IMPACT STATEMENT (EIS)

(a) An EIS is a document required of Federal agencies for proposals significantly affecting the quality of the human environment. EIS describes the positive and negative effects of the proposed action and any reasonable alternatives. A Notice of Intent (NOI) will be published in the FEDERAL REGISTER as soon a practicable after a decision to prepare an EIS is made and before the scoping process is initiated. An EIS shall describe how alternatives considered in it, and the decisions based on it, will or will not achieve the goals of NEPA to prevent damage to the environment and promote human health. Additionally, an EIS shall describe how the USMS will comply with relevant environmental laws and policies. The format and content of an EIS are set out at 40 CFR part 1502. The USMS may prepare an EIS without prior preparation of an EA.

(b) A Record of Decision (ROD) will be prepared at the time a decision is made regarding a proposal that is analyzed and documented in an EIS. The ROD will state the decision, discuss the alternatives considered, and state whether all alternative practicable means to avoid or minimize environmental harms have been adopted, or if not, why they were not adopted. Where applicable, the ROD will also describe and adopt a monitoring and enforcement program for any mitigation.

(c) Actions that normally require preparing an EIS include:

(1) USMS actions that are likely to have a significant environmental impact on the human environment, or

(2) Construction of a major facility on a previously undisturbed site.

6. ENVIRONMENTAL ASSESSMENT (EA)

(a) An EA is a concise public document that is prepared for actions that do not normally require preparation of an EIS, but do not meet the requirements of a Categorical Exclusion (CE). An EA serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a Finding of No Significant Impact (FONSI), aid in complying with NEPA when an EIS is not necessary, and facilitate preparation of an EIS when one is required. The EA results in either a determination that a proposed action may have a significant impact on the human environment, and therefore, requires further study in an EIS, or the issuance of a FONSI. The contents of an EA are described at 40 CFR 1508.9.

(b) A FONSI will include the EA or a summary of the EA. The FONSI will be prepared and made available to the public through means described in paragraph 9 of this Appendix, including publication in local newspapers and in the FEDERAL REGISTER for matters of national concern. The FONSI will be available for review and comment for 30 days prior to signature and the initiation of the action, unless special circumstances warrant reducing the public comment period to 15 days. Implementing the action can proceed after consideration of public comments and the decision-maker signs the FONSI.

(c) Actions that normally require preparation of an EA include:

(1) Proposals to conduct an expansion of an existing facility,

(2) Awarding a contract or entering into an agreement for new construction at a previously developed site, or an expansion of an existing facility, or

(3) Projects or other proposed actions that are activities described in categorical exclusions, but do not qualify for a categorical exclusion because they involve extraordinary circumstances.

7. CATEGORICAL EXCLUSIONS (CE)

(a) CEs are certain categories of activities determined not to have individual or cumulative significant effects on the human environment, and absent extraordinary circumstances, are excluded from preparation of an EA, or EIS, under NEPA. Using CEs for such activities reduces unnecessary paperwork and delay. Such activities are not excluded from compliance with other applicable local, State, or Federal environmental laws.

(b) Extraordinary circumstances must be considered before relying upon a CE to determine whether the proposed action may have a significant environmental effect. Any of the following circumstances preclude the use of a CE:

(1) The project may have effects on the quality of the environment that are likely to be highly controversial;

(2) The scope or size of the project is greater than normally experienced for a particular action described in subsection (c) below;

(3) There is potential for degradation, even if slight, of already-existing poor environmental conditions;

(4) A degrading influence, activity, or effect is initiated in an area not already significantly modified from its natural condition;

(5) There is a potential for adverse effects on areas of critical environmental concern or other protected resources including, but not limited to, threatened or endangered species or their habitats, significant archaeological materials, prime or unique agricultural lands, wetlands, coastal zones, sole source aquifers, 100-year-old flood plains, places listed, proposed, or eligible for listing on the National Register of Historic Places, natural landmarks listed, proposed, or eligible for listing on the National Registry of Natural Landmarks, Wilderness Areas or wilderness study areas, or Wild and Scenic River areas; or

(6) Possible significant direct, indirect, or cumulative environmental impacts exist.

(c) Actions that normally qualify for a CE include:

(1) Minor renovations or repairs within an existing facility, unless the project would adversely affect a structure listed in the National Register of Historic Places or is eligible for listing in the register,

(2) Facility expansion, or construction of a limited addition to an existing structure, or facility, and new construction or reconstruction of a small facility on a previously developed site. The exclusion applies only if:

(i) The structure and proposed use comply with local planning and zoning and any applicable State or Federal requirements; and

(ii) The site and the scale of construction are consistent with those of existing adjacent or nearby buildings.

(3) Security upgrades of existing facility grounds and perimeter fences, not including such upgrades as adding lethal fences or major increases in height or lighting of a perimeter fence in a residential area or other area sensitive to the visual impacts resulting from height or lighting changes,

(4) Federal contracts or agreements for detentions services, including actions such as procuring guards for detention services or

leasing bed space (which may include operational costs) from an existing facility operated by a State or a local government or a private correctional corporation,

(5) General administrative activities that involve a limited commitment of resources, such as personnel actions or policy related to personnel issues, organizational changes, procurement of office supplies and systems, and commitment or reallocation of funds for previously reviewed and approved programs or activities,

(6) Change in contractor or Federal operators at an existing contractor-operated correctional or detention facility,

(7) Transferring, leasing, maintaining, acquiring, or disposing of interests in land where there is no change in the current scope and intensity of land use, including management and disposal of seized assets pursuant to Federal laws,

(8) Transferring, leasing, maintaining, acquiring, or disposing of equipment, personal property, or vessels that do not increase the current scope and intensity of USMS activities, including management and disposal of seized assets pursuant to Federal forfeiture laws,

(9) Routine procurement of goods and services to support operations and infrastructure that are conducted in accordance with Department of Justice energy efficiency policies and applicable Executive Orders, such as E.O. 13148,

(10) Routine transportation of prisoners or detainees between facilities and flying activities in compliance with Federal Aviation Administration Regulations, only applicable where the activity is in accordance with normal flight patterns and elevations for the facility and where the flight patterns/elevations have been addressed in an installation master plan or other planning document that has been the subject of a NEPA review, and

(11) Lease extensions, renewals, or succeeding leases where there is no change in the intensity of the facility's use.

8. RESPONSIBILITIES

(a) The Director of the USMS, in conjunction with the Senior Environmental Advisor, possesses authority over the USMS NEPA compliance.

(b) The Senior Environmental Advisor's duties include:

(1) Advising the Director or other USMS decisionmakers on USMS NEPA procedures and compliance,

(2) Supervising the Environmental Coordinator,

(3) Acting as NEPA liaison to CEQ for the Director and other USMS decisionmakers on important decisions outside the authority of the Environmental Coordinator,

(4) Consulting with CEQ regarding alternative NEPA procedures requiring the preparation of an EIS in emergency situations, and

(5) Consulting with CEQ and officials of other Federal agencies to settle agency disputes over the NEPA process, including designating lead and cooperating agencies.

(c) The USMS Environmental Coordinator will act as the agency's NEPA contact, and will be responsible for:

(1) Ensuring that adequate EAs and EISs are prepared at the earliest possible time, ensuring that decisions are made in accordance with the general policies and purposes of NEPA, verifying information provided by applicants, evaluating environmental effects; assuring that, when appropriate, EAs and EISs contain documentation from independent parties with expertise in particular environmental matters, taking responsibility for the scope and content of EAs prepared by applicants, and returning EAs and EISs that are found to be inadequate,

(2) Ensuring that the USMS conducts an independent evaluation, and where appropriate, prepares a FONSI, a NOI, and/or a ROD,

(3) Coordinating the efforts for preparation of an EIS consistent with the requirements of the CEQ regulations at 40 CFR part 1500–1508,

(4) Cooperating and coordinating planning efforts with other Federal agencies, and

(5) Providing for agency training on environmental matters.

(d) The agency shall ensure compliance with NEPA for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement. The USMS, through the Environmental Coordinator shall:

(1) Identify types of actions initiated by private parties, State and local agencies and other non-Federal entities for which agency involvement is reasonably foreseeable,

(2) Provide (A) full public notice that agency advice on such matters is available, (B) detailed written publications containing that advice, and (C) early consultation in cases where agency involvement is reasonably foreseeable, and

(3) Consult early with appropriate Indian tribes, State and local agencies, and interested private persons and organizations on those projects in which the USMS involvement is reasonably foreseeable.

(e) To assist in ensuring that all Federal agencies' decisions are made in accordance with the general policies and purposes of NEPA, the USMS, through the Environmental Coordinator shall:

(1) Comment within the specified time period on other Federal agencies' EISs, where the USMS has jurisdiction by law regarding a project, and make such comments as specific as possible with regard to adequacy of the document, the merits of the alternatives, or both,

(2) Where the USMS is the lead agency on a project, coordinate with other Federal agencies and supervise the development of and retain responsibility for the EIS,

(3) Where the USMS is a cooperating agency on a project, cooperate with any other Federal agency acting as lead agency through information sharing and staff support,

(4) Independently evaluate, provide guidance on, and take responsibility for scope and contents of NEPA analyses performed by contractors or applicants used by USMS. When the USMS is the lead agency, USMS will choose the contractor to prepare an EIS, require the contractor to execute a disclosure statement stating that the contractor has no financial or other interest in the outcome of the project, and participate in the preparation of the EIS by providing guidance and an independent evaluation prior to approval,

(5) Consider alternatives to a proposed action where it involves unresolved conflicts concerning available resources. The USMS shall make available to the public, prior to a final decision, any NEPA documents and additional decision documents, or parts thereof, addressing alternatives,

(6) Conduct appropriate NEPA procedures for the proposed action as early as possible for consideration by the appropriate decision-maker, and ensure that all relevant environmental documents, comments, and responses accompany the proposal through the agency review process for the final decision,

(7) Include, as part of the administrative record, relevant environmental documents, comments, and responses in formal rulemaking or adjudicatory proceedings, and

(8) Where emergency circumstances require taking action that will result in a significant environmental impact, contact CEQ via the USMS Senior Environmental Advisor for consultation on alternative arrangements, which will be limited to those necessary to control the immediate impacts of the emergency.

9. Public Involvement

(a) In accordance with NEPA and CEQ regulations and to ensure public involvement in decision-making regarding environmental impact on local communities, the USMS shall also engage in the following procedures during its NEPA process:

(1) When preparing an EA, EIS, or FONSI, USMS personnel in charge of preparing the document will invite comment from affected Federal, tribal, State, local agencies, and other interested persons, as early as the scoping process;

(2) The USMS will disseminate information to potentially interested or affected parties, such as local communities and Indian tribes, through such means as news releases to various local media, announcements to local citizens groups, public hearings, and posted signs near the affected area;

(3) The USMS will mail notice to those individuals or groups who have requested one on a specific action or similar actions;

(4) For matters of national concern, the USMS will publish notification in the Federal Register, and will send notification by mail to national organizations reasonably expected to be interested;

(5) If a decision is made to develop an EIS, the USMS will publish a NOI in the Federal Register as soon as possible;

(6) The personnel in charge of preparing the NEPA analysis and documentation will invite public comment and maintain two-way communication channels throughout the NEPA process, provide explanations of where interested parties can obtain information on status reports of the NEPA process and other relevant documents, and keep all public affairs officers informed;

(7) The USMS will establish a Web site to keep the public informed; and

(8) During the NEPA process, responsible personnel will consult with local government and tribal officials, leaders of citizen groups, and members of identifiable population segments within the potentially affected environment, such as farmers and ranchers, homeowners, small business owners, minority and disadvantaged communities, and tribal members.

10. Scoping

Prior to starting the NEPA analysis, USMS personnel responsible for preparing either an EA or EIS, shall engage in an early scoping process to identify the significant issues to be examined in depth, and to identify and eliminate from detailed study those issues which are not significant or which have been adequately addressed by prior environmental review. The scoping process should identify any other environmental analyses being conducted relevant to the proposed action, address timing and set time limits with respect to the NEPA process, set page limits, designate respective responsibilities among the lead and cooperating agencies, identify any other environmental review and consultation requirements to allow for integration with the NEPA analysis, and hold an early scoping meeting that may be integrated with other initial planning meetings.

11. Mitigation and Monitoring

USMS personnel, who are responsible for preparing NEPA analyses and documents, will consider mitigation measures to avoid or minimize environmental harm. EAs and EISs will consider reasonable mitigation measures relevant to the proposed action

and alternatives. Paragraph 5(b) of this Appendix describes the requirements for documenting mitigation measures in a ROD.

12. SUPPLEMENTING AN EA OR EIS

When substantial changes are made to a proposed action that is relevant to environmental concerns, a supplement will be prepared for an EA or a draft or a final EIS. A supplement will also be prepared when significant new circumstances arise or new relevant information surfaces concerning and bearing upon the proposed action or its impacts. Any necessary supplement shall be processed in the same way as an original EA or EIS, with the exception that new scoping is not required. Any supplement shall be added to the formal administrative record, if such record exists.

13. COMPLIANCE WITH OTHER ENVIRONMENTAL STATUTES

To the extent practicable, a NEPA document shall include information necessary to assure compliance with all applicable environmental statutes.

[71 FR 71048, Dec. 8, 2006]

PART 63—FLOODPLAIN MANAGEMENT AND WETLAND PROTECTION PROCEDURES

Sec.
63.1 Purpose.
63.2 Policy.
63.3 References.
63.4 Definitions.
63.5 Responsibilities.
63.6 Procedures.
63.7 Determination of location.
63.8 Implementation.
63.9 Exception.

AUTHORITY: 5 U.S.C. 301, Executive Order No. 11988 of May 24, 1977, and Executive Order No. 11990 of May 24, 1977.

SOURCE: Order No. 902–80, 45 FR 50565, July 30, 1980, unless otherwise noted.

§ 63.1 Purpose.

These guidelines set forth procedures to be followed by the Department of Justice to implement Executive Order 11988 (Floodplain Management) and Executive Order 11990 (Protection of Wetlands). (The Orders.)

§ 63.2 Policy.

(a) It is the Department of Justice's policy to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and floodplains and to avoid direct or indirect support of new construction in floodplains and wetlands whenever there is a practicable alternative. The Department will provide leadership and take affirmative action to carry out the Orders.

(b) It is the Department of Justice's intention to integrate these procedures with those required under statutes protecting the environment, such as the National Environmental Policy Act (NEPA). Whenever possible, the procedures detailed herein should be coordinated with other required documents, such as the environmental impact statement (EIS) or environmental assessment required under NEPA, so that unnecessary paperwork can be eliminated.

§ 63.3 References.

(a) Unified National Program for Floodplain Management, Water Resources Council, which is incorporated in these guidelines.

(b) Water Resources Council Floodplain Management Guidelines, Water Resources Council, 1978 (43 FR 6030).

(c) National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001 *et seq.*) and NFIP criteria (44 CFR part 59 *et seq.*).

(d) Flood Disaster Protection Act of 1973 (Pub. L. 93–234, 87 Stat. 975).

(e) National Environmental Policy Act of 1969, as amended (43 U.S.C. 4321 *et seq.*) (NEPA).

§ 63.4 Definitions.

Throughout this part, the following basic definitions shall apply:

(a) *Action*—any Federal activity including:

(1) Acquiring, managing and disposing of Federal lands and facilities;

(2) Providing federally undertaken, financed, or assisted construction and improvements; and

(3) Conducting Federal activities and program affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

(b) *Agency*—an executive department, a government corporation, or an independent establishment and includes the military departments.

(c) *Base flood*—that flood which has a one percent chance of occurrence in any given year (also known as a *100-year flood*). (This term is used in the National Flood Insurance Program (NFIP) to indicate the minimum level of flooding to be used by a community in its floodplain management regulations.)

(d) *Base floodplain*—the 100-year floodplain (one percent chance floodplain). Also see definition of floodplain.

(e) *Channel*—a natural or artificial watercourse of perceptible extent, with a definite bed and banks to confine and conduct continuously or periodically flowing water.

(f) *Critical action*—any activity for which even a slight chance of flooding would be too great.

(g) *Facility*—any man-made or man-placed item other than a structure.

(h) *Flood or flooding*—a general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the usual and rapid accumulation or runoff of surface waters from any source.

(i) *Flood fringe*—that portion of the floodplain outside of the regulatory floodway (often referred to as ''floodway fringe'').

(j) *Floodplain*—the lowland and relatively flat areas adjoining inland and coastal waters including floodprone areas of offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year. The base floodplain shall be used to designate the 100-year floodplain (one percent chance floodplain). The critical action floodplain is defined as the 500-year floodplain (0.2 percent chance floodplain).

(k) *Floodproofing*—the modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out or to reduce effects of water entry.

(l) *Minimize*—to reduce to the smallest possible amount or degree.

(m) *One percent chance flood*—the flood having one chance in 100 of being exceeded in any one-year period (a large flood). The likelihood of exceeding this magnitude increases in a time period longer than one year. For example, there are two chances in three of a larger flood exceeding the one percent chance flood in a 100-year period.

(n) *Practicable*—capable of being done within existing constraints. The test of what is practicable depends upon the situation and includes consideration of the pertinent factors, such as environment, cost or technology.

(o) *Preserve*—to prevent modification to the natural floodplain environment or to maintain it as closely as possible to its natural state.

(p) *Regulatory floodway*—the area regulated by Federal, State or local requirements; the channel of a river or other watercourse and the adjacent land areas that must be reserved in an open manner, i.e., unconfined or unobstructed either horizontally or vertically, to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than a designated amount (not to exceed one foot as set by the NFIP).

(q) *Restore*—to re-establish a setting or environment in which the natural functions of the floodplain can again operate.

(r) *Structures*—walled or roofed buildings, including mobile homes and gas or liquid storage tanks that are primarily above ground (as set by the NFIP).

(s) *Wetlands*—''those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds'' (as defined in Executive Order 11990 (Protection of Wetlands)).

§ 63.5 Responsibilities.

(a) The Assistant Attorney General, Land and Natural Resources Division,

(1) Has overall responsibility for ensuring that the Department's responsibilities for complying with the Orders are carried out,

(2) Will ensure that the Water Resources Council, the Council on Environmental Quality, and the Federal Insurance Agency (FIA) are kept informed of the Department's execution of the Orders, as necessary, and

(3) Will determine, and revise on a continuing basis, which components of the Department should take further steps, such as the promulgation of program specific procedures, to comply with the Orders. Considerations for making this selection are whether a component:

(i) Acquires, manages, and disposes of federal lands and facilities;

(ii) Provides federally undertaken, financed or assisted construction and improvements;

(iii) Conducts federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities;

(iv) Reviews and approves component procedures for complying with the Orders;

(b) The heads of offices, boards, bureaus and divisions,

(1) Are responsible for preparing program specific guidelines or procedures, where necessary, to comply with the Orders and for updating these procedures, as required,

(2) Will maintain general supervision over any new construction planning within the office, board, bureau, or division to see that the policy considerations and procedural requirements contained herein are followed in the planning process,

(3) Will furnish, with all requests for new authorizations or appropriations for proposals to be located in floodplains or wetlands, a statement that the proposal is in accord with the Orders,

(4) Will provide information to applicants for licenses, permits, loans or grants in areas in which floodplain and wetland requirements may have to be met,

(5) Will provide conspicuous notice of past flood damage and potential flood hazard on structures under the component's control and used by the general public, and

(6) If responsible for granting a lease, an easement, or right-of-way, or for disposing of federal property in a floodplain or wetland to nonfederal public or private parties, will, unless otherwise directed by law.

(i) Reference uses in the conveyance that are restricted under identified Federal, State or local floodplain regulations; and

(ii) Attach other appropriate restrictions; or

(iii) Refuse to convey.

§63.6 Procedures.

Prior to taking any action, as defined in §63.4(a) of this part, an office, board, bureau or division shall:

(a) Determine whether the proposed action is located in a wetland and/or the 100-year floodplain (or the 500-year floodplain for critical actions) and determine whether the proposed action has the potential to affect or be affected by a floodplain or wetland. The determination concerning location in a floodplain or wetland shall be performed in accordance with §63.7 of this part. For actions which are in both a floodplain and wetland, the wetland should be considered as one of the natural and beneficial values of the floodplain.

(b) Notify the public at the earliest possible time of the intent to carry out the action affecting or affected by a floodplain or wetland, and involve the broadest affected and interested public in the decisionmaking process. At a minimum, all notices shall be published in the newspaper serving the project area that has the widest circulation and shall be distributed through the A–95 review process if subject to that process. In addition, notices of actions shall be published in the FEDERAL REGISTER, if so required by the Assistant Attorney General, Land and Natural Resources Division, or by law. For certain actions, notice may entail other audiences and means of distribution. All actions shall be reviewed according to the following criteria to determine the appropriate audience for and means of notification beyond those required above: Scale of action, potential for controversy, degree of public need for the action, number of affected persons, and anticipated potential impacts. Each notice shall include the following: A statement of

the purpose of and a description of the proposed action, a map of the general area clearly delineating the action's locale and its relationship to its environs, a statement that it has been determined to be located in or that it affects a floodplain or wetland, a statement of intent to avoid the floodplain or wetland where practicable, and to mitigate impacts where avoidance cannot be achieved, and identification of the responsible official for receipt of comments and for further information.

(c) Identify and evaluate practicable alternatives to locating in a floodplain or wetland (including alternative sites outside the floodplain or wetland; alternative actions which serve essentially the same purpose as the proposed action, but which have less potential to adversely affect the floodplain or wetland; and the ''no action'' option). The following factors shall be analyzed in determining the practicability of alternatives: Natural environment (topography, habitat, hazards, etc.); social concerns (aesthetics, historical and cultural values, land use patterns, etc.); economic aspects (costs of space, construction, services, and relocation); and legal constraints (deeds, leases, etc.). The component shall not locate the proposed action in the base floodplain (500-year floodplain for critical actions) or in a wetland if a practicable alternative exists outside the base floodplain (500-year floodplain for critical actions) or wetland.

(d) Identify the full range of potential direct or indirect adverse impacts associated with the occupancy and modification of floodplains and wetlands and the direct and indirect support of floodplain and wetland development that could result from the proposed action. Flood hazard-related factors shall be analyzed for all actions. These include, for example, the following: Depth, velocity and rate of rise of flood water; duration of flooding, high hazard areas (riverine and coastal); available warning and evacuation time and routes; effects of special problems, e.g., levees and other protection works, erosion, subsidence, sink holes, ice jams, combinations of flood sources, etc. Natural values-related factors, shall be analyzed for all actions. These include, for example, the following: water resource values (natural moderation of floods, water quality maintenance, and ground water recharge); living resource values (fish and wildlife and biological productivity); cultural resource values (archeological and historic sites, and open space for recreation and green belts); and agricultural, aquacultural and forestry resource values. Factors relevant to a proposed action's effects on the survival and quality of wetlands, shall be analyzed for all actions. These include, for example, the following: Public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards, sediment and erosion; maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

(e) Where avoidance of floodplains or wetlands cannot be achieved, design or modify its actions so as to minimize harm to or within the floodplain, minimize the destruction, loss or degradation of wetlands, restore and preserve natural and beneficial floodplain values, and preserve and enhance natural and beneficial wetland values. The component shall minimize potential harm to lives and property from the 100-year flood (500-year flood for critical actions), minimize potential adverse impacts the action may have on others, and minimize potential adverse impacts the action may have on floodplain and wetland values, Minimization of harm to property shall be performed in accord with the standards and criteria set out at 44 CFR part 59 *et seq.*, (formerly 24 CFR part 1901 *et seq.*), substituting the 500-year standard for critical actions and, where practicable, elevating structures on open works—walls, columns, piers, piles, etc.—rather than on fill. Minimization of harm to lives shall include, but not be limited to, the provision for warning and evacuation procedures for all projects and shall emphasize adequacy of warning time and access and egress routes.

(f) Re-evaluate the proposed action to determine, first, if it is still practicable in light of its exposure to flood hazards and its potential to disrupt floodplain and wetland values and, second, if alternatives rejected at paragraph (c) of this section are practicable, in light of the information gained in paragraphs (d) and (e) of this section. Unless required by law, the proposed action shall not be located in a floodplain or wetland unless the importance of the floodplain or wetland site clearly outweighs the requirements of E.O. 11988 and E.O. 11990 to avoid direct or indirect support of floodplain and wetland development; reduce the risk of flood loss; minimize the impact of floods on human safety, health and welfare; restore and preserve floodplain values; and minimize the destruction, loss or degradation of wetlands. In addition, where there are no practicable alternative sites and actions, and where the potential adverse effects of using the floodplain or wetland site cannot be minimized, no action shall be taken, unless required by law.

(g) Prepare, and circulate a finding and public explanation of any final decision that there is no practicable alternative to locating an action in, or affecting a floodplain or wetland. The same audience and means of distribution used in paragraph (b) of this section, shall be used to circulate this finding. The finding shall include the following: the reasons why the action is proposed to be located in a floodplain or wetland, a statement indicating whether the action conforms to applicable State or local floodplain management standards, a list of alternatives considered, and a map of the general area clearly delineating the project locale and its relationship to its environs. A brief comment period on the finding shall be provided wherever practicable prior to taking any action.

(h) Review the implementation and post implementation phase of the proposed action to ensure that the provisions of paragraph (e) of this section, are fully implemented. This responsibility shall be fully integrated into existing review, audit, field oversight and other monitoring processes, and additional procedures shall be prepared where existing procedures may be inadequate to ensure that the Orders' goals are met.

§63.7 Determination of location.

(a) In order to determine whether an action is located on or affects a *floodplain*, the component shall:

(1) Consult the FIA Flood Insurance Rate Map (FIRM) and the Flood Insurance Study (FIS); or

(2) If a detailed map (FIRM) is not available, consult an FIA Flood Hazard Boundary Map (FHBM); or

(3) If data on flood elevations, floodways, or coastal high hazard areas are needed, or if none of the maps delineates the flood hazard boundaries in the vicinity of the proposed site, seek detailed information and assistance as necessary and appropriate from the Department of Agriculture's Soil Conservation Service, the Army Corps of Engineers, the National Oceanic and Atmospheric Administration, the Federal Emergency Management Agency's Regional Offices/Division of Insurance and Hazard Mitigation, the Department of the Interior's Geological Survey, Bureau of Land Management, and Bureau of Reclamation, the Tennessee Valley Authority, the Delaware River Basin Commission, the Susquehanna River Basin Commission, individual states and/or land administering agencies; or

(4) If the sources listed above do not have or know of the information necessary to comply with the Orders' requirements, seek, as permitted by law, the services of a federal or other engineer experienced in this work to

(i) Locate the site and the limits of the coastal high hazard area, floodway and of the applicable floodplain, and

(ii) Determine base flood elevations.

(b) In the absence of a finding to the contrary, the component shall assume that action involving a facility or structure that has been flooded in a major disaster or emergency is in the applicable floodplain for the site of the proposed action.

(c) In order to determine whether an action is located on or affects a *wetland*, the component shall:

(1) Consult with the United States Fish and Wildlife Service (FWS) for information concerning the location, scale and type of wetlands within the area which could be affected by the proposed action; or

(2) If the FWS does not have adequate information upon which to base the determination, consult wetland inventories maintained by the Army Corps of Engineers, the Environmental Protection Agency, various states, communities and others; or

(3) If state or other sources do not have adequate information upon which to base the determination, insure that an on-site analysis is performed by a representative of the FWS or other qualified individual for wetlands characteristics based on the performance definition of what constitutes a wetland.

§ 63.8 Implementation.

Agencies and divisions within the Department of Justice shall amend existing regulations and procedures, as appropriate, to incorporate the policy and procedures set forth in these guidelines. Such amendments will be made within 6 months of final publication of these guidelines.

§ 63.9 Exception.

Nothing in these guidelines shall apply to assistance provided for emergency work essential to save lives and protect property and public health and safety performed pursuant to sections 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

PART 64—DESIGNATION OF OFFICERS AND EMPLOYEES OF THE UNITED STATES FOR COVERAGE UNDER SECTION 1114 OF TITLE 18 OF THE U.S. CODE

Sec.

64.1 Purpose.
64.2 Designated officers and employees.

AUTHORITY: 18 U.S.C. 1114, 28 U.S.C. 509, 5 U.S.C. 301.

§ 64.1 Purpose.

This regulation designates categories of federal officers and employees in addition to those already designated by the statute, who will be within the protective coverage of 18 U.S.C. 1114, which prohibits the killing or attempted killing of such designated officers and employees. The categories of federal officers and employees covered by section 1114 are also protected, while they are engaged in or on account of the performance of their official duties, from a conspiracy to kill, 18 U.S.C. 1117; kidnapping, 18 U.S.C. 1201(a)(5); forcible assault, intimidation, or interference, 18 U.S.C. 111; and threat of assault, kidnap or murder with intent to impede, intimidate, or retaliate against such officer or employee, 18 U.S.C. 115(a)(1)(B). In addition, the immediate family members of such officers and employees are protected against assault, kidnap, murder, attempt to kidnap or murder, and threat to assault, kidnap, or murder with intent to impede, intimidate, or retaliate against such officer or employee, 18 U.S.C. 115(a)(1)(A). The protective coverage has been extended to those federal officers and employees whose jobs involve inspection, investigative or law enforcement responsibilities, or whose work involves a substantial degree of physical danger from the public that may not be adequately addressed by available state or local law enforcement resources.

[Order No. 1874–94, 59 FR 25816, May 18, 1994]

§ 64.2 Designated officers and employees.

The following categories of federal officers and employees are designated for coverage under section 1114 of title 18 of the U.S. Code:

(a) Judges and special trial judges of the U.S. Tax Court;

(b) Commissioners and employees of the U.S. Parole Commission;

(c) Attorneys of the Department of Justice;

(d) Resettlement specialists and conciliators of the Community Relations Service of the Department of Justice;

(e) Officers and employees of the Bureau of Prisons;

(f) Criminal investigators employed by a U.S. Attorney's Office; and employees of a U.S. Attorney's Office assigned to perform debt collection functions;

(g) U.S. Trustees and Assistant U.S. Trustees; bankruptcy analysts and other officers and employees of the U.S. Trustee System who have contact with creditors and debtors, perform audit functions, or perform other investigative or enforcement functions in administering the bankruptcy laws;

(h) Attorneys and employees assigned to perform or to assist in performing investigative, inspection or audit functions of the Office of Inspector General of an ''establishment'' or a ''designated Federal entity'' as those terms are defined by section 11 and 8E, respectively, of the Inspector General Act of 1978, as amended, 5 U.S.C. app. 3 section 11 and 8E, and of the Offices of the Inspector General of the U.S. Government Printing Office, the Merit Systems Protection Board, and the Selective Service System.

(i) Employees of the Department of Agriculture at the State, district or county level assigned to perform loan making, loan servicing or loan collecting function;

(j) Officers and employees of the Bureau of Alcohol, Tobacco and Firearms assigned to perform or to assist in performing investigative, inspection or law enforcement functions;

(k) Federal air marshals of the Federal Aviation Administration;

(l) Employees of the Bureau of Census employed in field work conducting censuses and surveys;

(m) Employees and members of the U.S. military services and employees of the Department of Defense who:

(1) Are military police officers,

(2) Have been assigned to guard and protect property of the United States, or persons, under the administration and control of a U.S. military service or the Department of Defense, or

(3) Have otherwise been assigned to perform investigative, correction or other law enforcement functions;

(n) The Director, Deputy Director for Supply Reduction, Deputy Director for Demand Reduction, Associate Director for State and Local Affairs, and Chief of Staff of the Office of National Drug Control Policy;

(o) Officers and employees of the Department of Energy authorized to carry firearms in the performance of investigative, inspection, protective or law enforcement functions;

(p) Officers and employees of the U.S. Environmental Protection Agency assigned to perform or to assist in performing investigative, inspection or law enforcement functions;

(q) Biologists and technicians of the U.S. Fish and Wildlife Service who are participating in sea lamprey control operations;

(r) Uniformed and nonuniformed special police of the General Services Administration; and officers and employees of the General Services Administration assigned to inspect property in the process of its acquisition by or on behalf of the U.S. Government;

(s) Special Agents of the Security Office of the U.S. Information Agency;

(t) Employees of the regional, subregional and resident offices of the National Labor Relations Board assigned to perform investigative and hearing functions or to supervise the performance of such functions; and auditors and Security Specialists of the Division of Administration of the National Labor Relations Board;

(u) Officers and employees of the U.S. Nuclear Regulatory Commission:

(1) Assigned to perform or to assist in performing investigative, inspection or law enforcement functions or

(2) Engaged in activities related to the review of license applications and license amendments;

(v) Investigators employed by the U.S. Office of Personnel Management;

(w) Attorneys, accountants, investigators and other employees of the U.S. Securities and Exchange Commission assigned to perform or to assist in performing investigative, inspection or other law enforcement functions;

(x) Employees of the Social Security Administration assigned to Administration field offices, hearing offices and field assessment offices;

(y) Officers and employees of the Tennessee Valley Authority authorized by the Tennessee Valley Authority Board of Directors to carry firearms in the performance of investigative, inspection, protective or law enforcement functions;

(z) Officers and employees of the Federal Aviation Administration, the Federal Highway Administration, the National Highway Traffic Safety Administration, the Research and Special Programs Administration and the Saint Lawrence Seaway Development Corporation of the U.S. Department of Transportation who are assigned to perform or assist in performing investigative, inspection or law enforcement functions;

(aa) Federal administrative law judges appointed pursuant to 5 U.S.C. 3105; and

(bb) Employees of the Office of Workers' Compensation Programs of the Department of Labor who adjudicate and administer claims under the Federal Employees' Compensation Act, the Longshore and Harbor Workers' Compensation Act and its extension, or the Black Lung Benefits Act.

[Order No. 1874–94, 59 FR 25816, May 18, 1994]

PART 65—EMERGENCY FEDERAL LAW ENFORCEMENT ASSISTANCE

Subpart A—Eligible Applicants

Sec.
65.1 General.
65.2 State Government.

Subpart B—Allocation of Funds and Other Assistance

65.10 Fund availability.
65.11 Limitations on fund and other assistance use.
65.12 Other assistance.

Subpart C—Purpose of Emergency Federal Law Enforcement Assistance

65.20 General.
65.21 Purpose of assistance.
65.22 Exclusions.

Subpart D—Application for Assistance

65.30 General.
65.31 Application content.

Subpart E—Submission and Review of Applications

65.40 General.
65.41 Review of State applications.

Subpart F—Additional Requirements

65.50 General.
65.51 Recordkeeping.
65.52 Civil rights.
65.53 Confidentiality of information.

Subpart G—Repayment of Funds

65.60 Repayment of funds.

Subpart H—Definitions

65.70 Definitions.

Subpart I—Immigration Emergency Fund

65.80 General.
65.81 General definitions.
65.82 Procedure for requesting a Presidential determination of an immigration emergency.
65.83 Assistance required by the Attorney General.
65.84 Procedures for the Attorney General when seeking State or local assistance.
65.85 Procedures for State or local governments applying for funding.

AUTHORITY: The Comprehensive Crime Control Act of 1984, Title II, Chap. VI, Div. I, Subdiv. B, Emergency Federal Law Enforcement Assistance, Pub. L. 98–473, 98 Stat. 1837, Oct. 12, 1984 (42 U.S.C. 10501 *et seq.*); 8 U.S.C. 1101 note; Sec. 610, Pub. L. 102–140, 105 Stat. 832.

SOURCE: 50 FR 51340, Dec. 16, 1985, unless otherwise noted.

Subpart A—Eligible Applicants

§ 65.1 General.

This subject describes who may apply for emergency Federal law enforcement assistance under the Justice Assistance Act of 1984.

§ 65.2 State Government.

In the event that a law enforcement emergency exists throughout a state or part of a state, a state (on behalf of itself or a local unit of government) may submit an application to the Attorney General, for emergency Federal law enforcement assistance. This application is to be submitted by the chief executive officer of the state, in writing, on Standard Form 424, and in accordance with these regulations.

Subpart B—Allocation of Funds and Other Assistance

§65.10 Fund availability.

For the previous fiscal year (FY '85), $800,000 was appropriated for emergency Federal law enforcement assistance for the entire country. In FY '86, $1.5 million has been requested. The FY '86 request has not yet been appropriated and is not currently available. The form and extent of assistance provided will be determined by the nature and scope of the emergency presented; but, in any event, no fund award may exceed the amount ultimately appropriated.

§65.11 Limitations on fund and other assistance use.

(a) *Land acquisition*. No funds shall be used for the purpose of land acquisition.

(b) *Non-supplantation*. No funds shall be used to supplant state or local funds that would otherwise be made available for such purposes.

(c) *Civil justice*. No funds or other assistance shall be used with respect to civil justice matters except to the extent that such civil justice matters bear directly and substantially upon criminal justice matters or are inextricably intertwined with criminal justice matters.

(d) *Federal law enforcement personnel*. Nothing in the enabling legislation authorizes the use of Federal law enforcement personnel to investigate violations of criminal law other than violations with respect to which investigation is authorized by other provisions of law. (section 609O(a), of the Act).

(e) *Direction, supervision, control*. Nothing in the enabling legislation shall be construed to authorize the Attorney General or the Federal law enforcement community to exercise any direction, supervision, or control over any police force or other criminal justice agency of an applicant for Federal law enforcement assistance. (section 609O(b), of the Act).

§65.12 Other assistance.

In accordance with the purposes and limitations of this subdivision, members of the Federal law enforcement community may provide needed assistance in the form of equipment, training, intelligence information, and personnel. The application may include requests for assistance of this nature.

Subpart C—Purpose of Emergency Federal Law Enforcement Assistance

§65.20 General.

The purpose of the Act is to assist state and/or local units of government which are experiencing law enforcement emergencies to respond to those emergencies through the provision of Federal law enforcement assistance. The authority and responsibility for implementation of this section is vested in the Attorney General of the United States.

§65.21 Purpose of assistance.

The purpose of emergency Federal law enforcement assistance is to provide necessary assistance to (and through) a state government to provide an adequate response to an uncommon situation which requires law enforcement, which is or threatens to become of serious or epidemic proportions, and with respect to which state and local resources are inadequate to protect the lives and property of citizens, or to enforce the criminal law.

§65.22 Exclusions.

Excluded from the situations for which this assistance is intended are:

(a) The perceived need for planning or other activities related to crowd control for general public safety projects; and,

(b) A situation requiring the enforcement of laws associated with scheduled public events, including political conventions and sports events.

Subpart D—Application for Assistance

§65.30 General.

The Act requires that applications be submitted in writing, by the chief executive officer of a state, on Standard Form 424, in accordance with these regulations.

§ 65.31 Application content.

The Act identifies six factors which the Attorney General will consider in approving or disapproving an application, and includes administrative requirements to ensure appropriate use of Federal assistance. Therefore, each application must be in writing and must include the following:

(a) *Problem.* A description of the nature and extent of the law enforcement emergency, including the specific identification and description of the political and geographical subdivision(s) wherein the emergency exists;

(b) *Cause.* A description of the situation or extraordinary circumstances which produced such emergency;

(c) *Resources.* A description of the state and local criminal justice resources available to address the emergency, and a discussion of why and to what degree they are insufficient;

(d) *Assistance requested.* A specific statement of the funds, equipment, training, intelligence information, or personnel requested, and a description of their intended use;

(e) *Other assistance.* The identification of any other assistance the state or appropriate unit of government has received, or could receive, under any provision of the Act; and,

(f) *Other requirements.* Assurance of compliance with other requirements of the Act, detailed in other parts of these regulations, including: Nonsupplantation; nondiscrimination; confidentiality of information; prohibition against land acquisition; recordkeeping and audit; limitation on civil justice matters.

Subpart E—Submission and Review of Applications

§ 65.40 General.

This subpart describes the process and criteria for the Attorney General's review and approval or disapproval of state applications. The original application, on Standard Form 424, signed by the chief executive officer of the state should be submitted directly to the Attorney General, U.S. Department of Justice, Washington, DC 20503. One copy of the application should be sent to the Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, Washington, DC 20531.

[67 FR 7270, Feb. 19, 2002]

§ 65.41 Review of State applications.

(a) *Review criteria.* The Act provides the basis for review and approval or disapproval of state applications. Federal law enforcement assistance may be provided if such assistance is necessary to provide an adequate response to a law enforcement emergency. In determining whether to approve or disapprove an application for assistance under this section, the Attorney General shall consider:

(1) The nature and extent of such emergency throughout a state or in any part of a state;

(2) The situation or extraordinary circumstances which produced such emergency;

(3) The availability of state and local criminal justice resources to resolve the problem;

(4) The cost associated with the increased Federal presence;

(5) The need to avoid unnecessary Federal involvement and intervention in matters primarily of state and local concern; and,

(6) Any assistance which the state or other appropriate unit of government has received, or could receive, under any provision of title I of the Omnibus Crime Control and Safe Streets Act of 1968.

(b) *Review process.* (1) The Attorney General shall consult with the Assistant Attorney General, Office of Justice Programs, and the Director, Bureau of Justice Assistance, on requests for grant assistance.

(2) All requests for assistance of the Federal law enforcement community (e.g., equipment, training, information, or personnel) shall be reviewed by the Attorney General in consultation with appropriate members of the Federal law enforcement community, including the United States Attorney(s) in the affected District(s). Such requests will be subject to statutory restrictions, including section 609O on Federal agency activities.

(3) The Attorney General will approve or disapprove each application, submitted in accordance with these

regulations, no later than ten (10) days after receipt.

Subpart F—Additional Requirements

§ 65.50 General.

This subpart sets forth additional requirements under the Justice Assistance Act. Applicants for assistance must assure compliance with each of these requirements.

§ 65.51 Recordkeeping.

(a) The state must assure that it adheres to the recordkeeping requirements enumerated in OMB Circulars, Number A–102 and Number A–128. This requirement extends to participating units of local government, in that they are viewed as the state's subgrantees.

(b) The Attorney General and the Comptroller of the United States shall have access, for the purpose of audit and examination, to any books, documents, and records of recipients of Federal law enforcement assistance provided under this subdivision which, in the opinion of the Attorney General or the Comptroller General, are related to the receipt or use of such assistance.

§ 65.52 Civil rights.

The Act provides that ''no person in any state shall on the grounds of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title.'' Recipients of funds under the Act are also subject to the provisions of title VI of the Civil Rights Act of 1964; section 504 of the Rehabilitation Act of 1973, as amended; title IX of the Education Amendments of 1972; the Age Discrimination Act of 1975; and the Department of Justice Non-Discrimination Regulations 28 CFR part 42, subparts C, D, E, and G.

§ 65.53 Confidentiality of information.

Section 812 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (as amended and implemented by 28 CFR part 20) shall apply with respect to information, including criminal history information and criminal intelligence systems operating with the support of Federal law enforcement assistance.

Subpart G—Repayment of Funds

§ 65.60 Repayment of funds.

(a) If Federal law enforcement assistance provided under this subdivision is used by the recipient of such assistance in violation of these regulations, or for any purpose other than the purpose for which it is provided, then such recipient shall promptly repay to the Attorney General an amount equal to the value of such assistance.

(b) The Attorney General may bring a civil action in an appropriate United States District Court to recover any amount authorized to be repaid under law.

Subpart H—Definitions

§ 65.70 Definitions.

(a) *Law enforcement emergency*. The term *law enforcement emergency* is defined by the Act as an uncommon situation which requires law enforcement, which is or threatens to become of serious or epidemic proportions, and with respect to which state and local resources are inadequate to protect the lives and property of citizens, or to enforce the criminal law. The Act specifically *excludes* the following situations when defining ''law enforcement emergency'':

(1) The perceived need for planning or other activities related to crowd control for general public safety projects; and,

(2) A situation requiring the enforcement of laws associated with scheduled public events, including political convention and sports events.

(b) *Federal law enforcement assistance*. The term *Federal law enforcement assistance* is defined by the Act to mean funds, equipment, training, intelligence information, and personnel.

(c) *Federal law enforcement community*. The term *Federal law enforcement community* is defined by the Act as the heads of the following departments or agencies:

(1) Federal Bureau of Investigation;

(2) Drug Enforcement Administration;

(3) Criminal Division of the Department of Justice;

(4) Internal Revenue Service;

(5) Customs Service;

(6) Department of Homeland Security;

(7) U.S. Marshals Service;

(8) National Park Service;

(9) U.S. Postal Service;

(10) Secret Service;

(11) U.S. Coast Guard;

(12) Bureau of Alcohol, Tobacco, Firearms, and Explosives;

(13) National Security Division of the Department of Justice; and

(14) Other Federal agencies with specific statutory authority to investigate violations of Federal criminal law.

(d) *State*. The term *state* is defined by the Act as any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.

[50 FR 51340, Dec. 16, 1985, as amended by Order No. 2865–2007, 72 FR 10069, Mar. 7, 2007]

Subpart I—Immigration Emergency Fund

SOURCE: Order No. 1892–94, 59 FR 30522, June 14, 1994, unless otherwise noted.

§ 65.80 General.

The regulations of this subpart set forth procedures for implementing section 404(b) of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1101 note, by providing for Presidential determinations of the existence of an immigration emergency, and for payments from the Immigration Emergency Fund or other funding available for such purposes, to State and local governments for assistance provided in meeting an immigration emergency. The regulations of this subpart also establish procedures by which the Attorney General may draw upon the Immigration Emergency Fund, without a Presidential determination that an immigration emergency exists, to provide funding to State and local governments for assistance provided as required by the Attorney General in certain specified circumstances.

[Order No. 1892–94, 59 FR 30522, June 14, 1994, as amended by Order No. 2601–2002, 67 FR 48359, July 24, 2002]

§ 65.81 General definitions.

As used in this part:

Assistance means any actions taken by a State or local government directly relating to aiding the Attorney General in the administration of the immigration laws of the United States and in meeting urgent demands arising from the presence of aliens in the State or local government's jurisdiction, when such actions are taken to assist in meeting an immigration emergency or under any of the circumstances specified in section 404(b)(2)(A) of the INA. Assistance may include, but need not be limited to, the provision of large shelter facilities for the housing and screening of aliens, and, in connection with these activities, the provision of such basic necessities as food, water clothing, and health care.

Immigration emergency means an actual or imminent influx of aliens which either is of such magnitude or exhibits such other characteristics that effective administration of the immigration laws of the United States is beyond the existing capabilities of the Immigration and Naturalization Service (''INS'') in the affected area or areas. Characteristics of an influx of aliens, other than magnitude, which may be considered in determining whether an immigration emergency exists include: the likelihood of continued growth in the magnitude of the influx; an apparent connection between the influx and increases in criminal activity; the actual or imminent imposition of unusual and overwhelming demands on law enforcement agencies; and other similar characteristics.

Other circumstances means a situation that, as determined by the Attorney General, requires the resources of a State or local government to ensure the proper administration of the immigration laws of the United States or to meet urgent demands arising from the presence of aliens in a State or local government's jurisdiction.

§ 65.82 Procedure for requesting a Presidential determination of an immigration emergency.

(a) The President may make a determination concerning the existence of an immigration emergency after review of a request from either the Attorney General of the United States or the chief executive of a State or local government. Such a request shall include a description of the facts believed to constitute an immigration emergency and the types of assistance needed to meet that emergency. Except when a request is made by the Attorney General, the requestor shall file the original application with the Office of the President and shall file copies of the application with the Attorney General and with the Commissioner of INS.

(b) If the President determines that an immigration emergency exists, the President shall certify that fact to the Judiciary Committees of the House of Representatives and of the Senate.

§ 65.83 Assistance required by the Attorney General.

The Attorney General may request assistance from a State or local government in the administration of the immigration laws of the United States or in meeting urgent demands where the need for assistance arises because of the presence of aliens in that State or local jurisdiction, and may provide funding to a State or local government relating to such assistance from the Immigration Emergency Fund or other funding available for such purposes, without a Presidential determination of an immigration emergency, in any of the following circumstances:

(a) An INS district director certifies to the Commissioner of INS, who shall, in turn, certify to the Attorney General, that the number of asylum applications filed in that INS district during the relevant calendar quarter exceeds by at least 1,000 the number of such applications filed in that district during the preceding calendar quarter. For purposes of this paragraph, providing parole at a point of entry in a district shall be deemed to constitute an application for asylum in the district.

(b) The Attorney General determines that there exist circumstances involving the administration of the immigration laws of the United States that endanger the lives, property, safety, or welfare of the residents of a State or locality.

(c) The Attorney General determines that there exist any other circumstances, as defined in § 65.81 of this subpart, such that it is appropriate to seek assistance from a State or local government in administering the immigration laws of the United States or in meeting urgent demands arising from the presence of aliens in a State or local jurisdiction.

(d)(1) If, in making a determination pursuant to paragraph (b) or (c) of this section, the Attorney General also determines that the situation involves an actual or imminent mass influx of aliens arriving off the coast or near a land border of the United States and presents urgent circumstances requiring an immediate Federal response, the Attorney General will formally declare that a mass influx of aliens is imminent or occurring. The determination that a mass influx of aliens is imminent or occurring will be based on the factors set forth in the definitions contained in § 65.81 of this subpart. The Attorney General will determine and define the time period that encompasses a mass influx of aliens by declaring when such an event begins and when it ends. The Attorney General will initially define the geographic boundaries where the mass influx of aliens is imminent or occurring.

(2) Based on evolving developments in the scope of the event, the Commissioner of the INS may, as necessary, amend and redefine the geographic area defined by the Attorney General to expand or decrease the boundaries. This authority shall not be further delegated.

(3) The Attorney General, pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), may authorize any State or local law enforcement officer to perform or exercise any of the powers, privileges, or duties conferred or imposed by the Act, or regulations issued thereunder, upon officers or employees of the Service. Such authorization must be with the consent of the head of the department, agency, or establishment under whose jurisdiction the officer is serving.

(4) Authorization for State or local law enforcement officers to exercise Federal immigration law enforcement authority for transporting or guarding aliens in custody may be exercised as necessary beyond the defined geographic boundaries where the mass influx of aliens is imminent or occurring. Otherwise, Federal immigration law enforcement authority to be exercised by State or local law enforcement officers will be authorized only within the defined geographic boundaries where the mass influx of aliens is imminent or occurring.

(5) State or local law enforcement officers will be authorized to exercise Federal immigration law enforcement authority only during the time period prescribed by the Attorney General in conjunction with the initiation and termination of a declared mass influx of aliens.

[Order No. 1892–94, 59 FR 30522, June 14, 1994, as amended by Order No. 2601–2002, 67 FR 48360, July 24, 2002]

§ 65.84 Procedures for the Attorney General when seeking State or local assistance.

(a)(1) When the Attorney General determines to seek assistance from a State or local government under § 65.83 of this subpart, or when the President has determined that an immigration emergency exists, the Attorney General shall negotiate the terms and conditions of that assistance with the State or local government. The Attorney General shall then execute a written agreement with appropriate State or local officials, which sets forth the terms and conditions of the assistance, including funding. Such written agreements can be reimbursement agreements, grants, or cooperative agreements.

(2) The Commissioner may execute written contingency agreements regarding assistance under § 65.83(d) of this subpart in advance of the Attorney General's determination pursuant to that section. However, such advance agreements shall not authorize State or local law enforcement officers to perform any functions of Service officers or employees under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), until the Attorney General has made the necessary determinations and authorizes such performance. Any such advance agreements shall contain precise activation procedures.

(3) Written agreements regarding assistance under § 65.83(d) of this subpart, including contingency agreements, shall include the following minimum requirements:

(i) A statement of the powers, privileges, or duties that State or local law enforcement officers will be authorized to exercise and the conditions under which they may be exercised;

(ii) A statement of the types of assistance by State or local law enforcement officers for which the Attorney General shall be responsible for reimbursing the relevant parties in accordance with the procedures set forth in paragraph (b) of this section;

(iii) A statement that the relevant State or local law enforcement officers are not authorized to exercise any functions of Service officers or employees under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), until the Attorney General has made a determination pursuant to that section and authorizes such performance;

(iv) A requirement that State or local law enforcement officers cannot exercise any authorized functions of Service officers or employees under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), until they have successfully completed and been certified in a Service-prescribed course of instruction in basic immigration law, immigration law enforcement fundamentals and procedures, civil rights law, and sensitivity and cultural awareness issues;

(v) A description of the duration of the written agreement, and of the authority the Attorney General will confer upon State or local law enforcement officers pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), along with a provision for amending, terminating, or extending the duration of the written agreement, or for terminating or amending the authority to be conferred pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8);

(vi) A requirement that the exercise of any Service officer functions by State or local law enforcement officers pursuant to section 103(a)(8) of the

INA, 8 U.S.C. 1103(a)(8), be at the direction of the Service;

(vii) A requirement that any State or local law enforcement officer performing Service officer or employee functions pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), must adhere to the policies and standards set forth during the training, including applicable immigration law enforcement standards and procedures, civil rights law, and sensitivity and cultural awareness issues;

(viii) A statement that the authority to perform Service officer or employee functions pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), does not abrogate or abridge constitutional or civil rights protections;

(ix) A requirement that a complaint reporting and resolution procedure for allegations of misconduct or wrongdoing by State or local officers designated, or activities undertaken, pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), be in place;

(x) A requirement that a mechanism to record and monitor complaints regarding the immigration enforcement activities of State or local law enforcement officers authorized to enforce immigration laws be in place;

(xi) A listing by position (title and name when available) of the Service officers authorized to provide operational direction to State or local law enforcement officers assisting in a Federal response pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8);

(xii) A requirement that a State or local law enforcement agency maintain records of operational expenditures incurred as a result of supporting the Federal response to a mass influx of aliens;

(xiii) Provisions concerning State or local law enforcement officer use of Federal property or facilities, if any;

(xiv) A requirement that any department, agency, or establishment whose State or local law enforcement officer is performing Service officer or employee functions shall cooperate fully in any Federal investigation related to allegations of misconduct or wrongdoing in conjunction with such functions, or to the written agreement; and

(xv) A procedure by which the appropriate law enforcement agency, department, or establishment will be notified that the Attorney General has made a determination under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), to authorize State or local law enforcement officers to exercise Federal immigration enforcement authority under the provisions of the respective agreements.

(4) The Attorney General may abbreviate or waive any of the training required pursuant to a written agreement regarding assistance under § 65.83(d) of this chapter, including contingency agreements, in the event that the number of State or local law enforcement officers available to respond in an expeditious manner to urgent and quickly developing events during a declared mass influx of aliens is insufficient to protect public safety, public health, or national security. Such officers still would be required to adhere to applicable policies and standards of the Immigration and Naturalization Service. The decision to abbreviate or waive these training requirements is at the sole discretion of the Attorney General.

(b) A reimbursement agreement shall contain the procedures under which the State or local government is to obtain reimbursement for its assistance. A reimbursement agreement shall include the title of the official to whom claims are to be submitted, the intervals at which claims are to be submitted, a description of the supporting documentation to be submitted, and any limitations on the total amount of reimbursement that will be provided. Grants and cooperative agreements shall be made and administered in accordance with the uniform procedures in part 66 of this title.

(c) In exigent circumstances, the Attorney General may agree to provide funding to a State or local government without a written agreement. A reimbursement agreement, grant, or cooperative agreement conforming to the specifications in this section shall be reduced to writing as soon as practicable.

[Order No. 1892–94, 59 FR 30522, June 14, 1994, as amended by Order No. 2601–2002, 67 FR 48360, July 24, 2002; Order No. 2659–2003, 68 FR 8822, Feb. 26, 2003]

§ 65.85 Procedures for State or local governments applying for funding.

(a) In the event that the chief executive of a State or local government determines that any of the circumstances set forth in § 65.83 of this subpart exists, he or she may pursue the procedures in this section to submit to the Attorney General an application for a reimbursement agreement, grant, or cooperative agreement as described in § 65.84 of this subpart.

(b) The Department strongly encourages chief executives of States and local governments, if possible, to consult informally with the Attorney General and the Commissioner of INS prior to submitting a formal application. This informal consultation is intended to facilitate discussion of the nature of the assistance to be provided by the State or local government, the requirements of the Attorney General, if any, for such assistance, the costs associated with such assistance, and the Department's preliminary views on the appropriateness of the proposed funding.

(c) The chief executive of a State or local government shall submit an application in writing to the Attorney General, and shall file a copy with the Commissioner of INS. The application shall set forth in detail the following information:

(1) The name of the jurisdiction requesting reimbursement;

(2) All facts supporting the application;

(3) The nature of the assistance which the State or local government has provided or will provide, as required by the Attorney General, for which funding is requested;

(4) The dollar amount of the funding sought;

(5) A justification for the amount of funding being sought;

(6) The expected duration of the conditions requiring State or local assistance;

(7) Information about whether funding is sought for past costs or for future costs;

(8) The name, address, and telephone number of a contact person from the requesting jurisdiction.

(d) If the Attorney General determines that the assistance for which funding is sought under paragraph (c) of this section is appropriate under the standards of this subpart, the Attorney General may enter into a reimbursement or cooperative agreement or may make a grant in the same manner as if the assistance had been requested by the Attorney General as described under § 65.84 of this subpart.

(e) The Attorney General will consider all applications from State or local governments until the Attorney General has obligated funding available for such purposes as determined by the Attorney General. The Attorney General will make a decision with respect to any application submitted under this section that contains the information described in paragraph (c) of this section within 15 calendar days of such application.

(f) In exigent circumstances, the Attorney General may waive the requirements of this section concerning the form, contents, and order of consideration of applications, including the requirement in paragraph (c) of this section that applications be submitted in writing.

[Order No. 1892–94, 59 FR 30522, June 14, 1994, as amended by Order No. 2601–2002, 67 FR 48361, July 24, 2002]

PART 66—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Subpart A—General

Sec.
66.1 Purpose and scope of this part.
66.2 Scope of subpart.
66.3 Definitions.
66.4 Applicability.
66.5 Effect on other issuances.
66.6 Additions and exceptions.

Subpart B—Pre-Award Requirements

66.10 Forms for applying for grants.
66.11 State plans.
66.12 Special grant or subgrant conditions for ''high-risk'' grantees.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

66.20 Standards for financial management systems.

66.21 Payment.
66.22 Allowable costs.
66.23 Period of availability of funds.
66.24 Matching or cost sharing.
66.25 Program income.
66.26 Non-Federal audit.

CHANGES, PROPERTY, AND SUBAWARDS

66.30 Changes.
66.31 Real property.
66.32 Equipment.
66.33 Supplies.
66.34 Copyrights.
66.35 Subawards to debarred and suspended parties.
66.36 Procurement.
66.37 Subgrants.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

66.40 Monitoring and reporting program performance.
66.41 Financial reporting.
66.42 Retention and access requirements for records.
66.43 Enforcement.
66.44 Termination for convenience.

Subpart D—After-The-Grant Requirements

66.50 Closeout.
66.51 Later disallowances and adjustments.
66.52 Collection of amounts due.

Subpart E—Entitlement [Reserved]

AUTHORITY: 18 U.S.C. 4042, 4351–4353; 42 U.S.C. 3711 *et seq.*, 5601 *et seq.*, 10601 *et seq.*

SOURCE: Order No. 1252–88, 53 FR 8068 and 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§66.1 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.

§66.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§66.3 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 U.S. 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.

§ 66.4 Applicability.

(a) *General.* Subparts A–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 § 66.6, 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 § 66.4(a)(3) through (8) are subject to subpart E.

§ 66.5 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 §66.6.

§66.6 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

§66.10 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.

§66.11 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.

§ 66.12 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

§ 66.20 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.

§ 66.21 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 § 66.43(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.

§ 66.22 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.	OBM Circular A–122.
Educational institutions.	OMB Circular A–21.
For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular.	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 66.23 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.

§ 66.24 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 § 66.25, 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 § 66.25(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 § 66.22, 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.

§ 66.25 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 § 66.34.)

(f) *Property*. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 66.31 and 66.32.

(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.

§ 66.26 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, § 66.36 shall be followed.

[Order No. 1252–88, 53 FR 8068, 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45942, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

§ 66.30 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 § 66.22) 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 §66.36 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 §66.22) 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.

§66.31 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.

§ 66.32 Equipment.

(a) The Omnibus Crime Control and Safe Streets Act of 1968, as amended, Public Law 90–351, section 808, requires that the title to all equipment and supplies purchased with section 403 or 1302 (block or formula funds) shall vest in the criminal justice agency or nonprofit organization that purchased the property if it certifies to the State office described in section 408 or 1308 that it will use the property for criminal justice purposes. If such certification is not made, title to the property shall vest in the State office, which shall seek to have the property used for criminal justice purposes elsewhere in the State prior to using it or disposing of it in any other manner.

(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 § 66.25(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 66.32(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.

[53 FR 8068, 8087, Mar. 11, 1988, as amended by Order No. 1252–88, 53 FR 8068, Mar. 11, 1988; 53 FR 12099, Apr. 12, 1988]

§ 66.33 Supplies.

(a) The Omnibus Crime Control and Safe Streets Act of 1968, as amended, Public Law 90–351, section 808, requires that the title to all equipment and supplies purchased with section 403 or 1302 (block or formula funds) shall vest in the criminal justice agency or nonprofit organization that purchased the property if it certifies to the State office described in section 408 or 1308 that it will use the property for criminal justice purposes. If such certification is not made, title to the property shall vest in the State office, which shall seek to have the property used for criminal justice purposes elsewhere in the State prior to using it or disposing of it in any other manner.

(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.

[53 FR 8068, 8087, Mar. 11, 1988, as amended by Order No. 1252–88, 53 FR 8069, Mar. 11, 1988]

§ 66.34 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.

§ 66.35 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.''

§ 66.36 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 § 66.36. 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 § 66.36(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 § 66.22). 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).

[Order No. 1252–88, 53 FR 8068, 8067, Mar. 11, 1988, as amended by Order No. 1961–95, 60 FR 19639, 19642, Apr. 19, 1995]

§ 66.37 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 § 66.42 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 66.10;

(2) Section 66.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 66.21; and

(4) Section 66.50.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§ 66.40 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.

§ 66.41 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 § 66.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through 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 § 66.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs*—(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 66.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 66.41(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 § 66.41(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 § 66.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 66.41(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 § 66.41(b)(2).

§ 66.42 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 § 66.36(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.

§ 66.43 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 §66.35).

§66.44 Termination for convenience.

Except as provided in §66.43 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 §66.43 or paragraph (a) of this section.

Subpart D—After-The-Grant Requirements

§66.50 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 §66.32(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.

§66.51 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 § 66.42;

(d) Property management requirements in §§ 66.31 and 66.32; and

(e) Audit requirements in § 66.26.

§ 66.52 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 administrative 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—Entitlement [Reserved]

PART 68—RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE ADMINISTRATIVE LAW JUDGES IN CASES INVOLVING ALLEGATIONS OF UNLAWFUL EMPLOYMENT OF ALIENS, UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES, AND DOCUMENT FRAUD

Sec.

68.1 Scope of rules.
68.2 Definitions.
68.3 Service of complaint, notice of hearing, written orders, and decisions.
68.4 Complaints regarding unfair immigration-related employment practices.
68.5 Notice of date, time, and place of hearing.
68.6 Service and filing of documents.
68.7 Form of pleadings.
68.8 Time computations.
68.9 Responsive pleadings—answer.
68.10 Motion to dismiss for failure to state a claim upon which relief can be granted.
68.11 Motions and requests.
68.12 Prehearing statements.
68.13 Conferences.
68.14 Consent findings or dismissal.
68.15 Intervenor in unfair immigration-related employment cases.
68.16 Consolidation of hearings.
68.17 Amicus curiae.
68.18 Discovery—general provisions.
68.19 Written interrogatories to parties.
68.20 Production of documents, things, and inspection of land.
68.21 Admissions.
68.22 Depositions.
68.23 Motion to compel response to discovery; sanctions.
68.24 Use of depositions at hearings.
68.25 Subpoenas.
68.26 Designation of Administrative Law Judge.
68.27 Continuances.
68.28 Authority of Administrative Law Judge.
68.29 Unavailability of Administrative Law Judge.
68.30 Disqualification.
68.31 Separation of functions.
68.32 Expedition.
68.33 Participation of parties and representation.
68.34 Legal assistance.
68.35 Standards of conduct.
68.36 *Ex parte* communications.
68.37 Waiver of right to appear and failure to participate or to appear.
68.38 Motion for summary decision.
68.39 Formal hearings.
68.40 Evidence.
68.41 Official notice.
68.42 In camera and protective orders.
68.43 Exhibits.
68.44 Records in other proceedings.
68.45 Designation of parts of documents.
68.46 Authenticity.
68.47 Stipulations.
68.48 Record of hearings.
68.49 Closing the record.
68.50 Receipt of documents after hearing.
68.51 Restricted access.
68.52 Final order of the Administrative Law Judge.
68.53 Review of an interlocutory order of an Administrative Law Judge in cases arising under section 274A or 274C.
68.54 Administrative review of a final order of an Administrative Law Judge in cases arising under section 274A or 274C.
68.55 Referral of cases arising under sections 274A or 274C to the Attorney General for review.
68.56 Judicial review of a final agency order in cases arising under section 274A or 274C.

68.57 Judicial review of the final agency order of an Administrative Law Judge in cases arising under section 274B.
68.58 Filing of the official record.

AUTHORITY: 5 U.S.C. 301, 554; 8 U.S.C. 1103, 1324a, 1324b, and 1324c; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321.

§68.1 Scope of rules.

The rules of practice in this part are applicable to adjudicatory proceedings before Administrative Law Judges of the Executive Office for Immigration Review, United States Department of Justice, with regard to unlawful employment cases under section 274A of the INA, unfair immigration-related employment practice cases under section 274B of the INA, and document fraud cases under section 274C of the INA. Such proceedings shall be conducted expeditiously, and the parties shall make every effort at each stage of a proceeding to avoid delay. To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling. The Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.

[Order No. 2203–99, 64 FR 7073, Feb. 12, 1999]

§68.2 Definitions.

For purposes of this part:

Adjudicatory proceeding means an administrative judicial-type proceeding, before the Office of the Chief Administrative Hearing Officer, commencing with the filing of a complaint and leading to the formulation of a final agency order;

Administrative Law Judge means an Administrative Law Judge appointed pursuant to the provisions of 5 U.S.C. 3105;

Administrative Procedure Act means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559;

Certification means a formal assertion in writing of the specified fact(s), signed by the person(s) making the certification and thereby attesting to the truth of the content of the writing, except as follows:

(1) *Certified court reporter* means a person who has been deemed by an appropriate body to be qualified to transcribe or record testimony during formal legal proceedings,

(2) *Certified mail* means a form of mail similar to registered mail by which sender may require return receipt from addressee, and

(3) *Certified copy* means a copy of a document or record, signed by the officer to whose custody the original is entrusted, thereby attesting that the copy is a true copy;

Certify means the act of executing a certification;

Chief Administrative Hearing Officer or an official who has been designated to act as the Chief Administrative Hearing Officer, is the official who, under the Director, Executive Office for Immigration Review, generally administers the Administrative Law Judge program, exercises administrative supervision over Administrative Law Judges and others assigned to the Office of the Chief Administrative Hearing Officer, and who, in accordance with sections 274A(e)(7) and 274C(d)(4) of the INA, exercises discretionary authority to review the decisions and orders of Administrative Law Judges adjudicated under sections 274A and 274C of the INA;

Complainant means the Immigration and Naturalization Service in cases arising under sections 274A and 274C of the INA. In cases arising under section 274B of the INA, ''complainant'' means the Special Counsel (as defined in this section), and also includes the person or entity who has filed a charge with the Special Counsel, or, in private actions, an individual or private organization;

Complaint means the formal document initiating an adjudicatory proceeding;

Consent order means any written document containing a specified remedy or other relief agreed to by all parties and entered as an order by the Administrative Law Judge;

Debt Collection Improvement Act means the Debt Collection Improvement Act of 1996, Pub. L. 104–134, Title III, 110 Stat. 1321 (1996);

Decision means any findings of fact or conclusions of law by an Administrative Law Judge or the Chief Administrative Hearing Officer;

Document fraud cases means cases involving allegations under section 274C of the INA.

Entry means the date the Administrative Law Judge, Chief Administrative Hearing Officer, or the Attorney General signs the order; *Entry* as used in section 274B(i)(1) of the INA means the date the Administrative Law Judge signs the order;

Final agency order is an Administrative Law Judge's final order, in cases arising under sections 274A and 274C of the INA, that has not been modified, vacated, or remanded by the Chief Administrative Hearing Officer pursuant to § 68.54, referred to the Attorney General for review pursuant to § 68.55(a), or accepted by the Attorney General for review pursuant to § 68.55(b)(3). Alternatively, if the Chief Administrative Hearing Officer modifies or vacates the final order pursuant to § 68.54, the modification or vacation becomes the final agency order if it has not been referred to the Attorney General for review pursuant to § 68.55(a) or accepted by the Attorney General for review pursuant to § 68.55(b)(3). If the Attorney General enters an order that modifies or vacates either the Chief Administrative Hearing Officer's or the Administrative Law Judge's order, the Attorney General's order is the final agency order. In cases arising under section 274B of the INA, an Administrative Law Judge's final order is also the final agency order;

Final order is an order by an Administrative Law Judge that disposes of a particular proceeding or a distinct portion of a proceeding, thereby concluding the jurisdiction of the Administrative Law Judge over that proceeding or portion thereof;

Hearing means that part of a proceeding that involves the submission of evidence, either by oral presentation or written submission;

Interlocutory order means an order that decides some point or matter, but is not a final order or a final decision of the whole controversy; it decides some intervening matter pertaining to the cause of action and requires further steps to be taken in order for the Administrative Law Judge to adjudicate the cause on the full merits;

INA means the Immigration and Nationality Act of 1952, ch. 477, Pub. L. 82–414, 66 Stat. 163, as amended;

Issued as used in section 274A(e)(8) and section 274C(d)(5) of the INA means the date on which an Administrative Law Judge's final order, the Chief Administrative Hearing Officer's order, or an adoption, modification, or vacation by the Attorney General becomes a final agency order;

Motion means an oral or written request, made by a person or a party, for some action by an Administrative Law Judge;

Order means a determination or mandate by an Administrative Law Judge, the Chief Administrative Hearing Officer, or the Attorney General that resolves some point or directs some action in the proceeding;

Ordinary mail refers to the mail service provided by the United States Postal Service using only standard postage fees, exclusive of special systems, electronic transfers, and other means that have the effect of providing expedited service;

Party includes all persons or entities named or admitted as a complainant, respondent, or intervenor in a proceeding; or any person filing a charge with the Special Counsel under section 274B of the INA, resulting in the filing of a complaint, concerning an unfair immigration-related employment practice;

Pleading means the complaint, motions, the answer thereto, any supplement or amendment thereto, and reply that may be permitted to any answer, supplement, or amendment submitted to the Administrative Law Judge or, when no judge is assigned, the Chief Administrative Hearing Officer;

Prohibition of indemnity bond cases means cases involving allegations under section 274A(g) of the INA;

Respondent means a party to an adjudicatory proceeding, other than a complainant, against whom findings may be made or who may be required to provide relief or take remedial action;

Special Counsel means the Special Counsel for Unfair Immigration-Related Employment Practices appointed

by the President under section 274B of the INA, or his or her designee or in the case of a vacancy in the Office of Special Counsel, the officer or employee designated by the President who shall act as Special Counsel during such vacancy;

Unfair immigration-related employment practice cases means cases involving allegations under section 274B of the INA;

Unlawful employment cases means cases involving allegations under section 274A of the INA, other than prohibition of indemnity bond cases.

[Order No. 2203–99, 64 FR 7073, Feb. 12, 1999, as amended by Order No. 2255–99, 64 FR 49660, Sept. 14, 1999]

§68.3 Service of complaint, notice of hearing, written orders, and decisions.

(a) Service of complaint, notice of hearing, written orders, and decisions shall be made by the Office of the Chief Administrative Hearing Officer or the Administrative Law Judge to whom the case is assigned either:

(1) By delivering a copy to the individual party, partner of a party, officer of a corporate party, registered agent for service of process of a corporate party, or attorney or representative of record of a party;

(2) By leaving a copy at the principal office, place of business, or residence of a party; or

(3) By mailing to the last known address of such individual, partner, officer, or attorney or representative of record.

(b) Service of complaint and notice of hearing is complete upon receipt by addressee.

(c) In circumstances where the Office of the Chief Administrative Hearing Officer or the Administrative Law Judge encounters difficulty with perfecting service, the Chief Administrative Hearing Officer or the Administrative Law Judge may direct that a party execute service of process.

[Order No. 2203–99, 64 FR 7074, Feb. 12, 1999]

§68.4 Complaints regarding unfair immigration-related employment practices.

(a) *Generally*. An individual must file a charge with the Special Counsel within one hundred and eighty (180) days of the date of the alleged unfair immigration-related employment practice.

(b) The Special Counsel shall, within one hundred and twenty (120) days of the date of receipt of the charge:

(1) Determine whether there is a reasonable cause to believe the charge is true and whether to bring a complaint respecting the charge with the Chief Administrative Hearing Officer within the 120-day period; or,

(2) Notify the party within the 120-day period that the Special Counsel will not file a complaint with the Chief Administrative Hearing Officer within the 120-day period.

(c) The charging individual may file a complaint directly with the Chief Administrative Hearing Officer within ninety (90) days after the date of receipt of notice that the Special Counsel will not be filing a complaint within the 120-day period. However, the Special Counsel's failure to file a complaint within the 120-day period will not affect the right of the Special Counsel to investigate the charge or bring a complaint within the 90-day period.

[Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§68.5 Notice of date, time, and place of hearing.

(a) *Generally*. The Administrative Law Judge to whom the case is assigned shall notify the parties of a date, time, and place set for hearing thereon or for a prehearing conference, or both within thirty (30) days of receipt of respondent's answer to the complaint.

(b) *Place of hearing*. In section 274B cases, pursuant to section 554 of title 5, United States Code, due regard shall be given to the convenience of the parties and the witnesses in selecting a place for a hearing. Sections 274A(e)(3)(B) and 274C(d)(2)(B) of the INA require that hearings be held at the nearest practicable place to the place where the person or entity resides or to the place where the alleged violation occurred.

[54 FR 48596, Nov. 24, 1989. Redesignated and amended by Order No. 1534–91, 56 FR 50053, 50054, Oct. 3, 1991; Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.6 Service and filing of documents.

(a) *Generally*. An original and four copies of the complaint shall be filed with the Chief Administrative Hearing Officer. An original and two copies of all other pleadings, including any attachments, shall be filed with the Chief Administrative Hearing Officer by the parties presenting the pleadings until an Administrative Law Judge is assigned to a case. Thereafter, all pleadings shall be delivered or mailed for filing to the Administrative Law Judge assigned to the case, and shall be accompanied by a certification indicating service to all parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Except as required by § 68.54(c) and paragraph (c) of this section, service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The person serving the document shall certify to the manner and date of service.

(b) *Discovery*. The parties shall not file requests for discovery, answers, or responses thereto with the Administrative Law Judge. The Administrative Law Judge may, however, upon motion of a party or on his or her own initiative, order that such requests for discovery, answers, or responses thereto be filed.

(c) *Where a time limit is imposed by statute, regulation, or order*. Pleadings and briefs may be filed by facsimile with either an Administrative Law Judge or, in the case of a complaint, with the Chief Administrative Hearing Officer, only to toll the running of a time limit. All original signed pleadings and other documents must be forwarded concurrently with the transmission of the facsimile. Any party filing documents by facsimile must include in the certification of service a certification that service on the opposing party has also been made by facsimile or by same-day hand delivery, or, if service by facsimile or same-day hand delivery cannot be made, a certification that the document has been served instead by overnight delivery service. In the case of requests for administrative review, briefs or other filings relating to review by the Chief Administrative Hearing Officer, filing, or service shall be made using the procedure set forth in this paragraph pursuant to § 68.54(c).

[Order No. 2203–99, 64 FR 7074, Feb. 12, 1999]

§ 68.7 Form of pleadings.

(a) Every pleading shall contain a caption setting forth the statutory provision under which the proceeding is instituted, the title of the proceeding, the docket number assigned by the Office of the Chief Administrative Hearing Officer, the names of all parties (or, after the complaint, at least the first party named as a complainant or respondent), and a designation of the type of pleading (e.g., complaint, motion to dismiss). The pleading shall be signed, dated, and shall contain the address and telephone number of the party or person representing the party. The pleading shall be on standard size (8½ × 11) paper and should also be typewritten when possible.

(b) A complaint filed pursuant to section 274A, 274B, or 274C of the INA shall contain the following:

(1) A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated;

(2) The names and addresses of the respondents, agents, and/or their representatives who have been alleged to have committed the violation;

(3) The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred; and,

(4) A short statement containing the remedies and/or sanctions sought to be imposed against the respondent.

(5) The complaint must be accompanied by a statement identifying the party or parties to be served by the Office of the Chief Administrative Hearing Officer with notice of the complaint pursuant to § 68.3.

(c) Complaints filed pursuant to sections 274A and 274C of the INA shall be signed by an attorney and shall be accompanied by a copy of the Notice of Intent to Fine and Request for Hearing. Complaints filed pursuant to section 274B of the INA shall be accompanied by a copy of the charge, previously filed with the Special Counsel pursuant to section 274B(b)(1), and a copy of the Special Counsel's letter of determination regarding the charges.

(d) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process, provided that all copies are clear and legible.

(e) All documents presented by a party in a proceeding must be in the English language or, if in a foreign language, accompanied by a certified translation.

[Order No. 2203–99, 64 FR 7074, Feb. 12, 1999]

§ 68.8 Time computations.

(a) *Generally*. In computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is Saturday, Sunday, or legal holiday observed by the Federal Government in which case the time period includes the next business day. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) Computation of time for filing by mail. Pleadings are not deemed filed until received by the Office of the Chief Administrative Hearing Officer or Administrative Law Judge assigned to the case.

(c) Computation of time for service by mail.

(1) Service of all pleadings other than complaints is deemed effective at the time of mailing; and

(2) Whenever a party has the right or is required to take some action within a prescribed period after the service upon such party of a pleading, notice, or other document (other than a complaint or a subpoena) and the pleading, notice, or document is served by ordinary mail, five (5) days shall be added to the prescribed period unless the compliance date is otherwise specified by the Chief Administrative Hearing Officer or the Administrative Law Judge.

[54 FR 48596, Nov. 24, 1989. Redesignated and amended by Order No. 1534–91, 56 FR 50053, 50054, Oct. 3, 1991; Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.9 Responsive pleadings—answer.

(a) *Time for answer*. Within thirty (30) days after the service of a complaint, each respondent shall file an answer.

(b) *Default*. Failure of the respondent to file an answer within the time provided may be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default.

(c) *Answer*. Any respondent contesting any material fact alleged in a complaint, or contending that the amount of a proposed penalty or award is excessive or inappropriate, or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing. The answer shall include:

(1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial (any allegation not expressly denied shall be deemed to be admitted); and

(2) A statement of the facts supporting each affirmative defense.

(d) *Reply*. Complainants may file a reply responding to each affirmative defense asserted.

(e) *Amendments and supplemental pleadings*. If a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make the pleading conform to the evidence. The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events that have occurred or new law

promulgated since the date of the pleadings and which are relevant to any of the issues involved.

[Order No. 2203–99, 64 FR 7075, Feb. 12, 1999]

§ 68.10 Motion to dismiss for failure to state a claim upon which relief can be granted.

(a) The respondent, without waiving the right to offer evidence in the event that the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. The filing of a motion to dismiss does not affect the time period for filing an answer.

(b) The Administrative Law Judge may dismiss the complaint, based on a motion by the respondent or without a motion from the respondent, if the Administrative Law Judge determines that the complainant has failed to state a claim upon which relief can be granted. However, in the prehearing phase of an adjudicatory proceeding brought under this part, the Administrative Law Judge shall not dismiss a complaint in its entirety for failure to state a claim upon which relief may be granted, upon his or her own motion, without affording the complainant an opportunity to show cause why the complaint should not be dismissed.

[Order No. 2203–99, 64 FR 7075, Feb. 12, 1999]

§ 68.11 Motions and requests.

(a) *Generally*. The Chief Administrative Hearing Officer is authorized to act on non-adjudicatory matters relating to a proceeding prior to the appointment of an Administrative Law Judge. After the complaint is referred to an Administrative Law Judge, any application for an order or any other request shall be made by motion which shall be made in writing unless the Administrative Law Judge in the course of an oral hearing consents to accept such motion orally. The motion or request shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions or requests made during the course of any oral hearing or appearance before an Administrative Law Judge shall be stated orally and made part of the transcript. Whether a motion is made orally or in writing, all parties shall be given reasonable opportunity to respond or to object to the motion or request.

(b) *Responses to motions*. Within ten (10) days after a written motion is served, or within such other period as the Administrative Law Judge may fix, any party to the proceeding may file a response in support of, or in opposition to, the motion, accompanied by such affidavits or other evidence upon which he/she desires to rely. Unless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive document shall be filed.

(c) *Oral arguments or briefs*. No oral argument will be heard on motions unless the Administrative Law Judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.12 Prehearing statements.

(a) At any time prior to the commencement of the hearing, the Administrative Law Judge may order any party to file a prehearing statement of position.

(b) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and shall briefly set forth the following matters, unless otherwise ordered by the Administrative Law Judge:

(1) Issues involved in the proceedings;

(2) Facts stipulated to together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible;

(3) Facts in dispute;

(4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;

(5) A brief statement of applicable law;

(6) The conclusions to be drawn;

(7) The estimated time required for presentation of the party's or parties' case; and

(8) Any appropriate comments, suggestions, or information which might

assist the parties or the Administrative Law Judge in preparing for the hearing or otherwise aid in the disposition of the proceeding.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.13 Conferences.

(a) *Purpose and scope.* (1) Upon motion of a party or in the Administrative Law Judge's discretion, the judge may direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to the hearing, or in a conference during the course of the hearing, when the Administrative Law Judge finds that the proceeding would be expedited by such a conference. Prehearing conferences normally shall be conducted by conference telephonic communication unless, in the opinion of the Administrative Law Judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance. Reasonable notice of the time, place, and manner of the prehearing conference shall be given.

(2) At the conference, the following matters may be considered:

(i) The simplification of issues;

(ii) The necessity of amendments to pleadings;

(iii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(iv) The limitations on the number of expert or other witnesses;

(v) Negotiation, compromise, or settlement of issues;

(vi) The exchange of copies of proposed exhibits;

(vii) The identification of documents or matters of which official notice may be requested;

(viii) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(ix) Such other matters, including the disposition of pending motions, as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A verbatim record of the conference will not be kept unless directed by the Administrative Law Judge.

(c) *Order.* Actions taken as a result of a conference shall be reduced to a written order, unless the Administrative Law Judge concludes that a stenographic report shall suffice, or, if the conference takes place within seven (7) days of the beginning of the hearing, the Administrative Law Judge elects to make a statement on the record at the hearing summarizing the actions taken.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.14 Consent findings or dismissal.

(a) *Submission.* Where the parties or their authorized representatives or their counsel have entered into a settlement agreement, they shall:

(1) Submit to the presiding Administrative Law Judge:

(i) The agreement containing consent findings; and

(ii) A proposed decision and order; or

(2) Notify the Administrative Law Judge that the parties have reached a full settlement and have agreed to dismissal of the action. Dismissal of the action shall be subject to the approval of the Administrative Law Judge, who may require the filing of the settlement agreement.

(b) *Content.* Any agreement containing consent findings and a proposed decision and order disposing of a proceeding or any part thereof shall also provide:

(1) That the decision and order based on consent findings shall have the same force and effect as a decision and order made after full hearing;

(2) That the entire record on which any decision and order may be based shall consist solely of the complaint, notice of hearing, and any other such pleadings and documents as the Administrative Law Judge shall specify;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the decision and order entered into in accordance with the agreement.

(c) *Disposition.* In the event an agreement containing consent findings and

an interim decision and order is submitted, the Administrative Law Judge, within thirty (30) days or as soon as practicable thereafter, may, if satisfied with its timeliness, form, and substance, accept such agreement by entering a decision and order based upon the agreed findings. In his or her discretion, the Administrative Law Judge may conduct a hearing to determine the fairness of the agreement, consent findings, and proposed decision and order.

[Order No. 2203–99, 64 FR 7075, Feb. 12, 1999]

§ 68.15 Intervenor in unfair immigration-related employment cases.

The Special Counsel, or any other interested person or private organization, other than an officer of the Immigration and Naturalization Service, may petition to intervene as a party in unfair immigration-related employment cases. The Administrative Law Judge, in his or her discretion, may grant or deny such a petition.

[Order No. 1534–91, 56 FR 50054, Oct. 3, 1991]

§ 68.16 Consolidation of hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Administrative Law Judge assigned may, upon motion by any party, or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made at the discretion of the Administrative Law Judge.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.17 Amicus curiae.

A brief of an amicus curiae may be filed by leave of the Administrative Law Judge upon motion or petition of the amicus curiae. The amicus curiae shall not participate in any way in the conduct of the hearing, including the presentation of evidence and the examination of witnesses.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.18 Discovery—general provisions.

(a) *General*. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things, or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. The frequency or extent of these methods may be limited by the Administrative Law Judge upon his or her own initiative or pursuant to a motion under paragraph (c) of this section.

(b) *Scope of discovery*. Unless otherwise limited by order of the Administrative Law Judge in accordance with the rules in this part, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.

(c) *Protective orders*. Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge may make any order that justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) The discovery not be had;

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

(3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery; or

(4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters.

(d) *Supplementation of responses*. A party who has responded to a request

for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:

(1) A party is under a duty to supplement timely his or her response with respect to any question directly addressed to:

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

(2) A party is under a duty to amend timely a prior response if he or she later obtains information upon the basis of which:

(i) He or she knows the response was incorrect when made; or

(ii) He or she knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Administrative Law Judge upon motion of a party or agreement of the parties.

[Order No. 2203–99, 64 FR 7076, Feb. 12, 1999]

§ 68.19 Written interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any authorized officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories shall be served on all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons of objection shall be stated in lieu of an answer. The answers and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answer or objections upon all parties to the proceeding within thirty (30) days after service of the interrogatories, or within such shorter or longer period as the Administrative Law Judge upon motion may allow.

(c) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Administrative Law Judge may upon motion order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(d) A person or entity upon whom interrogatories are served may respond by the submission of business records, indicating to which interrogatory the documents respond, if they are sufficient to answer said interrogatories.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.20 Production of documents, things, and inspection of land.

(a) Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his/her behalf, to inspect and copy any designated documents or things or to inspect land, in the possession, custody, or control of the party upon whom the request is served; and

(2) Permit the party making the request, or a person acting on his/her behalf, to enter the premises of the party upon whom the request is served to accomplish the purposes stated in paragraph (1) of this section.

(b) The request may be served on any party without leave of the Administrative Law Judge.

(c) The request shall:

(1) Set forth the items to be inspected either by individual item or by category;

(2) Describe each item or category with reasonable particularity; and

(3) Specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after service of the request.

(e) The response shall state, with respect to each item or category:

(1) That inspection and related activities will be permitted as requested; or

(2) That objection is made in whole or in part, in which case the reasons for objection shall be stated.

(f) A copy of each request for production and each written response shall be served on all parties.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.21 Admissions.

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves on the requesting party:

(1) A written statement denying specifically the relevant matters of which an admission is requested;

(2) A written statement setting forth in detail the reasons why he/she can neither truthfully admit nor deny them; or

(3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(c) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he/she has made reasonable inquiry and that the information known or readily obtainable by him/her is insufficient to enable the party to admit or deny.

(d) Any matter admitted under this section is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission.

(e) A copy of each request for admission and each written response shall be served on all parties.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.22 Depositions.

(a) *Notice.* Any party desiring to take the deposition of a witness shall give notice in writing to the witness and other parties of the time and place of the deposition, and the name and address of each witness. If documents are requested, the notice shall include a written request for the production of documents. Not less than ten (10) days written notice shall be given when the deposition is to be taken within the continental United States, and not less then twenty (20) days written notice shall be given when the deposition is to be taken elsewhere, unless otherwise permitted by the Administrative Law Judge or agreed to by the parties.

(b) *When, how, and by whom taken.* The following procedures shall apply to depositions:

(1) Depositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths. The party taking a deposition upon oral examination shall state in the notice the method by which the testimony shall be recorded. Unless the Administrative Law Judge orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(2) Each witness testifying upon deposition shall testify under oath and any other party shall have the right to cross-examine. The questions asked and the answers thereto, together with all objections made, shall be recorded as provided by paragraph (b)(1) of this section. The person administering the oath shall certify in writing that the transcript or recording is a true record of the testimony given by the witness. The witness shall review the transcript or recording within thirty (30) days of notification that it is available and subscribe in writing to the deposition, indicating in writing any changes in

form or substance, unless such review is waived by the witness and the parties by stipulation.

(c) *Motion to terminate or limit examination.* During the taking of a deposition, a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, oppression of a deponent or party, or improper questions asked. The deposition will then be adjourned. However, the objecting party or deponent must immediately move the Administrative Law Judge for a ruling on his or her objections to the deposition conduct or proceedings.

[Order No. 2203–99, 64 FR 7076, Feb. 12, 1999]

§ 68.23 Motion to compel response to discovery; sanctions.

(a) If a deponent fails to answer a question asked, or a party upon whom a discovery request is made pursuant to §§ 68.18 through 68.22 fails to respond adequately or objects to the request or to any part thereof, or fails to permit inspection as requested, the discovering party may move the Administrative Law Judge for an order compelling a response or inspection in accordance with the request. A party who has taken a deposition or has requested admissions or has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the Administrative Law Judge may order that an answer be served. If the Administrative Law Judge determines that an answer does not comply with the requirements of the rules in this part, he or she may order either that the matter is admitted or that an amended answer be served.

(b) The motion shall set forth and include:

(1) The nature of the questions or request;

(2) The response or objections of the party upon whom the request was served;

(3) Arguments in support of the motion; and

(4) A certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge.

(c) If a party, an officer or an agent of a party, or a witness, fails to comply with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, the answering of interrogatories, a response to a request for admissions, or any other order of the Administrative Law Judge, the Administrative Law Judge may, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay, take the following actions:

(1) Infer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party;

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;

(3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer, or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(4) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both;

(6) In the case of failure to comply with a subpoena, the Administrative Law Judge may also take the action provided in § 68.25(e); and

(7) In ruling on a motion made pursuant to this section, the Administrative Law Judge may make and enter a protective order such as he or she is authorized to enter on a motion made pursuant to § 68.42.

(d) *Evasive or incomplete response.* For the purposes of this section, an evasive

or incomplete response to discovery may be treated as a failure to respond.

[Order No. 2203–99, 64 FR 7076, Feb. 12, 1999]

§ 68.24 Use of depositions at hearings.

(a) *Generally*. At the hearing, any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness;

(2) The deposition of an expert witness may be used by any party for any purpose, unless the Administrative Law Judge rules that such use would be unfair or a violation of due process;

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose;

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Administrative Law Judge finds:

(i) That the witness is dead;

(ii) That the witness is out of the United States or more than 100 miles from the place of hearing unless it appears that the absence of the witness was procured by the party offering the deposition;

(iii) That the witness is unable to attend to testify because of age, sickness, infirmity, or imprisonment;

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist to make it desirable, in the interest of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used;

(5) If only part of a deposition is offered in evidence by a party, any other party may require him or her to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts; and

(6) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the parties or their representatives or successors in interest has been brought (or commenced), all depositions lawfully taken and duly filed in the former proceeding may be used in the latter if originally taken therefor.

(7) A party offering deposition testimony may offer it in stenographic or nonstenographic form, but if in nonstenographic form, the party shall also be responsible for providing a transcript of the portions so offered.

(b) *Objections to admissibility*. Except as provided in this paragraph, objections may be made at the hearing to receiving in evidence any deposition or part thereof for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

[Order No. 2203–99, 64 FR 7077, Feb. 12, 1999]

§ 68.25 Subpoenas.

(a) An Administrative Law Judge, upon his or her own initiative or upon request of an individual or entity before a complaint is filed or by a party once a complaint has been filed, may issue subpoenas as authorized by statute, either prior to or subsequent to the filing of a complaint. Such subpoena may require attendance and testimony of witnesses and production of

things including, but not limited to, papers, books, documents, records, correspondence, or tangible things in their possession and under their control and access to such things for the purposes of examination and copying. A subpoena may be served by overnight courier service or overnight mail, certified mail, or by any person who is not less than 18 years of age. A witness, other than a witness subpoenaed on behalf of the Federal Government, may not be required to attend a deposition or hearing unless the mileage and witness fee applicable to witnesses in courts of the United States for each date of attendance is paid in advance of the date of the proceeding. Mileage and witness fees need not be paid to a witness at the time of service of the subpoena if the witness is subpoenaed by the Federal Government.

(b) The subpoena shall identify the person or things subpoenaed, the person to whom it is returnable and the place, date, and time at which it is returnable; or the subpoena shall identify the nature of the evidence to be examined and copied, and the date and time when access is requested. Where a nonparty is subpoenaed, the requestor of the subpoena must give notice to all parties, or if no complaint has been filed, then notice shall be given to individuals or entities who have been charged with an unfair immigration-related employment practice under section 274B of the INA, the individual initiating the alleged unfair immigration-related employment practice, and the Office of Special Counsel. For purposes of this subsection, the receipt of the subpoena or a copy of the subpoena shall serve as the notice.

(c) Any person served with a subpoena issued by an Administrative Law Judge who intends not to comply with it shall, within ten (10) days after the date of service of the subpoena upon such person or within such other time the Administrative Law Judge deems appropriate, petition the Administrative Law Judge to revoke or modify the subpoena. A copy of the petition shall be served on all parties. If a complaint has not been filed in the matter, a copy of the petition shall be served on the individual or entity that requested the subpoena. The petition shall separately identify each portion of the subpoena with which the petitioner does not intend to comply and shall state, with respect to each such portion, the grounds upon which the petitioner relies. A copy of the subpoena shall be attached to the petition. Within eight (8) days after receipt of the petition, the individual or entity that applied for the subpoena may respond to such petition, and the Administrative Law Judge shall then make a final determination upon the petition. The Administrative Law Judge shall cause a copy of the final determination of the petition to be served upon all parties, or, if a complaint has not been filed, upon the individuals or entities requesting and responding to the subpoena.

(d) A party shall have standing to challenge a subpoena issued to a nonparty if the party can claim a personal right or privilege in the discovery sought.

(e) Failure to comply. Upon the failure of any person to comply with an order to testify or a subpoena issued under this section, the Administrative Law Judge may, where authorized by law, apply through appropriate counsel to the appropriate district court of the United States for an order requiring compliance with the order or subpoena.

[Order No. 1534–91, 56 FR 50055, Oct. 3, 1991, as amended by Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.26 Designation of Administrative Law Judge.

Hearings shall be held before an Administrative Law Judge appointed under 5 U.S.C. 3105 and assigned to the Department of Justice. The presiding judge in any case shall be designated by the Chief Administrative Hearing Officer. The Chief Administrative Hearing Officer may reassign a case previously assigned to an Administrative Law Judge to promote administrative efficiency. In unfair immigration-related employment practice cases, only Administrative Law Judges specially designated by the Attorney General as having special training respecting employment discrimination may be

chosen by the Chief Administrative Hearing Officer to preside.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991, as amended by Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.27 Continuances.

(a) *When granted.* Continuances shall only be granted in cases where the requester has a prior judicial commitment or can demonstrate undue hardship, or a showing of other good cause.

(b) *Time limit for requesting.* Except for good cause arising thereafter, requests for continuances must be filed not later than fourteen (14) days prior to the date of the scheduled proceeding.

(c) *How filed.* Motions for continuances shall be in writing, unless made during the prehearing conference or the hearing. Copies shall be served on all parties. Any motions for continuances filed fewer than fourteen (14) days before the date of the scheduled proceeding shall, in addition to the written request, be telephonically communicated to the Administrative Law Judge or a member of the Judge's staff and to all other parties.

(d) *Ruling.* Time permitting, the Administrative Law Judge shall enter a written order in advance of the scheduled proceeding date that either grants or denies the request. Otherwise, the ruling shall be made orally by telephonic communication to the party requesting the continuance, who shall be responsible for telephonically notifying all other parties. Oral orders shall be confirmed in writing by the Administrative Law Judge.

[Order No. 2203–99, 64 FR 7077, Feb. 12, 1999]

§ 68.28 Authority of Administrative Law Judge.

(a) *General powers.* In any proceeding under this part, the Administrative Law Judge shall have all appropriate powers necessary to conduct fair and impartial hearings, including, but not limited to, the following:

(1) Conduct formal hearings in accordance with the provisions of the Administrative Procedure Act and of this part;

(2) Administer oaths and examine witnesses;

(3) Compel the production of documents and appearance of witnesses in control of the parties;

(4) Compel the appearance of witnesses by the issuance of subpoenas as authorized by law;

(5) Issue decisions and orders;

(6) Take any action authorized by the Administrative Procedure Act;

(7) Exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Attorney General as are necessary and appropriate therefore; and

(8) Take other appropriate measures necessary to enable him or her to discharge the duties of the office.

(b) *Enforcement.* If any person in proceedings before an Administrative Law Judge disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the Administrative Law Judge responsible for the adjudication may, where authorized by statute or law, apply through appropriate counsel to the Federal District Court having jurisdiction in the place in which he/she is sitting to request appropriate remedies.

[54 FR 48596, Nov. 24, 1989. Redesignated and amended by Order No. 1534–91, 56 FR 50053, 50055, Oct. 3, 1991; Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.29 Unavailability of Administrative Law Judge.

In the event the Administrative Law Judge designated to conduct the hearing becomes unavailable, the Chief Administrative Hearing Officer may designate another Administrative Law Judge for the purpose of further hearing or other appropriate action.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.30 Disqualification.

(a) When an Administrative Law Judge deems himself or herself disqualified to preside in a particular proceeding, such judge shall withdraw therefrom by notice on the record directed to the Chief Administrative Hearing Officer.

(b) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Administrative Law Judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The Administrative Law Judge shall rule upon the motion.

(c) In the event of disqualification or recusal of an Administrative Law Judge as provided in paragraph (a) or (b) of this section, the Chief Administrative Hearing Officer shall refer the matter to another Administrative Law Judge for further proceedings.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.31 Separation of functions.

No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of the Administrative Law Judge, except as a witness or counsel in the proceedings.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.32 Expedition.

Hearings shall proceed with all reasonable speed, insofar as practicable and with due regard to the convenience of the parties.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.33 Participation of parties and representation.

(a) *Participation of parties.* Any party shall have the right to appear in a proceeding and may examine and cross-examine witnesses and introduce into the record documentary or other relevant evidence, except that the participation of any intervenor shall be limited to the extent prescribed by the Administrative Law Judge.

(b) *Person compelled to testify.* Any person compelled to testify in a proceeding in response to a subpoena may be accompanied, represented, and advised by an individual meeting the requirements of paragraph (c) of this section.

(c) *Representation for parties other than the Department of Justice.* Persons who may appear before the Administrative Law Judges on behalf of parties other than the Department of Justice include:

(1) An attorney at law who is admitted to practice before the federal courts or before the highest court of any state, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Administrative Law Judges. An attorney's own representation that the attorney is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise ordered by the Administrative Law Judge.

(2) A law student, enrolled in an accredited law school, may practice before an Administrative Law Judge. The law student must seek advance approval by filing a statement with the Administrative Law Judge proving current participation in a legal assistance program or clinic conducted by the law school. Practice before the Administrative Law Judge shall be under direct supervision of a faculty member or an attorney. An appearance by a law student shall be without direct or indirect remuneration. The Administrative Law Judge may determine the amount of supervision required of the supervising faculty member or attorney.

(3) An individual who is neither an attorney nor a law student may be allowed to provide representation to a party upon a written order from the Administrative Law Judge assigned to the case granting approval of the representation. The individual must file a written application with the Administrative Law Judge demonstrating that the individual possesses the knowledge of administrative procedures, technical expertise, or other qualifications necessary to render valuable service in the

proceedings and is otherwise competent to advise and assist in the presentation of matters in the proceedings.

(i) *Application*. A written application by an individual who is neither an attorney nor a law student for admission to represent a party in proceedings shall be submitted to the Administrative Law Judge within ten (10) days from the receipt of the Notice of Hearing and complaint by the party on whose behalf the individual wishes to file the application. This period of time for filing the application may be extended upon approval of the Administrative Law Judge. The application shall set forth in detail the requesting individual's qualifications to represent the party.

(ii) *Inquiry on qualifications or ability*. The Administrative Law Judge may, at any time, inquire as to the qualifications or ability of any non-attorney to render assistance in proceedings before the Administrative Law Judge.

(iii) *Denial of authority to appear*. Except as provided in paragraph (c)(3)(iv) of this section, the Administrative Law Judge may enter an order denying the privilege of appearing to any individual who the Judge finds does not possess the requisite qualifications to represent others; is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude.

(iv) *Exception*. Any individual may represent him or herself or any corporation, partnership or unincorporated association of which that individual is a partner or general officer in proceedings before the Administrative Law Judge without prior approval of the Administrative Law Judge and without filing the written application required by this paragraph. Such individuals must, however, file a notice of appearance in the manner set forth in paragraph (e) of this section.

(d) *Representation for the Department of Justice*. The Department of Justice may be represented by the appropriate counsel in these proceedings.

(e) *Proof of authority*. Any individual acting in a representative capacity in any adjudicative proceeding may be required by the Administrative Law Judge to show his or her authority to act in such capacity. Representation of a respondent shall be at no expense to the Government.

(f) *Notice of appearance*. Except for a government attorney filing a complaint pursuant to section 274A, 274B, or 274C of the INA, each attorney shall file a notice of appearance. Such notice shall indicate the name of the case or controversy, the case number if assigned, and the party on whose behalf the appearance is made. The notice of appearance shall be signed by the attorney, and shall be accompanied by a certification indicating that such notice was served on all parties of record. A request for a hearing signed by an attorney and filed with the Immigration and Naturalization Service pursuant to section 274A(e)(3)(A) or 274C(d)(2)(A) of the INA, and containing the same information as required by this section, shall be considered a notice of appearance on behalf of the respondent for whom the request was made.

(g) *Withdrawal or substitution of a representative*. Withdrawal or substitution of an attorney or representative may be permitted by the Administrative Law Judge upon written motion. The Administrative Law Judge shall enter an order granting or denying such motion for withdrawal or substitution.

[Order No. 2203–99, 64 FR 7077, Feb. 12, 1999, as amended by Order No. 2255–99, 64 FR 49660, Sept. 14, 1999]

§ 68.34 Legal assistance.

The Office of the Chief Administrative Hearing Officer does not have authority to appoint counsel.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.35 Standards of conduct.

(a) All persons appearing in proceedings before an Administrative Law Judge are expected to act with integrity, and in an ethical manner.

(b) The Administrative Law Judge may exclude from proceedings parties, witnesses, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the

prohibition against *ex parte* communications. The Administrative Law Judge shall state in the record the cause for barring an attorney or other individual from participation in a particular proceeding. The Administrative Law Judge may suspend the proceeding for a reasonable time for the purpose of enabling a party to obtain another attorney or representative.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.36 *Ex parte* communications.

(a) *General.* Except for other employees of the Executive Office for Immigration Review, the Administrative Law Judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. Communications by the Office of the Chief Administrative Hearing Officer, the assigned judge, or any party for the sole purpose of scheduling hearings, or requesting extensions of time are not considered *ex parte* communications, except that all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto.

(b) *Sanctions.* A party or participant who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.37 Waiver of right to appear and failure to participate or to appear.

(a) *Waiver of right to appear.* If all parties waive in writing their right to appear before the Administrative Law Judge or to present evidence or argument personally or by representative, it shall not be necessary to give notice of and conduct an oral hearing. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Chief Administrative Hearing Officer or the Administrative Law Judge. Where such a waiver has been filed by all parties and they do not appear before the Administrative Law Judge personally or by representative, the Administrative Law Judge shall make a record of the relevant written evidence submitted by the parties, together with any pleadings they may submit with respect to the issues in the case. Such documents shall be considered as all of the evidence in the case and decision shall be based on them.

(b) *Dismissal—Abandonment by party.* A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if:

(1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge; or

(2) Neither the party nor his or her representative appears at the time and place fixed for the hearing and either

(i) Prior to the time for hearing, such party does not show good cause as to why neither he or she nor his or her representative can appear; or

(ii) Within ten (10) days after the time for hearing or within such other period as the Administrative Law Judge may allow, such party does not show good cause for such failure to appear.

(c) *Default—Failure to appear.* A default decision, under § 68.9(b), may be entered, with prejudice, against any party failing, without good cause, to appear at a hearing.

[54 FR 48596, Nov. 24, 1989. Redesignated and amended by Order No. 1534–91, 56 FR 50053, 50056, Oct. 3, 1991; Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.38 Motion for summary decision.

(a) A complainant, not fewer than thirty (30) days after receipt by respondent of the complaint, may move with or without supporting affidavits for summary decision on all or any part of the complaint. Motions by any party for summary decision on all or any part of the complaint will not be entertained within the twenty (20) days prior to any hearing, unless the Administrative Law Judge decides otherwise. Any other party, within ten (10) days after service of a motion for summary

decision, may respond to the motion by serving supporting or opposing papers with affidavits, if appropriate, or countermove for summary decision. The Administrative Law Judge may set the matter for argument and/or call for submission of briefs.

(b) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(c) The Administrative Law Judge shall enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

(d) *Form of summary decisions.* Any final order entered as a summary decision shall conform to the requirements for all final orders. A final order made under this section shall include a statement of:

(1) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and

(2) Any terms and conditions of the final order.

(e) *Hearings on issue of fact.* Where a genuine question of material fact is raised, the Administrative Law Judge shall set the case for an evidentiary hearing.

[Order No. 2203–99, 64 FR 7078, Feb. 12, 1999]

§ 68.39 Formal hearings.

(a) *Public.* Hearings shall be open to the public. The Administrative Law Judge may order a hearing or any part thereof closed, where to do so would be in the best interests of the parties, a witness, the public, or other affected persons. Any order closing the hearing shall set forth the reasons for the decision. Any objections thereto shall be made a part of the record.

(b) *Jurisdiction.* The Administrative Law Judge shall have jurisdiction to decide all issues of fact and related issues of law.

(c) *Rights of parties.* Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the right to present evidence, to conduct such cross-examination as may be necessary for a full and complete disclosure of the facts, and to be heard by objection, motion, and argument.

(d) *Rights of participation.* Every party shall have the right to make a written or oral statement of position. At the discretion of the Administrative Law Judge, participants may file proposed findings of fact, conclusions of law, and a post hearing brief.

(e) *Amendments to conform to the evidence.* When issues not raised by the request for hearing, prehearing stipulation, or prehearing order are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made on motion of any party at any time; but failure to so amend does not affect the result of the hearing of these issues. The Administrative Law Judge may grant a continuance to enable the objecting party to meet such evidence.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.40 Evidence.

(a) *Applicability of Federal rules of evidence.* Unless otherwise provided by statute or these rules, the Federal Rules of Evidence will be a general guide to all proceedings held pursuant to these rules.

(b) *Admissibility.* All relevant material and reliable evidence is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence. Stipulations of fact may be introduced in evidence with respect to any issue. Every party shall have the right to present his/her case or defense

by oral or documentary evidence, depositions, and duly authenticated copies of records and documents; to submit rebuttal evidence; and to conduct such reasonable cross-examination as may be required for a full and true disclosure of the facts. The Administrative Law Judge shall have the right in his/her discretion to limit the number of witnesses whose testimony may be merely cumulative and shall, as a matter of policy, not only exclude irrelevant, immaterial, or unduly repetitious evidence but shall also limit the cross-examination of witnesses to reasonable bounds so as not to prolong the hearing unnecessarily, and unduly burden the record. Material and relevant evidence shall not be excluded because it is not the best evidence, unless its authenticity is challenged, in which case reasonable time shall be given to establish its authenticity. When only portions of a document are to be relied upon, the offering party shall prepare the pertinent excerpts, adequately identified, and shall supply copies of such excerpts, together with a statement indicating the purpose for which such materials will be offered, to the Administrative Law Judge and to the other parties. Only the excerpts, so prepared and submitted, shall be received in the record. However, the original document should be made available for examination and for use by opposing counsel for purposes of cross-examination. Compilations, charts, summaries of data, and photostatic copies of documents may be admitted in evidence if the proceedings will thereby be expedited, and if the material upon which they are based is available for examination by the parties.

(c) *Objections to evidence.* Objections to the admission or exclusion of evidence shall be in short form, stating the grounds of objections relied upon, and to the extent permitted by the Administrative Law Judge, the transcript shall include argument or debate thereon. Rulings on such objections shall be made at the time of objection or prior to the receipt of further evidence. Such ruling shall be a part of the record.

(d) *Exceptions.* Formal exceptions to the rulings of the Administrative Law Judge made during the course of the hearing are unnecessary. For all purposes for which an exception otherwise would be taken, it is sufficient that a party, at the time the ruling of the Administrative Law Judge is made or sought, makes known the action he/she desires the Administrative Law Judge to take or his/her objection to an action taken, and his/her grounds therefor.

(e) *Offers of proof.* Any offer of proof made in connection with an objection taken to any ruling of the Administrative Law Judge rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony, and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.41 Official notice.

Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice. Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the Administrative Law Judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.42 In camera and protective orders.

(a) *Privileged communications.* Upon application of any person, the Administrative Law Judge may limit discovery or introduction of evidence or enter such protective or other orders as in the Judge's judgment may be consistent with the objective of protecting privileged communications and of protecting data and other material the disclosure of which would unreasonably prejudice a party, witness, or third party.

(b) *Classified or sensitive matter.* (1) Without limiting the discretion of the

Administrative Law Judge to give effect to any other applicable privilege, it shall be proper for the Administrative Law Judge to limit discovery or introduction of evidence or to enter such protective or other orders as in the Judge's judgment may be consistent with the objective of preventing undue disclosure of classified or sensitive matter. When the Administrative Law Judge determines that information in documents containing sensitive matter should be made available the Judge may direct the producing party to prepare an unclassified or nonsensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

(2) If the Administrative Law Judge determines that this procedure is inadequate and that classified or otherwise sensitive matter must form part of the record in order to avoid prejudice to any party, the Judge may so advise the parties and provide an opportunity for arrangements to permit a party or a representative to have access to such matter. Such arrangements may include obtaining security clearances or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure.

[Order No. 2203–99, 64 FR 7079, Feb. 12, 1999]

§ 68.43 Exhibits.

(a) *Identification*. All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered.

(b) *Exchange of exhibits*. When written exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and two copies to the Administrative Law Judge, unless the parties previously have been furnished with copies or the Administrative Law Judge directs otherwise. If the Administrative Law Judge has not fixed a time for the exchange of exhibits, the parties shall exchange copies of exhibits at the earliest practicable time, preferably before the hearing or, at the latest, at the commencement of the hearing.

(c) *Substitution of copies for original exhibits*. The Administrative Law Judge may permit a party to withdraw original documents offered in evidence and substitute true copies in lieu thereof.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991, and amended by Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.44 Records in other proceedings.

In case any portion of the record in any other proceeding or civil or criminal action is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the Administrative Law Judge directs otherwise.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.45 Designation of parts of documents.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, the participant offering the same shall plainly designate the matter so offered, segregating and excluding insofar as practicable the immaterial or irrelevant parts. If other matter in such document is in such bulk or extent as would necessarily encumber the record, such document will not be received in evidence, but may be marked for identification, and if properly authenticated, the relevant and material parts thereof may be read into the record, or if the Administrative Law Judge so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit, and copies shall be delivered by the participant offering the same to the other parties or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.46 Authenticity.

The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection therto is filed prior to the hearing, except that a party will be permitted to

challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.47 Stipulations.

The parties may by stipulation in writing at any stage of the proceeding, or by stipulation made orally at the hearing, agree upon any pertinent facts in the processing. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.48 Record of hearings.

(a) *General*. A verbatim written record of all hearings shall be kept, except in cases where the proceedings are terminated in accordance with § 68.14. All evidence upon which the Administrative Law Judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits introduced as evidence shall be marked for identification and incorporated into the record. Transcripts may be obtained by the parties and the public from the official court reporter of record. Any fees in connection therewith shall be the responsibility of the parties.

(b) *Corrections*. Corrections to the official transcript will be permitted upon motion. Motions for correction must be submitted within ten (10) days of the receipt of the transcript by the Administrative Law Judge or such other time as may be permitted by the Administrative Law Judge. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the Administrative Law Judge.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991, and amended by Order No. 1635–92, 57 FR 57672, Dec. 7, 1992]

§ 68.49 Closing the record.

(a) When there is a hearing, the record shall be closed at the conclusion of the hearing unless the Administrative Law Judge directs otherwise.

(b) If any party waives a hearing, the record shall be closed on the date set by the Administrative Law Judge as the final date for the receipt of submissions of the parties to the matter.

(c) Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record. However, the Administrative Law Judge shall make part of the record any motions for attorney's fees authorized by statutes, and any supporting documentation, any determinations thereon, and any approved correction to the transcript.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.50 Receipt of documents after hearing.

Documents submitted for the record after the close of the hearing will not be received in evidence except upon ruling of the Administrative Law Judge. Such documents when submitted shall be accompanied by proof that copies have been served upon all parties, who shall have an opportunity to comment thereon. Copies shall be received not later than twenty (20) days after the close of the hearing except for good cause shown, and not less than ten (10) days prior to the date set for filing briefs. Exhibit numbers should be assigned by counsel or the party.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.51 Restricted access.

On his/her own motion, or on the motion of any party, the Administrative Law Judge may direct that there be a restricted access portion of the record to contain any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. This portion of the record shall be placed in a separate file and clearly marked to

avoid improper disclosure and to identify it as a portion of the official record in the proceedings.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

§ 68.52 Final order of the Administrative Law Judge.

(a) *Proposed final order.* (1) Within twenty (20) days of filing of the transcript of the testimony, or within such additional time as the Administrative Law Judge may allow, the Administrative Law Judge may require the parties to file proposed findings of fact, conclusions of law, and orders, together with supporting briefs expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(2) The Administrative Law Judge may, by order, require that when a proposed order is filed for the Administrative Law Judge's consideration, the filing party shall submit to the Administrative Law Judge a copy of the proposed order on a 3.5″ microdisk.

(b) *Entry of final order.* Unless an extension of time is given by the Chief Administrative Hearing Officer for good cause, the Administrative Law Judge shall enter the final order within sixty (60) days after receipt of the hearing transcript or of post-hearing briefs, proposed findings of fact, and conclusions of law, if any, by the Administrative Law Judge. The final order entered by the Administrative Law Judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. The standard of proof shall be by a preponderance of the evidence.

(c) *Contents of final order with respect to unlawful employment of unauthorized aliens.* (1) If, upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity named in the complaint has violated section 274A(a)(1)(A) or (a)(2) of the INA, the final order shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of:

(i) Not less than $275 and not more than $2,200 for each unauthorized alien with respect to whom there was a violation of either such paragraph occurring before March 27, 2008; not less than $375 and not more than $3,200 for each unauthorized alien with respect to whom there was a violation of either such paragraph occurring on or after March 27, 2008;

(ii) In the case of a person or entity previously subject to one final order under this paragraph (c)(1), not less than $2,200 and not more than $5,500 for each unauthorized alien with respect to whom there was a violation of either such paragraph occurring before March 27, 2008, and not less than $3,200 and not more than $6,500 for each unauthorized alien with respect to whom there was a violation of either such paragraph occurring on or after March 27, 2008; or

(iii) In the case of a person or entity previously subject to more than one final order under paragraph (c)(1) of this section, not less than $3,300 and not more than $11,000 for each unauthorized alien with respect to whom there was a violation of each such paragraph occurring before March 27, 2008, and not less than $4,300 and not more than $16,000 for each unauthorized alien with respect to whom there was a violation of each such paragraph occurring on or after March 27, 2008.

(2) The final order may also require the respondent to participate in, and comply with the terms of, one of the pilot programs set forth in Pub. L. 104–208, Div. C, sections 401–05, 110 Stat. 3009, 3009–655 to 3009–665 (1996) (codified at 8 U.S.C. 1324a (note)), with respect to the respondent's hiring or recruitment or referral of individuals in a state (as defined in section 101(a)(36) of the INA) covered by such a program.

(3) The final order may also require the respondent to comply with the requirements of section 274A(b) of the INA with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years; and to take such other remedial action as is appropriate.

(4) In the case of a person or entity composed of distinct, physically separate subdivisions, each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and under the control of, or common control with, another subdivision, each

such subdivision shall be considered a separate person or entity.

(5) If, upon a preponderance of the evidence, the Administrative Law Judge determines that a person or entity named in the complaint has violated section 274A(a)(1)(B) of the INA, except as set forth in paragraph (c)(6) of this section, the final order under this paragraph shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred before March 15, 1999, and not less than $110 and not more than $1,100 for each individual with respect to whom such violation occurred on or after March 15, 1999. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) With respect to a violation of section 274A(a)(1)(B) of the INA where a person or entity participating in a pilot program has failed to provide notice of final nonconfirmation of employment eligibility of an individual to the Attorney General as required by Pub. L. 104–208, Div. C, section 403(a)(4)(C), 110 Stat. 3009, 3009–661 (1996) (codified at 8 U.S.C. 1324a (note)), the final order under this paragraph shall require the person or entity to pay a civil penalty in an amount of not less than $500 and not more than $1,000 for each individual with respect to whom such violation occurred before March 27, 2008, and not less than $550 and not more than $1,100 for each individual with respect to whom such violation occurred on or after March 27, 2008.

(7) *Prohibition of indemnity bond cases.* If, upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity has violated section 274A(g)(1) of the INA, the final order shall require the person or entity to pay a civil penalty of $1,000 for each individual with respect to whom such violation occurred before March 15, 1999, and $1,100 for each individual with respect to whom such violation occurred on or after March 15, 1999, and require the return of any amounts received in such violation to the individual or, if the individual cannot be located, to the general fund of the Treasury.

(8) *Adjustment of penalties for inflation.* The civil penalties cited in paragraph (c) of this section shall be subject to adjustments for inflation at least every four years in accordance with the Debt Collection Improvement Act.

(9) *Attorney's fees.* A prevailing respondent may receive, pursuant to 5 U.S.C. 504, an award of attorney's fees in unlawful employment and prohibition of indemnity bond cases. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed. An award of attorney's fees will not be made if the Administrative Law Judge determines that the complainant's position was substantially justified or special circumstances make the award unjust.

(d) *Contents of final order with respect to unfair immigration-related employment practice cases.* (1) If, upon the preponderance of the evidence, the Administrative Law Judge determines that any person or entity named in the complaint has engaged in or is engaging in an unfair immigration-related employment practice, the final order shall include a requirement that the person or entity cease and desist from such practice. The final order may also require the person or entity:

(i) To comply with the requirements of section 274A(b) of the INA with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years;

(ii) To retain for a period of up to three years, and only for purposes consistent with section 274A(b)(5) of the INA, the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States;

(iii) To hire individuals directly and adversely affected, with or without back pay;

(iv) To post notices to employees about their rights under section 274B

and employers' obligations under section 274A;

(v) To educate all personnel involved in hiring and in complying with section 274A or 274B about the requirements of 274A or 274B;

(vi) To order, in an appropriate case, the removal of a false performance review or false warning from an employee's personnel file;

(vii) To order, in an appropriate case, the lifting of any restrictions on an employee's assignments, work shifts, or movements;

(viii) Except as provided in paragraph (d)(1)(xii) of this section, to pay a civil penalty of not less than $275 and not more than $2,200 for each individual discriminated against before March 27, 2008, and not less than $375 and not more than $3,200 for each individual discriminated against on or after March 27, 2008;

(ix) Except as provided in paragraph (d)(1)(xii) of this section, in the case of a person or entity previously subject to a single final order under section 274B(g)(2) of the INA, to pay a civil penalty of not less than $2,200 and not more than $5,500 for each individual discriminated against before March 27, 2008, and not less than $3,200 and not more than $6,500 for each individual discriminated against on or after March 27, 2008;

(x) Except as provided in paragraph (d)(1)(xii) of this section, in the case of a person or entity previously subject to more than one final order under section 274B(g)(2) of the INA, to pay a civil penalty of not less than $3,300 and not more than $11,000 for each individual discriminated against before March 27, 2008, and not less than $4,300 and not more than $16,000 for each individual discriminated against on or after March 27, 2008;

(xi) To participate in, and comply with the terms of, one of the pilot programs set forth in Pub. L. 104–208, Div. C, sections 401–05, 110 Stat. 3009, 3009–655 to 3009–665 (1996) (codified at 8 U.S.C. 1324a (note)), with respect to the respondent's hiring or recruitment or referral of individuals in a state (as defined in section 101(a)(36) of the INA) covered by such a program; and

(xii) In the case of an unfair immigration-related employment practice where a person or entity, for the purpose or with the intent of discriminating against an individual in violation of section 274B(a), requests more or different documents than are required under section 274A(b) or refuses to honor documents that on their face reasonably appear to be genuine, to pay a civil penalty of not less than $100 and not more than $1,000 for each individual discriminated against before March 15, 1999, and not less than $110 and not more than $1,100 for each individual discriminated against on or after March 15, 1999, or to order any of the remedies listed as paragraphs (d)(1)(i) through (d)(1)(vii) of this section.

(2) The civil penalties cited in paragraph (d) of this section shall be subject to adjustments for inflation at least every four years in accordance with the Debt Collection Improvement Act.

(3) Back pay liability shall not accrue from a date more than two years prior to the date of the filing of a charge with the Special Counsel. In no event shall back pay accrue from before November 6, 1986. Interim earnings or amounts earnable with reasonable diligence by the individual or individuals discriminated against shall operate to reduce the back pay otherwise allowable. No order shall require the hiring of an individual as an employee, or the payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status unless it is determined that an unfair immigration-related employment practice exists under section 274B(a)(5) of the INA.

(4) In applying paragraph (d) of this section in the case of a person or entity composed of distinct, physically separate subdivisions, each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with another subdivision, each such subdivision shall be considered a separate person or entity.

(5) If, upon the preponderance of the evidence, the Administrative Law

Judge determines that a person or entity named in the complaint has not engaged in and is not engaging in an unfair immigration-related employment practice, then the final order shall dismiss the complaint.

(6) *Attorney's fees.* The Administrative Law Judge in his or her discretion may allow a prevailing party, other than the United States, a reasonable attorney's fee if the losing party's argument is without reasonable foundation in law and fact. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative stating the actual time expended and the rate at which fees and other expenses were computed.

(e) *Contents of final order with respect to document fraud cases.* (1) If, upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity has violated section 274C of the INA, the final order shall include a requirement that the respondent cease and desist from such violations and pay a civil money penalty in an amount of:

(i) Not less than $275 and not more than $2,200 for each document that is the subject of a violation under section 274C(a)(1) through (4) of the INA before March 27, 2008, and not less than $375 and not more than $3,200 for each document that is the subject of a violation under section 274C(a)(1) through (4) of the INA on or after March 27, 2008;

(ii) Not less than $250 and not more than $2,000 for each document that is the subject of a violation under section 274C(a)(5) or (6) of the INA before March 27, 2008, and not less than $275 and not more than $2,200 for each document that is the subject of a violation under section 274C(a)(5) or (6) of the INA on or after March 27, 2008;

(iii) In the case of a respondent previously subject to one or more final orders under section 274C(d)(3) of the INA, not less than $2,200 and not more than $5,500 for each document that is the subject of a violation under section 274C(a)(1) through (4) of the INA before March 27, 2008, and not less than $3,200 and not more than $6,500 for each document that is the subject of a violation under section 274C(a)(1) through (4) of the INA on or after March 27, 2008; or

(iv) In the case of a respondent previously subject to one or more final orders under section 274C(d)(3) of the INA, not less than $2,000 and not more than $5,000 for each document that is the subject of a violation under section 274C(a)(5) or (6) of the INA before March 27, 2008, and not less than $2,200 and not more than $5,500 for each document that is the subject of a violation under section 274C(a)(5) or (6) of the INA on or after March 27, 2008.

(2) In the case of a person or entity composed of distinct, physically separate subdivisions, each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and under the control of, or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(3) *Adjustment of penalties for inflation.* The civil penalties cited in paragraph (e) of this section shall be subject to adjustments for inflation at least every four years in accordance with the Debt Collection Improvement Act.

(4) *Attorney's fees.* A prevailing respondent may receive, pursuant to 5 U.S.C. 504, an award of attorney's fees in document fraud cases. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed. An award of attorney's fees shall not be made if the Administrative Law Judge determines that the complainant's position was substantially justified or special circumstances make the award unjust.

(f) *Corrections to orders.* An Administrative Law Judge may, in the interest of justice, correct any clerical mistakes or typographical errors contained in a final order entered in a case arising under section 274A or 274C of the INA at any time within thirty (30) days after the entry of the final order. Changes other than clerical mistakes or typographical errors will be considered in cases arising under sections 274A and 274C of the INA by filing a request for review to the Chief Administrative Hearing Officer by a party

under § 68.54, or the Chief Administrative Hearing Officer may exercise discretionary review to make such changes pursuant to § 68.54. In cases arising under section 274B of the INA, an Administrative Law Judge may correct any substantive, clerical, or typographical errors or mistakes in a final order at any time within sixty (60) days after the entry of the final order.

(g) *Final agency order*. In a case arising under section 274A or 274C of the INA, the Administrative Law Judge's order becomes the final agency order sixty (60) days after the date of the Administrative Law Judge's order, unless the Chief Administrative Hearing Officer modifies, vacates, or remands the Administrative Law Judge's final order pursuant to § 68.54, or unless the order is referred to the Attorney General pursuant to § 68.55. In a case arising under section 274B of the INA, the Administrative Law Judge's order becomes the final agency order on the date the order is issued.

[Order No. 2203–99, 64 FR 7079, Feb. 12, 1999, as amended by Order No. 2255–99, 64 FR 49660, Sept. 14, 1999; Order No. 2944–2008, 73 FR 10136, Feb. 26, 2008]

§ 68.53 Review of an interlocutory order of an Administrative Law Judge in cases arising under section 274A or 274C.

(a) *Authority*. In a case arising under section 274A or 274C of the Immigration and Nationality Act, the Chief Administrative Hearing Officer may, within thirty (30) days of the date of an Administrative Law Judge's interlocutory order, issue an order that modifies or vacates the interlocutory order. The Chief Administrative Hearing Officer may review an Administrative Law Judge's interlocutory order if:

(1) An Administrative Law Judge, when issuing an interlocutory order, states in writing that the Judge believes:

(i) That the order concerns an important question of law on which there is a substantial difference of opinion; and

(ii) That an immediate appeal will advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy; or

(2) Within ten (10) days of the date of the entry of an interlocutory order a party requests by motion that the Chief Administrative Hearing Officer review the interlocutory order. This motion shall contain a clear statement of why interlocutory review is appropriate under the standards set out in paragraph (a)(1) of this section; or

(3) Within ten (10) days of the entry of the interlocutory order, the Chief Administrative Hearing Officer, upon the Officer's own initiative, determines that such order is appropriate for interlocutory review pursuant to the standards set out in paragraph (a)(1) and issues a notification of review. This notification shall state the issues to be reviewed.

(b) *Stay of proceedings*. Review of an Administrative Law Judge's interlocutory order will not stay the proceeding unless the Administrative Law Judge or the Chief Administrative Hearing Officer determines that the circumstances require a postponement.

(c) *Review by Chief Administrative Hearing Officer*. Review by the Chief Administrative Hearing Officer of an interlocutory order shall be conducted in the same manner as is provided for review of final orders in § 68.54(b) through (d). An interlocutory order, or an order modifying, vacating, or remanding an interlocutory order, shall not be considered a final agency order. If the Chief Administrative Hearing Officer does not modify, vacate, or remand an interlocutory order reviewed pursuant to paragraph (a) within thirty (30) days of the date that the order is entered, the Administrative Law Judge's interlocutory order is deemed adopted.

(d) *Effect of interlocutory review*. (1) An order by the Chief Administrative Hearing Officer modifying or vacating an interlocutory order shall also remand the case to the Administrative Law Judge. Further proceedings in the case shall be conducted consistent with the Chief Administrative Hearing Officer's order.

(2) Whether or not an interlocutory order is reviewed by the Chief Administrative Hearing Officer, all parties retain the right to request administrative review of the final order of the Administrative Law Judge pursuant to

§ 68.54 with respect to all issues in the case.

[Order No. 2203–99, 64 FR 7081, Feb. 12, 1999]

§ 68.54 Administrative review of a final order of an Administrative Law Judge in cases arising under section 274A or 274C.

(a) *Authority of the Chief Administrative Hearing Officer*. In a case arising under section 274A or 274C of the INA, the Chief Administrative Hearing Officer has discretionary authority, pursuant to sections 274A(e)(7) and 274C(d)(4) of the INA and 5 U.S.C. 557, to review any final order of an Administrative Law Judge in accordance with the provisions of this section.

(1) A party may file with the Chief Administrative Hearing Officer a written request for administrative review within ten (10) days of the date of entry of the Administrative Law Judge's final order, stating the reasons for or basis upon which it seeks review.

(2) The Chief Administrative Hearing Officer may review an Administrative Law Judge's final order on his or her own initiative by issuing a notification of administrative review within ten (10) days of the date of entry of the Administrative Law Judge's order. This notification shall state the issues to be reviewed.

(b) *Written and oral arguments*. (1) In any case in which administrative review has been requested or ordered pursuant to paragraph (a) of this section, the parties may file briefs or other written statements within twenty-one (21) days of the date of entry of the Administrative Law Judge's order.

(2) At the request of a party, or on the Officer's own initiative, the Chief Administrative Hearing Officer may, at the Officer's discretion, permit or require additional filings or may conduct oral argument in person or telephonically.

(c) *Filing and service of documents relating to administrative review*. All requests for administrative review, briefs, and other filings relating to review by the Chief Administrative Hearing Officer shall be filed and served by facsimile or same-day hand delivery, or if such filing or service cannot be made, by overnight delivery, as provided in § 68.6(c). A notification of administrative review by the Chief Administrative Hearing Officer shall also be served by facsimile or same-day hand delivery, or if such service cannot be made, by overnight delivery service.

(d) *Review by the Chief Administrative Hearing Officer*. (1) On or before thirty (30) days subsequent to the date of entry of the Administrative Law Judge's final order, but not before the time for filing briefs has expired, the Chief Administrative Hearing Officer may enter an order that modifies or vacates the Administrative Law Judge's order, or remands the case to the Administrative Law Judge for further proceedings consistent with the Chief Administrative Hearing Officer's order. However, the Chief Administrative Hearing Officer is not obligated to enter an order unless the Administrative Law Judge's order is modified, vacated or remanded.

(2) If the Chief Administrative Hearing Officer enters an order that remands the case to the Administrative Law Judge, the Administrative Law Judge will conduct further proceedings consistent with the Chief Administrative Hearing Officer's order. Any administrative review of the Administrative Law Judge's subsequent order shall be conducted in accordance with this section.

(3) The Chief Administrative Hearing Officer may make technical corrections to the Officer's order up to and including thirty (30) days subsequent to the issuance of that order.

(e) *Final agency order*. If the Chief Administrative Hearing Officer enters a final order that modifies or vacates the Administrative Law Judge's final order, and the Chief Administrative Hearing Officer's order is not referred to the Attorney General pursuant to § 68.55, the Chief Administrative Hearing Officer's order becomes the final agency order thirty (30) days subsequent to the date of the modification or vacation.

[Order No. 2203–99, 64 FR 7082, Feb. 12, 1999]

§ 68.55 Referral of cases arising under sections 274A or 274C to the Attorney General for review.

(a) *Referral of cases by direction of the Attorney General*. Within thirty (30) days of the entry of a final order by the

Chief Administrative Hearing Officer modifying or vacating an Administrative Law Judge's final order, or within sixty (60) days of the entry of an Administrative Law Judge's final order, if the Chief Administrative Hearing Officer does not modify or vacate the Administrative Law Judge's final order, the Chief Administrative Hearing Officer shall promptly refer to the Attorney General for review any final order in cases arising under section 274A or 274C of the INA if the Attorney General so directs the Chief Administrative Hearing Officer. When a final order is referred to the Attorney General in accordance with this paragraph, the Chief Administrative Hearing Officer shall give the Administrative Law Judge and all parties a copy of the referral.

(b) *Request by Commissioner of Immigration and Naturalization for review by the Attorney General.* The Chief Administrative Hearing Officer shall promptly refer to the Attorney General for review any final order in cases arising under sections 274A or 274C of the INA at the request of the Commissioner of Immigration and Naturalization within thirty (30) days of the entry of a final order modifying or vacating the Administrative Law Judge's final order or within sixty (60) days of the entry of an Administrative Law Judge's final order, if the Chief Administrative Hearing Officer does not modify or vacate the Administrative Law Judge's final order.

(1) The Immigration and Naturalization Service must first seek review of an Administrative Law Judge's final order by the Chief Administrative Hearing Officer, in accordance with § 68.54 before the Commissioner of Immigration and Naturalization may request that an Administrative Law Judge's final order be referred to the Attorney General for review.

(2) To request referral of a final order to the Attorney General, the Commissioner of Immigration and Naturalization must submit a written request to the Chief Administrative Hearing Officer and transmit copies of the request to all other parties to the case and to the Administrative Law Judge at the time the request is made. The written statement shall contain a succinct statement of the reasons the case should be reviewed by the Attorney General and the grounds for appeal.

(3) The Attorney General, in the exercise of the Attorney General's discretion, may accept the Commissioner's request for referral of the case for review by issuing a written notice of acceptance within sixty (60) days of the date of the request. Copies of such written notice shall be transmitted to all parties in the case and to the Chief Administrative Hearing Officer.

(c) *Review by the Attorney General.* When a final order of an Administrative Law Judge or the Chief Administrative Hearing Officer is referred to the Attorney General pursuant to paragraph (a) of this section, or a referral is accepted in accordance with paragraph (b)(3) of this section, the Attorney General shall review the final order pursuant to section 274A(e)(7) or 274C(d)(4) of the INA and 5 U.S.C. 557. No specific time limit is established for the Attorney General's review.

(1) All parties shall be given the opportunity to submit briefs or other written statements pursuant to a schedule established by the Chief Administrative Hearing Officer or the Attorney General.

(2) The Attorney General shall enter an order that adopts, modifies, vacates, or remands the final order under review. The Attorney General's order shall be stated in writing and shall be transmitted to all parties in the case and to the Chief Administrative Hearing Officer.

(3) If the Attorney General remands the case for further administrative proceedings, the Chief Administrative Hearing Officer or the Administrative Law Judge shall conduct further proceedings consistent with the Attorney General's order. Any subsequent final order of the Administrative Law Judge or the Chief Administrative Hearing Officer shall be subject to administrative review in accordance with § 68.54 and this section.

(d) *Final agency order.* (1) The Attorney General's order pursuant to paragraph (c) of this section (other than a remand as provided in paragraph (c)(3)) shall become the final agency order on the date of the Attorney General's order.

(2) If the Attorney General declines the Commissioner's request for referral of a case pursuant to paragraph (b) of this section, or does not issue a written notice of acceptance within sixty (60) days of the date of the Commissioner's request, then the final order of the Administrative Law Judge or the Chief Administrative Hearing Officer that was the subject of a referral pursuant to paragraph (b) shall become the final agency order on the day after that sixty (60) day period has expired.

[Order No. 2203–99, 64 FR 7082, Feb. 12, 1999]

§ 68.56 Judicial review of a final agency order in cases arising under section 274A or 274C.

A person or entity adversely affected by a final agency order may file, within forty-five (45) days after the date of the final agency order, a petition in the United States Court of Appeals for the appropriate circuit for review of the final agency order. Failure to request review by the Chief Administrative Hearing Officer of a final order by an Administrative Law Judge shall not prevent a party from seeking judicial review.

[Order No. 2203–99, 64 FR 7083, Feb. 12, 1999]

§ 68.57 Judicial review of the final agency order of an Administrative Law Judge in cases arising under section 274B.

Any person aggrieved by a final agency order issued under § 68.52(d) may, within sixty (60) days after entry of the order, seek review of the final agency order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. If a final agency order issued under § 68.52(d) is not appealed, the Special Counsel (or, if the Special Counsel fails to act, the person filing the charge, other than the Immigration and Naturalization Service officer) may file a petition in the United States District Court for the district in which the violation that is the subject of the final agency order is alleged to have occurred, or in which the respondent resides or transacts business, requesting that the order be enforced.

[Order No. 2203–99, 64 FR 7083, Feb. 12, 1999]

§ 68.58 Filing of the official record.

Upon timely receipt of notification that an appeal has been taken, a certified copy of the record will be filed promptly with the appropriate United States Court.

[Order No. 2203–99, 64 FR 7083, Feb. 12, 1999]

PART 69—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
69.100 Conditions on use of funds.
69.105 Definitions.
69.110 Certification and disclosure.

Subpart B—Activities by Own Employees

69.200 Agency and legislative liaison.
69.205 Professional and technical services.
69.210 Reporting.

Subpart C—Activities by Other Than Own Employees

69.300 Professional and technical services.

Subpart D—Penalties and Enforcement

69.400 Penalties.
69.405 Penalty procedures.
69.410 Enforcement.

Subpart E—Exemptions

69.500 Secretary of Defense.

Subpart F—Agency Reports

69.600 Semi-annual compilation.
69.605 Inspector General report.
APPENDIX A TO PART 69—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 69—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Public Law 101–121 (31 U.S.C. 1352); [citation to Agency rulemaking authority].

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

SOURCE: 55 FR 6737, 6751, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 69.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative

agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 69.105 Definitions.

For purposes of this part:

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

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

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

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

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

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

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

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

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

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4

of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

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

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

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

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

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

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

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

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

(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.

§ 69.110 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

§ 69.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 69.100 (a), does

not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

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

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

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

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

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

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

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

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

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

§ 69.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 69.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement 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.

§ 69.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 69.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 69.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 69.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational 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

§ 69.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than

$10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

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

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

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

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

§ 69.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 69.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 69.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 69.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to

the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 69.605 Inspector General report.

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

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

(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 69—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

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

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

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

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a

civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 69—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

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

1. Type of Federal Action:
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐ a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐ a. initial filing
b. material change
For Material Change Only:
year _____ quarter _____
date of last report _____

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier _____, *if known:*

Congressional District, *if known:*

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known:*

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable:* _____

8. Federal Action Number, *if known:*

9. Award Amount, *if known:*
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply):*
$ _____ ☐ actual ☐ planned

12. Form of Payment *(check all that apply):*
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

13. Type of Payment *(check all that apply):*
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____
Print Name: _____
Title: _____
Telephone No.: _____ **Date:** _____

Federal Use Only:

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Standard Form - LLL

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

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 70—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS (INCLUDING SUBAWARDS) WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS AND OTHER NON-PROFIT ORGANIZATIONS

Subpart A—General

Sec.
70.1 Purpose and applicability.
70.2 Definitions.
70.3 Effect on other issuances.
70.4 Deviations.
70.5 Subawards.

Subpart B—Pre-Award Requirements

70.10 Purpose.
70.11 Pre-award policies.
70.12 Forms for applying for Federal assistance.
70.13 Debarment and suspension.
70.14 Special award conditions.
70.15 Metric system of measurement.
70.16 Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 codified at 42 U.S.C. 6962).
70.17 Certifications and representations.

Subpart C—Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

70.20 Purpose of financial and program management.
70.21 Standards for financial management systems.
70.22 Payment.
70.23 Cost sharing or matching.
70.24 Program income.
70.25 Revision of budget and program plans.
70.26 Non-Federal audits.
70.27 Allowable costs.
70.28 Period of availability of funds.

PROPERTY STANDARDS

70.30 Purpose of property standards.
70.31 Insurance coverage.
70.32 Real property.
70.33 Federally-owned and exempt property.
70.34 Equipment.
70.35 Supplies and other expendable property.
70.36 Intangible property.
70.37 Property trust relationship.

PROCUREMENT STANDARDS

70.40 Purpose of procurement standards.
70.41 Recipient responsibilities.
70.42 Codes of conduct.
70.43 Competition.
70.44 Procurement procedures.
70.45 Cost and price analysis.
70.46 Procurement records.
70.47 Contract administration.
70.48 Contract provisions.

REPORTS AND RECORDS

70.50 Purpose of reports and records.
70.51 Monitoring and reporting program performance.
70.52 Financial reporting.
70.53 Retention and access requirements for records.

TERMINATION AND ENFORCEMENT

70.60 Purpose of termination and enforcement.
70.61 Termination.
70.62 Enforcement.

Subpart D—After-the-Award Requirements

70.70 Purpose.
70.71 Closeout procedures.
70.72 Subsequent adjustments and continuing responsibilities.
70.73 Collection of amounts due.

APPENDIX A TO PART 70—CONTRACT PROVISIONS

AUTHORITY: 5 U.S.C. 301; the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3711, *et seq.* (as amended); Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601, *et seq.* (as amended); Victims of Crime Act of 1984, 42 U.S.C. 10601, *et seq.* (as amended); 18 U.S.C. 4042, 4351–4353; OMB Circular A–110 (64 FR 54926, October 8, 1999).

SOURCE: Order No. 1980–95, 60 FR 38242, July 26, 1995, unless otherwise noted.

Subpart A—General

§ 70.1 Purpose and applicability.

This part establishes uniform administrative requirements for the Department grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. It also establishes rules governing how State, local and Indian tribal governments shall administer subawards to nongovernmental entities.

§ 70.2 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 Department 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 the Department determines that all applicable administrative actions and all required work of the award have been completed by the recipient and the Department.

(h) *Contract* means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

(i) *Cost sharing or matching* means the portion of project or program costs not borne by the Federal Government.

(j) *The Department* refers to the United States Department of Justice awarding agencies, which include the Office of Justice Programs (OJP), Community Relation Service (CRS), United States Marshals Service (USMS), National Institute of Corrections (NIC), Office of Special Counsel (OSC), and the Civil Rights Division (CRD).

(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 the Department sponsorship ends.

(l) *Disallowed costs* means those charges to an award that the Department 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 $5000 or more per unit. However, consistent with recipient policy, lower limits may be established.

(n) *Excess property* means property under the control of the Department 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 Department 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 funds authorized* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

(q) *Federal share* of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

(r) *Funding period* means the period of time when Federal funding is available for obligation by the recipient.

(s) *Independent Research and Development costs* means research and development conducted by an organization which is not sponsored by Federal or non-Federal awards, contracts, or other agreements.

(t) *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.

(u) *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.

(v) *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.

(w) *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.

(x) *Prior approval* means written approval by an authorized official evidencing prior consent.

(y) *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 § 70.24 (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, interest on loans made with award funds, and income from asset forfeitures accounted for from the time of seizure. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in the Department 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.

(z) *Project costs* means all allowable costs, as set forth in the applicable Federal costs 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.

(aa) *Project period* means the period established in the award document during which Federal sponsorship begins and ends.

(bb) *Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

(cc) *Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

(dd) *Recipient* means an organization receiving financial assistance directly from the Department to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Department. 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 designed as Federally-funded research and development centers.

(ee) *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.

(ff) *Small awards* means a grant or cooperative agreement not exceeding the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently $100,000).

(gg) *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 § 70.2(e).

(hh) *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 Department.

(ii) *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.''

(jj) *Suspension* means an action by the Department that temporarily withdraws the Department sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Department. Suspension of an award is a separate action from suspension under the Department regulations implementing Exec. Order No. 12549 and 12689, ''Debarment and Suspension.''

(kk) *Termination* means the cancellation of the Department sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

(ll) *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.

(mm) *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.

(nn) *Unobligated balance* means the portion of the funds authorized by the Department that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(oo) *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.

(pp) *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.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57931, Nov. 24, 1995]

§ 70.3 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 in § 70.4.

§ 70.4 Deviations.

OMB, after consultation with the Department's Division of Financial Management and Grants Administration 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. The Department shall apply more restrictive requirements to a class of recipients when approved by OMB. The Department 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 Department.

§ 70.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, all of the Department's recipients, including State and local governments, shall apply the provisions of this part to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals or other non-profit organizations. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,'' published at 28 CFR part 66 (March 11, 1988).

Subpart B—Pre-Award Requirements

§ 70.10 Purpose.

Sections 70.11 through 70.17 prescribe forms and instructions and other pre-award matters to be used in applying for the Department's awards.

§ 70.11 Pre-award policies.

(a) *Use of grants and cooperative agreements, and contracts.* In each instance, the Department 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.* The Department shall notify the public

of its intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 70.12 Forms for applying for Federal assistance.

(a) The Department 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 Department as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series and instructions prescribed by the Department.

(c) For the Department's programs covered by Exec. Order No. 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 ''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.

§ 70.13 Debarment and suspension.

Recipients shall comply with the nonprocurement debarment and suspension common rule implementing Exec. Order No. 12549 and 12689, ''Debarment and Suspension.'' This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 70.14 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 Department will 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.

§ 70.15 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. The Department will follow the provisions of Exec. Order No. 12770, ''Metric Usage in Federal Government Programs.''

§ 70.16 Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 codified at 42 U.S.C. 6962).

Under the Act, 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 nonprofit 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.

§ 70.17 Certifications and representations.

Unless prohibited by statute or codified regulation, the Department will 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 must 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

§ 70.20 Purpose of financial and program management.

Sections 70.21 through 70.28 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.

§ 70.21 Standards for financial management systems.

(a) Recipients must relate financial data to performance data and development unit cost information whenever practical.

(b) Recipients' financial management systems must 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 § 70.52. When the Department requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient will 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 must 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 must 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 must 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) 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 will require adequate fidelity bond coverage when the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds must 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.''

§ 70.22 Payment.

(a) Payment methods must 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 must be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b) Recipients may 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 § 70.21. Cash advances to a recipient organization will 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 must 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 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 may 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 must be submitted on SF–270, ''Request for Advance or Reimbursement.''

(e) Reimbursement is the method that will be used when the requirements in paragraph (b) of this section 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 will make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients will be authorized to submit requests 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 will 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 will 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 subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients must 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 will not withhold payments for proper charges made by recipients at any time during the project period unless paragraph (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 the Department's 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 must 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, the Department will 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 the Department funds must 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 fifty percent by women or minority group members).

(k) Recipients must maintain advances of the Department's 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 must be remitted annually to Department of Health and Human Services, (HHS), Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals must 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. In keeping with Electronic Funds Transfer rules, (31 CFR part 206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIRE Deposit System. Recipients which do not have this capability should use a check.

(m) Recipients must use the SF–270, Request for Advance or Reimbursement or other standard form for all nonconstruction programs when electronic funds transfer is not used.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57931, Nov. 24, 1995]

§ 70.23 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, will 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 only with the prior approval of the Department.

(c) Values for recipient contributions of services and property must 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 must be the lesser of paragraph (c) (1) or (2) of this section.

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the 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 must 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 must 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 must 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 skills for which the employee would normally be 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 must be reasonable and must 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 must be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings must 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 must 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 must 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 must 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 must 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 must be documented.

§ 70.24 Program income.

(a) The standards set forth in this section requiring recipient organizations to account for program income related to projects financed in whole or in part with Department funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period must be retained by the recipient and, in accordance with the Department regulations or the terms and conditions of the award, must 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 Department authorizes the disposition of program income as described in paragraphs (b)(1) or (b)(2), of this section, program income in excess of any limits stipulated must be used in accordance with paragraph (b)(3) of this section.

(d) In the event that the Department does not specify in its regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3), of this section applies automatically to all projects or programs.

(e) Unless the Department's regulations or the terms and conditions of the award provide otherwise, recipients will 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 must be handled in accordance with the requirements of the Property Standards (See §§ 70.30 through 70.37).

(h) Unless the terms and conditions of the award provide otherwise, recipients will 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.

(i) Recipients must account for seized assets from the date of seizure until forfeiture and liquidation of funds occur.

§ 70.25 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 the Department's requirements. It must 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 must request in writing prior approval 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, 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) The Department restricts the transfer of funds among direct cost categories or programs, functions and activities, without prior written approval 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 ten percent of the total budget as last approved by the Department. The Department will 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.

(e) All other changes to nonconstruction budgets, except for the changes described in paragraph (g) of this section, do not require prior approval.

(f) For construction awards, recipients must request prior written approval promptly from the Department for budget revisions whenever paragraph (f) (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 Department 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 § 70.27.

(g) When the Department makes an award that provides support for both construction and nonconstruction work, the Department will require the recipient to request prior approval from the Department before making any fund or budget transfers between the two types of work supported.

(h) For both construction and nonconstruction awards, the Department will 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 $5000 or five percent of the award, whichever is greater. This notification will not be required if an application for additional funding is submitted for a continuation award.

(i) When requesting approval for budget revisions, recipients must use the budget forms that were used in the application unless the Department indicates a letter of request suffices.

(j) Within thirty calendar days from the date of receipt of the request for budget revisions, the Department will 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 thirty calendar days, the Department will inform the recipient in writing of the date when the recipient may expect the decision.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57931, Nov. 24, 1995]

§ 70.26 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 must follow the audit threshold in revised OMB Circular A–133 in determining

whether to conduct an audit in accordance with Government Auditing Standards.

[62 FR 45939, 45942, Aug. 29, 1997]

§ 70.27 Allowable costs.

(a) For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs must 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 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.

(b) OMB Circular A–122 does not cover the treatment of bid and proposal costs or independent research and development costs. The following rules apply to these costs for non-profit organizations subject to the Circular.

(1) *Bid and proposal costs.* Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for Federal and non-Federal awards, contracts, and agreements, including the development of scientific, costs, and other data needed to support the bids, proposals, and applications. Bid and proposal costs of the current accounting period are all allowable as indirect costs. Bid and proposal costs of past accounting periods are unallowable in the current period. However, if the recipient's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable. Bid and proposal costs do not include independent research and development costs covered by paragraph (b)(2) of this section, or preaward costs covered by Attachment B, Paragraph 33 of OMB Circular A–122.

(2) *Independent Research and Development costs.* Independent research and development shall must be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs to sponsored research and development. The costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

§ 70.28 Period of availability of funds.

Where a funding period is specified, a recipient must charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Department.

PROPERTY STANDARDS

§ 70.30 Purpose of property standards.

Sections 70.31 through 70.37 sets 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 will require recipients to observe these standards under awards and will 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 §§ 70.31 through 70.37.

§ 70.31 Insurance coverage.

Recipients must, 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.

§ 70.32 Real property.

(a) Title to real property will vest in the recipient subject to the condition that the recipient use the real property for the authorized purpose of the project as long as it is needed and will

not encumber the property without approval of the Department.

(b) The recipient must 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 will 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) of this section, the recipient must request disposition instructions from the Department. The Department will 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 must 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.

§ 70.33 Federally-owned and exempt property.

(a) *Federally-owned property.* (1) Title to Federally-owned property remains vested in the Federal Government. Recipients may be required by the terms and conditions of the award, to 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 must report the property to the Department for further Federal agency utilization.

(2) If the Department has no further need for the property, it will 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 Exec. Order No. 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 may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government when such property is ''exempt property.''

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995]

§ 70.34 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds will vest in the recipient, subject to conditions of this section.

(b) The recipient must 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 must 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 must not encumber the property without approval of the Department. When no longer needed for

the original project or program, the recipient must use the equipment in connection with its other Federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by the Department which funded the original project, then

(2) Activities sponsored by other Federal awarding agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient must 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 must be given to other projects or programs sponsored by the Department. Second preference must be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government may be permissible if authorized in writing by the Department. User charges must 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 written approval of the Department.

(f) The recipient's property management standards for equipment acquired with Federal funds and Federally-owned equipment must include all of the following:

(1) Equipment records must be maintained accurately and must 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 must be identified to indicate Federal ownership.

(3) A physical inventory of equipment must be taken and the results reconciled with the equipment records annually. Any differences between quantities determined by the physical inspection and those shown in the accounting records must be investigated to determine the causes of the difference. The recipient must, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system must be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment must be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient must promptly notify the Department.

(5) Adequate maintenance procedures must be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures must 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 Department or its successor. The amount of compensation must 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 must request disposition instructions from the Department. The Department will 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 must 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 will issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures will govern.

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient may 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 may 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 may 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 may be reimbursed by the Department for such costs incurred in its disposition.

(4) The Department 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 will be subject to the following standards.

(i) The equipment must be appropriately identified in the award or otherwise made known to the recipient in writing.

(ii) The Department will issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory must 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 may apply the standards of this section, as appropriate.

(iii) When the Department exercises its right to take title, the equipment is subject to the provisions for Federally-owned equipment.

§ 70.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property vests 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 may retain the supplies for use on non-Federal sponsored activities or sell them, but must, in either case, compensate the Federal Government for its share. The amount of compensation must be computer in the same manner as for equipment.

(b) The recipient must 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.

§ 70.36 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 Department 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 Departmental 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 Departmental 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 must use that property for the originally-authorized purpose, and the recipient must not encumber the property without approval of the Department. When no longer needed for the originally authorized purpose, disposition of the intangible property must occur in accordance with the provisions of § 70.34(g).

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995; Order No. 2289–2000, 65 FR 14407, 14410, Mar. 16, 2000]

§ 70.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds must 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 are required 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

§ 70.40 Purpose of procurement standards.

Sections 70.41 through 70.48 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 will be imposed by the Department upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 70.41 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.

§ 70.42 Codes of conduct.

The recipient must 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 must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 70.43 Competition.

All procurement transactions must be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient must 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 must be excluded from competing for such procurements. Awards must 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 must clearly set forth all requirements that the bidder or offeror must 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.

§ 70.44 Procurement procedures.

(a) All recipients must establish written procurement procedures. These procedures must 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 must 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 must be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards must 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 procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) may be determined by the recipient and must 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 must not be used.

(d) Contracts must be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration must 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 Exec. Order No. 12549 and 12689, ''Debarment and Suspension.''

(e) Recipients must, 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 regulation.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a ''brand name'' product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995]

§ 70.45 Cost and price analysis.

Some form of cost or price analysis must 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.

§ 70.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold must 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.

§ 70.47 Contract administration.

A system for contract administration must 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 must evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 70.48 Contract provisions.

The recipient must include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions must also be applied to subcontracts.

(a) Contracts in excess of the small purchase threshold must 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 must contain suitable provisions for termination by the recipient, including the manner by which termination must be effected and the basis for settlement. In addition, such contracts must 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 must 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 are to be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder must, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds must 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 must 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, must 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 must contain the procurement provisions of appendix A to this part as applicable.

REPORTS AND RECORDS

§ 70.50 Purpose of reports and records.

Sections 70.51 through 70.53 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.

§ 70.51 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 must monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 70.26.

(b) Performance reports must be submitted based on each calendar quarter. Reports are due thirty days after the reporting period, unless stated differently in the terms and conditions of the award. The final performance reports are due ninety calendar days after the expiration or termination of the award.

(c) Performance reports must 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.

(d) Recipients are required to submit the original and two copies of performance reports.

(e) Recipients must immediately notify the department, in writing, of developments that have a significant impact on the award-supported activities. Also, written notification must 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 must include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(f) The Department will make site visits, as needed.

(g) The Department will comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995]

§ 70.52 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) Recipients are required to use the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs.

(ii) Reports must be on an accrual basis. Recipients are not required to convert their accounting system, but must develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The Department requires the SF–269, SF–269A, or turnaround document to be submitted no later than forty five days after the calendar quarter. The final report is due ninety days from the end date of the award.

(b) When the Department needs additional information or more frequent reports, the following will be observed.

(1) When additional information is needed to comply with legislative requirements, the Department will 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 § 70.21, additional pertinent information to further monitor awards will 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, will comply with report clearance requirements of 5 CFR part 1320.

(3) The Department will accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(4) The Department will provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995]

§ 70.53 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 will 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 must 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 three year period, the records must 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 must be retained for three years after final disposition.

(3) When records are transferred to or maintained by the Department, the three year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in § 70.53(g).

(c) Copies of original records may be substituted for the original records if authorized by the Department.

(d) The Department will 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 will make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Department, its 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 must last as long as records are retained.

(f) Unless required by statute, the Department will not 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 must 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 allocation 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 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 three 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 three 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.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995]

TERMINATION AND ENFORCEMENT

§ 70.60 Purpose of termination and enforcement.

Sections 70.61 and 70.62 set forth uniform suspension, termination and enforcement procedures.

§ 70.61 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (2) or (3) of this section apply.

(1) By the 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 must 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 paragraph (a) (1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 70.71(a), including those for property management as applicable, must be considered in the termination of the award, and provision must be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 70.62 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 will, in addition to imposing any of the special conditions outlined in § 70.14, 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 Department will 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 Department 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 Exec. Order No. 12549 and 12689 and the Department implementing regulations (see § 70.13).

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995]

Subpart D—After-the-Award Requirements

§ 70.70 Purpose.

Sections 70.71 through 70.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 70.71 Closeout procedures.

(a) Recipients must 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 Department may approve extensions when requested in writing by the recipient.

(b) Unless the Department authorizes an extension, a recipient must liquidate all obligations incurred under the award not later than ninety calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) The Department will make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient must 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 will make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient must account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 70.31 through 70.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, the Department retains the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 70.72 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 § 70.26.

(4) Property management requirements in §§ 70.31 through 70.37.

(5) Records retention as required in § 70.53.

(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 §70.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§70.73 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 paragraph (a) (1), (2) or (3) of this section.

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Department may charge interest on an overdue debt in accordance with 4 CFR chapter II, ''Federal Claims Collection Standards.''

APPENDIX A TO PART 70—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, must contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts must contain a provision requiring compliance with Exec. Order No. 11246, ''Equal Employment Opportunity,'' as amended by Exec. Order No. 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 subawards in excess of $2000 for construction or repair awarded by recipients and subrecipients must 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 must 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 must 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 must 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 must 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 are required to pay wages not less than once a week. The recipient must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract must be conditioned upon the acceptance of the wage determination. The recipient must 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 must 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 is required to compute the wages of every mechanic and laborer on the basis of a standard work week of forty hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and one-half times the basic rate of pay for all hours worked in excess of forty 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 must 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 must 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 must 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 must 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 must 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 (Exec. Order No. 12549 and 12689)*—No contract shall be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with Exec. Order No. 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 Exec. Order No. 12549. Contractors with awards that exceed the small purchase threshold must provide the required certification regarding its exclusion status and that of its principal employees.

[Order No. 1980–95, 60 FR 38242, July 26, 1995; Order No. 1998–95, 60 FR 57932, Nov. 24, 1995]

PART 71—IMPLEMENTATION OF THE PROVISIONS OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

Subpart A—Implementation for Actions Initiated by the Department of Justice

Sec.

71.1 Purpose.
71.2 Definitions.
71.3 Basis for civil penalties and assessments.
71.4 Investigation.
71.5 Review by the reviewing official.
71.6 Prerequisites for issuing a complaint.
71.7 Complaint.
71.8 Service of complaint.
71.9 Answer.
71.10 Default upon failure to file an answer.
71.11 Referral of complaint and answer to the ALJ.
71.12 Notice of hearing.
71.13 Parties to the hearing.
71.14 Separation of functions.
71.15 *Ex parte* contacts.
71.16 Disqualification of reviewing official or ALJ.
71.17 Rights of parties.
71.18 Authority of the ALJ.
71.19 Prehearing conferences.
71.20 Disclosure of documents.
71.21 Discovery.
71.22 Exchange of witness lists, statements, and exhibits.
71.23 Subpoenas for attendance at hearing.
71.24 Protective order.
71.25 Fees.
71.26 Form, filing and service of papers.
71.27 Computation of time.
71.28 Motions.
71.29 Sanctions.
71.30 The hearing and burden of proof.
71.31 Determining the amount of penalties and assessments.
71.32 Location of hearing.
71.33 Witnesses.
71.34 Evidence.
71.35 The record.
71.36 Post-hearing briefs.
71.37 Initial decision.
71.38 Reconsideration of initial decision.
71.39 Appeal to authority head.
71.40 Stays ordered by the Department of Justice.
71.41 Stay pending appeal.
71.42 Judicial review.
71.43 Collection of civil penalties and assessments.
71.44 Right to administrative offset.
71.45 Deposit in Treasury of the United States.
71.46 Compromise or settlement.
71.47 Limitations.
71.48–71.50 [Reserved]

Subpart B—Assignment of Responsibilities Regarding Actions by Other Agencies

71.51 Purpose.
71.52 Approval of Agency requests to initiate a proceeding.
71.53 Stays of Agency proceedings at the request of the Department.
71.54 Collection and compromise of liabilities imposed by Agency.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 31 U.S.C. 3801–3812; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321.

SOURCE: Order No. 1268–88, 53 FR 11646, Apr. 8, 1988, unless otherwise noted.

Subpart A—Implementation for Actions Initiated by the Department of Justice

§71.1 Purpose.

This subpart implements the Program Fraud Civil Remedies Act of 1986, Public Law 99–509, 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute. The subpart 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.

§71.2 Definitions.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the United States Department of Justice, including all offices, boards, divisions and bureaus.

Authority head means the Attorney General or his designee. For purposes of these regulations, the Deputy Attorney General is designated to act on behalf of the Attorney General.

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 the authority for property, services, or money (including money representing grants, loans or insurance);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

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

(i) Provided such property or services;

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

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

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

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

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

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

Complaint means the administrative complaint served by the rviewing official on the defendant under §71.7.

Defendant means any person alleged in a complaint under §71.7 to be liable for a civil penalty or assessment under §71.3.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by §71.10 or §71.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating Official means the Inspector General.

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 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 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.

Reviewing Official means the Assistant Attorney General for Administration. For purposes of § 71.5 of these rules, the Assistant Attorney General for Administration, personally or through his immediate staff, shall perform the functions of the reviewing official provided that such person 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. All other functions of the reviewing official, including administrative prosecution under these rules, shall be performed with respect to the components listed below by the individuals listed below acting on behalf of the Assistant Attorney General for Administration:

(a) For the offices, boards, divisions and any other components not covered below, the General Counsel, Justice Management Division;

(b) For the Bureau of Prisons (BOP), the General Counsel, BOP;

(c) For the Drug Enforcement Administration (DEA), the Chief Counsel, DEA;

(d) For the Federal Bureau of Investigation (FBI), the Assistant Director, Legal Counsel Division;

(e) For the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the Chief Counsel, ATF;

(f) For the Immigration and Naturalization Service (INS), the General Counsel, INS; and

(g) For the United States Marshals Service (USMS), the Associate Director for Administration.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

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

(1) A contract with, or a bid or proposal for a contract with; or

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

[Order No. 1268–88, 53 FR 11646, Apr. 8, 1988, as amended by Order No. 1444–90, 55 FR 38318, Sept. 18, 1990; Order No. 2650–2003, 68 FR 4929, Jan. 31, 2003]

§ 71.3 Basis for civil penalties and assessments.

(a) Any person 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 claim listed in paragraphs (a)(1) through (a)(4) of this section made before September 29, 1999, and not more than $5,500 for each such claim made on or after September 29, 1999, if that person makes a claim that the person knows or has reason to know:

(1) Is false, fictitious, or fraudulent;

(2) Includes, or is supported by, any written statement which asserts a material fact which is false, fictitious or fraudulent;

(3) Includes or is supported by, any written statement that

(i) Omits a material fact;

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

(iii) Is a statement in which the person making such a statement has a duty to include such material fact; or

(4) Is for payment for the provision of property or services which the person has not provided as claimed.

(b) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(c) 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.

(d) 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.

(e) 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.

(f) Any person 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 statement listed in paragraphs (f)(1) and (f)(2) of this section made before September 29, 1999, and not more than $5,500 for each such statement made on or after September 29, 1999, if that person makes a written statement that:

(1) The person knows or has reason to know

(i) Asserts a material fact which is false ficticious, or fraudulent; or

(ii) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

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

(g) Each written representation, certification, or affirmation constitutes a separate statement.

(h) 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.

(i) No proof of specific intent to defraud is required to establish liability under this section.

(j) 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.

(k) 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.

[Order No. 1268–88, 53 FR 11646, Apr. 8, 1988, as amended by Order No. 2249–99, 64 FR 47103, Aug. 30, 1999]

§71.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted, he may issue a subpoena.

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official, or the person designated to receive the documents, a certification that

(i) The documents sought have been produced;

(ii) Such documents are not available and the reasons therefor; or

(iii) Such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be

warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations within 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 appropriate component of the Department.

§ 71.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 71.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 71.3, the reviewing official shall transmit to the Assistant Attorney General, Civil Division, a written notice of the reviewing official's intention to have a complaint issued under § 71.7. Such notice shall include

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that support 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 § 71.3 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.

§ 71.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 71.7 only if

(1) The Assistant Attorney General, Civil Division, 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 § 71.3(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 § 71.3(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.

§ 71.7 Complaint.

(a) On or after the date the Assistant Attorney General, Civil Division, 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 § 71.8.

(b) The complaint shall state the following:

(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) The fact 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 §71.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§71.8 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 or her representative.

§71.9 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 §71.11. 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.

§71.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in §71.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on the defendant in the manner prescribed in §71.8, 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 §71.3, 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 a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 71.38.

(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.

§ 71.11 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.

§ 71.12 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 § 71.8. At the same time, the ALJ shall send a copy of such notice to the reviewing official or his designee.

(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.

§ 71.13 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.

§ 71.14 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.

§ 71.15 *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.

§71.16 Disqualification of reviewing official or ALJ.

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

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

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

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

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with this section.

(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

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

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§71.17 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.

§71.18 Authority of the ALJ.

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

(b) The ALJ has the authority to

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

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

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

(4) Administer oaths and affirmations;

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

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

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

(9) Examine witnesses;

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

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

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

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

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

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§71.19 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.

§ 71.20 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 § 71.4(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 Assistant Attorney General, Civil Division, from the reviewing official as described in § 71.5 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 § 71.9.

§ 71.21 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 §§ 71.22 and 71.23, 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 are to be handled according to the following procedures:

(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 § 71.24.

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

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

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

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

(5) The ALJ may grant discovery subject to a protective order under §71.24.

(e) Depositions are to be handled in the following manner:

(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 §71.8.

(3) The deponent may file with the ALJ within ten days of service a motion to quash the subpoena or a motion for a protective order.

(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.

§71.22 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 §71.33(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 may 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.

§71.23 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 date fixed for the hearing unless otherwise allowed by the ALJ upon a showing of good cause. 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 §71.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§71.24 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 the subject of inquiry, 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 sealed deposition 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.

§ 71.25 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.

§ 71.26 Form, filing and service of papers.

(a) *Form.* Documents filed with the ALJ shall include an original and two copies. 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). 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.

(b) *Filing.* 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.

(c) *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 § 71.8 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.

(d) *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.

§ 71.27 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.

§ 71.28 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.

§71.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for the following reasons:

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

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

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

(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.

§71.30 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 §71.3 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 closed by the ALJ for good cause shown.

§71.31 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, double damages and a significant civil penalty ordinarily 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 public confidence in the management of Government programs and operations;

(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.

§ 71.32 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.

§ 71.33 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 § 71.22(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 the following:

(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.

§ 71.34 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 § 71.24.

§ 71.35 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 § 71.24.

§ 71.36 Post-hearing briefs.

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.

§ 71.37 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 § 71.3; 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 § 71.31.

(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 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.

§ 71.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on all parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 71.39.

(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 § 71.39.

§ 71.39 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.

(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 § 71.38, 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 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.

(b) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under § 71.38 has expired, the ALJ shall forward the record of the proceeding to the authority head.

(c) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(d) 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.

(e) There is no right to appear personally before the authority head.

(f) There is no right to appeal any interlocutory ruling by the ALJ.

(g) In reviewing the initial decision, the authority head shall not consider

any objection that was not raised before the ALJ unless the objecting party can demonstrate extraordinary circumstances causing the failure to raise the objection.

(h) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there was reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(i) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the ALJ in any initial decision.

(j) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(k) 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 §71.3 is final and not subject to judicial review.

§71.40 Stays ordered by the Department of Justice.

If at any time 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 Assistant Attorney General who ordered the stay.

§71.41 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.

§71.42 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.

§71.43 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.

§71.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §71.42 or §71.43, or any amount agreed upon in a compromise or settlement under §71.46, 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.

§71.45 Deposit in Treasury of the 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).

§71.46 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 § 71.42 or during the pendency of any action to collect penalties and assessments under § 71.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 71.42 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.

§ 71.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 71.8 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 § 71.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by written agreement of the parties.

§§ 71.48–71.50 [Reserved]

Subpart B—Assignment of Responsibilities Regarding Actions by Other Agencies

§ 71.51 Purpose.

This subpart further implements the Program Fraud Civil Remedies Act of 1986. The Act authorizes the Attorney General, or certain officials whom the Attorney General may designate, to make determinations or otherwise act with respect to another agency's exercise of the provisions of the Program Fraud Civil Remedies Act. See, *e.g.*, 31 U.S.C. 3803(a)(2), 3803(b), 3805. This subpart designates officials within the Department of Justice who are authorized to exercise the authorities conferred upon the Attorney General by the Program Fraud Civil Remedies Act with respect to cases brought or proposed to be brought under it.

§ 71.52 Approval of Agency requests to initiate a proceeding.

(a) The Assistant Attorney General of the Civil Division is authorized to act on notices by an agency submitted to the Department of Justice pursuant to 31 U.S.C. 3803(a)(2) and, pursuant to the provisions of section 3803(b), to approve or disapprove the referral to an agency's presiding officer of the allegations of liability stated in such notice.

(b) The Assistant Attorney General of the Civil Division may

(1) Require additional information prior to acting as set forth above, in which case the 90 day period shall be extended by the time necessary to obtain such additional information; and

(2) Impose limitations and conditions upon such approval or disapproval as may be warranted in his or her judgment.

§ 71.53 Stays of Agency proceedings at the request of the Department.

With respect to matters assigned to their divisions, the Assistant Attorneys General of the litigating divisions are authorized to determine that the continuation of any hearing under 31 U.S.C. 3803(b)(3) with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, and to so notify the authority head of this determination and thereafter to determine when such hearing may resume.

§ 71.54 Collection and compromise of liabilities imposed by Agency.

The Assistant Attorney General of the Civil Division is authorized to initiate actions to collect assessments and civil penalties imposed under the Program Fraud Civil Remedies Act of 1986, and, subsequent to the filing of a petition for judicial review pursuant to section 3805 of the Act, to defend such actions and/or to approve settlements and compromises of such liability.

PART 72—SEX OFFENDER REGISTRATION AND NOTIFICATION

Sec.
72.1 Purpose.
72.2 Definitions.
72.3 Applicability of the Sex Offender Registration and Notification Act.

AUTHORITY: Pub. L. 109–248, 120 Stat. 587.

SOURCE: Order No. 2868–2007, 72 FR 8897, Feb. 28, 2007, unless otherwise noted.

§ 72.1 Purpose.

This part specifies the applicability of the requirements of the Sex Offender Registration and Notification Act to sex offenders convicted prior to the enactment of that Act. These requirements include registering and keeping the registration current in each jurisdiction in which a sex offender resides, is an employee, or is a student. The Attorney General has the authority to specify the applicability of the Act's requirements to sex offenders convicted prior to its enactment under sections 112(b) and 113(d) of the Act.

§ 72.2 Definitions.

All terms used in this part that are defined in section 111 of the Sex Offender Registration and Notification Act (title 1 of Pub. L. 109–248) shall have the same definitions in this part.

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

[Order No. 2868–2007, 72 FR 8897, Feb. 28, 2007, as amended by Order No. 3239–2010, 75 FR 81853, Dec. 29, 2010]

PART 73—NOTIFICATIONS TO THE ATTORNEY GENERAL BY AGENTS OF FOREIGN GOVERNMENTS

Sec.
73.1 Definition of terms.
73.2 Exceptions.
73.3 Form of notification.
73.4 Partial compliance not deemed compliance.
73.5 Termination of notification.
73.6 Relation to other statutes.

AUTHORITY: 18 U.S.C. 951, 28 U.S.C. 509, 510.

SOURCE: Order No. 1373–89, 54 FR 46608, Nov. 6, 1989, unless otherwise noted.

§ 73.1 Definition of terms.

(a) The term *agent* means all individuals acting as representatives of, or on behalf of, a foreign government or official, who are subject to the direction or control of that foreign government or official, and who are not specifically excluded by the terms of the Act or the regulations thereunder.

(b) The term *foreign government* includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been regarded by the United States as a governing authority.

(c) The term *prior notification* means the notification letter, telex, or facsimile must be received by the addressee named in § 73.3 prior to commencing the services contemplated by the parties.

(d) When used in 18 U.S.C. 951(d)(1), the term *duly accredited* means that the sending State has notified the Department of State of the appointment and arrival of the diplomatic or consular officer involved, and the Department of State has not objected.

(e) When used in 18 U.S.C. 951(d) (2) and/or (3), the term *officially and publicly acknowledged and sponsored* means that the person described therein has filed with the Secretary of State a fully-executed notification of status with a foreign government; or is a visitor, officially sponsored by a foreign government, whose status is known and whose visit is authorized by an agency of the United States Government; or is an official of a foreign government on a temporary visit to the United States, for the purpose of conducting official business internal to the affairs of that foreign government; or where an agent of a foreign government is acting pursuant to the requirements of a Treaty, Executive Agreement, Memorandum of Understanding, or other understanding to which the United States or an agency of the United States is a party and which instrument specifically establishes another mechanism for notification of visits by agents and the terms of such visits.

(f) The term *legal commercial transaction,* for the purpose of 18 U.S.C. 951(d)(4), means any exchange, transfer, purchase or sale, of any commodity, service or property of any kind, including information or intellectual property, not prohibited by federal or state legislation or implementing regulations.

§ 73.2 Exceptions.

(a) The exemption provided in 18 U.S.C. 951(d)(4) for a ''legal commercial transaction'' shall not be available to any person acting subject to the direction or control of a foreign government or official where such person is an agent of Cuba or any other country that the President determines (and so reports to the Congress) poses a threat to the national security interest of the United States for purposes of 18 U.S.C. 951; or has been convicted of or entered a plea of nolo contendere to any offense under 18 U.S.C. 792–799, 831, or 2381, or under section 11 of the Export Administration Act of 1979, 50 U.S.C. app. 2410.

(b) The provisions of 18 U.S.C. 951(e)(2)(A) do not apply if the Attorney General, after consultation with the Secretary of State, determines and reports to Congress that the national security or foreign policy interests of the United States require that these provisions do not apply in specific circumstances to agents of such country.

(c) The provisions of 18 U.S.C. 951(e)(2)(B) do not apply to a person described in this clause for a period of more than five years beginning on the date of the conviction or the date of entry of the plea of nolo contendere.

[Order No. 1373–89, 54 FR 46608, Nov. 6, 1989, as amended by Order No. 3018–2008, 73 FR 73182, Dec. 2, 2008]

§ 73.3 Form of notification.

(a) Notification shall be made by the agent in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the National Security Division, except for those agents described in paragraphs (b) and (c) of this section. The document shall state that it is a notification under 18 U.S.C. 951, and provide the name or names of the agent making the notification, the firm name, if any, and the business address or addresses of the agent, the identity of the foreign government or official for whom the agent is acting, and a brief description of the activities to be conducted for the foreign government or official and the anticipated duration of the activities. Each notification shall contain a certification, pursuant to 28 U.S.C. 1746, that the notification is true and correct.

(b) Notification by agents engaged in law enforcement investigations or regulatory agency activity shall be in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of Interpol-United States National Central Bureau. Notification by agents engaged in intelligence, counterintelligence, espionage, counterespionage or counterterrorism assignment or service shall be in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the nearest FBI Legal Attache. In case of

exceptional circumstances, notification shall be provided contemporaneously or as soon as reasonably possible by the agent or the agent's supervisor. The letter, telex, or facsimile shall include the information set forth in paragraph (a) of this section.

(c) Notification made by agents engaged in judicial investigations pursuant to treaties or other mutual assistance requests or letters rogatory, shall be made in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the Office of International Affairs, Criminal Division. The letter, telex, or facsimile shall include the information set forth in paragraph (a) of this section.

(d) Any subsequent change in the information required by paragraph (a) of this section shall require a notification within 10 days of the change.

(e) Notification under 18 U.S.C. 951 shall be effective only if it has been done in compliance with this section, or if the agent has filed a registration under the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611, *et seq.*, which provides the information required by paragraphs (a) and (d) of this section.

[Order No. 1373–89, 54 FR 46608, Nov. 6, 1989, as amended by Order No. 2865–2007, 72 FR 10070, Mar. 7, 2007]

§ 73.4 Partial compliance not deemed compliance.

The fact that a notification has been filed shall not necessarily be deemed full compliance with 18 U.S.C. 951 or these regulations on the part of the agent; nor shall it indicate that the Attorney General has in any way passed on the merits of such notification or the legality of the agent's activities; nor shall it preclude prosecution, as provided for in 18 U.S.C. 951, for failure to file a notification when due, or for a false statement of a material fact therein, or for an omission of a material fact required to be stated therein.

§ 73.5 Termination of notification.

(a) An agent shall, within 30 days after the termination of his agency relationship, advise the Attorney General of such change.

(b) All notifications pursuant to this part will automatically expire five years from the date of the most recent notification.

(c) An agent, whose notification expires pursuant to (b) above, must file a new notification within 10 days if the relationship continues.

§ 73.6 Relation to other statutes.

The filing of a notification under this section shall not be deemed compliance with the requirements of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611, *et seq.*, nor compliance with any other statute.

PART 74—CIVIL LIBERTIES ACT REDRESS PROVISION

Subpart A—General

Sec.
74.1 Purpose.
74.2 Definitions.

Subpart B—Standards of Eligibility

74.3 Eligibility determinations.
74.4 Individuals excluded from compensation pursuant to section 108(B) of the Act.

Subpart C—Verification of Eligibility

74.5 Identification of eligible persons.
74.6 Location of eligible persons.

Subpart D—Notification and Payment

74.7 Notification of eligibility.
74.8 Notification of payment.
74.9 Conditions of acceptance of payment.
74.10 Authorization for payment.
74.11 Effect of refusal to accept payment.
74.12 Order of payment.
74.13 Payment in the case of a deceased eligible individual.
74.14 Determination of the relationship of statutory heirs.

Subpart E—Appeal Procedures

74.15 Notice of the right to appeal a finding of ineligibility.
74.16 Procedures for filing an appeal.
74.17 Action on appeal.
APPENDIX A TO PART 74—DECLARATIONS OF ELIGIBILITY BY PERSONS IDENTIFIED BY THE OFFICE OF REDRESS ADMINISTRATION AND REQUESTS FOR DOCUMENTATION

AUTHORITY: 50 U.S.C. app. 1989b.

SOURCE: Order No. 1359–89, 54 FR 34161, Aug. 18, 1989, unless otherwise noted.

Subpart A—General

§ 74.1 Purpose.

The purpose of this part is to implement section 105 of the Civil Liberties Act of 1988, which authorizes the Attorney General to locate, identify, and make payments to all eligible individuals of Japanese ancestry who were evacuated, relocated, and interned during World War II as a result of government action.

§ 74.2 Definitions.

(a) *The Act* means the Civil Liberties Act of 1988, Public Law 100–383, 102 Stat. 903, as codified at 50 U.S.C. app. 1989b *et seq.*, (August 10, 1988).

(b) *The Administrator* means the Administrator in charge of the Office of Redress Administration of the Civil Rights Division.

(c) *Assembly centers and relocation centers* means those facilities established pursuant to the acts described in § 74.4(i)–(ii).

(d) *Child of an eligible individual* means a recognized natural child, an adopted child, or a step-child who lived with the eligible person in a regular parent-child relationship.

(e) *The Commission* means the Commission on Wartime Relocation and Internment of Civilians established by the Commission on Wartime Relocation and Internment Act, 50 U.S.C. app. 1981 note.

(f) *Evacuation, relocation, and internment period* means that period beginning December 7, 1941, and ending June 30, 1946.

(g) *The Fund* means the Civil Liberties Public Education Fund in the Treasury of the United States administered by the Secretary of the Treasury pursuant to section 104 of the Civil Liberties Act of 1988.

(h) *The Office* means the Office of Redress Administration established in the Civil Rights Division of the U.S. Department of Justice to execute the responsibilities and duties assigned the Attorney General pursuant to section 105 of the Civil Liberties Act of 1988.

(i) *Parent of an eligible individual* means the natural father and mother, or fathers and mothers through adoption.

(j) *The Report* means the published report by the Commission on Wartime Relocation and Internment of Civilians of its findings and recommendations entitled, *Personal Justice Denied,* Part I and Part II.

(k) *Spouse of an eligible individual* means a wife or husband of an eligible individual who was married to that eligible person for at least one year immediately before the death of the eligible individual.

Subpart B—Standards of Eligibility

§ 74.3 Eligibility determinations.

(a) An individual is found to be eligible if such an individual:

(1) Is of Japanese ancestry; and

(2) Was living on the date of enactment of the Act, August 10, 1988; and

(3) During the evacuation, relocation, and internment period was—

(i) A United States citizen; or

(ii) A permanent resident alien who was lawfully admitted into the United States; or

(iii) An alien, who after the evacuation, relocation and internment period, was permitted by applicable statutes to obtain the status of permanent resident alien extending to the internment period; and

(4) Was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of—

(i) Executive Order 9066, dated February 19, 1942;

(ii) The Act entitled ''An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining, leaving, or committing any act in military areas or zones,'' approved March 21, 1942; or

(iii) Any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States or its agents, representatives, officers, or employees, respecting the evacuation, relocation, or internment of individuals solely on the basis of Japanese ancestry.

(b) The following individuals are deemed to have suffered a loss within the meaning of paragraph (a)(4) of this section:

(1) Individuals who were interned under the supervision of the wartime Relocation Authority, the Department of Justice or the United States Army; or

(2) Individuals enrolled on the records of the United States Government during the period beginning on December 7, 1941, and ending June 30, 1946, as being in a prohibited military zone, including those individuals who, during the voluntary phase of the government's evacuation program between the issuance of Public Proclamation No. 1 on March 2, 1942, and the enforcement of Public Proclamation No. 4 on March 29, 1942, filed a ''Change of Residence'' card with the Wartime Civil Control Administration; or

(3) Individuals ordered by the Navy to leave Bainbridge Island, off the coast of the State of Washington, or Terminal Island, near San Pedro, California; or

(4) Individuals who were members of the Armed Forces of the United States at the time of the evacuation and internment period and whose domicile was in a prohibited zone and as a result of the government action lost property; or

(5) Individuals who were members of the Armed Forces of the United States at the time of the evacuation and internment period and were prohibited by government regulations from visiting their interned families or forced to submit to undue restrictions amounting to a deprivation of liberty prior to visiting their families; or

(6) Individuals who, after March 29, 1942, evacuated and relocated from the West Coast as a result of government action, including those who obtained written permission to travel to a destination outside of the unauthorized areas from the Western Defense Command and the Fourth Army; or

(7) Individuals born in assembly centers, relocation centers or internment camps to parents of Japanese ancestry who had been evacuated, relocated or interned pursuant to paragraph (a)(4) of this section, including children born in the United States to parents of Japanese ancestry who were relocated to the United States from other countries in the Americas during the internment period; or

(8) Individuals who, prior to or at the time of evacuation, relocation or internment period, were in institutions, such as a hospital, pursuant to acts described in paragraph (a)(4) and, were placed under the custody of the Wartime Relocation Authority and confined within the grounds of the institution and not permitted to return to their homes or to go anywhere else.

(9) Individuals born on or before January 20, 1945, to a parent or parents who had been evacuated, relocated, or interned from his or her original place of residence in the prohibited military zones on the West Coast, on or after March 2, 1942, pursuant to paragraph (a)(4) of this section, and who were excluded by Executive Order 9066 or military proclamations issued under its authority, from their parent's or parents' original place of residence in the prohibited military zones on the West Coast. This also includes those individuals who were born to a parent or parents who had ''voluntarily'' evacuated from his or her original place of residence in the prohibited military zones on the West Coast, on or after March 2, 1942, pursuant to paragraph (b)(3) of this section, and who were excluded by Executive Order 9066 or military proclamations issued under its authority, from their parent's or parents' original place of residence in the prohibited military zones on the West Coast.

(c) Paragraph (b) of this section is not an exhaustive list of individuals who are deemed eligible for compensation; there may be other individuals determined to be eligible under the Act on a case-by-case basis by the Redress Administrator.

[Order No. 1359–89, 54 FR 34161, Aug. 18, 1989, as amended by Order No. 2077–97, 62 FR 19934, Apr. 24, 1997]

§ 74.4 Individuals excluded from compensation pursuant to section 108(B) of the Act.

(a) The term ''eligible individual'' does not include any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country.

(b) Nothing in paragraph (a) of this section is meant to exclude from eligibility any person who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country, and who had not yet reached the age of 21 and was not emancipated as of the date of departure from the United States, provided that such person is otherwise eligible for redress under these regulations and the following standards:

(1) Persons who were 21 years of age or older, or emancipated minors, on the date they departed the United States for Japan are subject to an irrebuttable presumption that they relocated to Japan voluntarily and will be ineligible.

(2) Persons who served in the active military service on behalf of the Government of Japan or an enemy government during the period beginning on December 7, 1941, and ending on September 2, 1945, are subject to an irrebuttable presumption that they departed the United States voluntarily for Japan. If such individuals served in the active military service of an enemy country, they must inform the Office of such service and, as a result, will be ineligible.

[Order No. 2056–96, 61 FR 51012, Sept. 30, 1996]

Subpart C—Verification of Eligibility

§ 74.5 Identification of eligible persons.

(a) The Office shall establish an information system with names and other identifying information of potentially eligible individuals from the following sources:

(1) Official sources:

(i) The National Archives;

(ii) The Department of Justice;

(iii) The Social Security Administration;

(iv) Internal Revenue Service;

(v) University libraries;

(vi) State and local libraries;

(vii) State and local historical societies;

(viii) State and local agencies.

(2) Unofficial sources:

(i) Potentially eligible individuals;

(ii) Eligible individuals, relatives, legal guardians, representatives, or attorneys;

(iii) Civic associations;

(iv) Religious organizations;

(v) Such other sources that the Administrator determines are appropriate.

(b) Historic information pertaining to individuals listed in official United States Government records will be analyzed to determine if such persons are eligible for compensation as set forth in section 108 of the Act.

(c) Persons not listed in the historic records of the United States Government who volunteer information pertaining to their eligibility may be required by the Administrator to submit affidavits and documentary evidence to support assertions of eligibility.

§ 74.6 Location of eligible persons.

The Office shall compare the names and other identifying information of eligible individuals from the historical official records of the United States Government with current information from both official and unofficial sources in the information system to determine if such persons are living or deceased and, if living, the present location of these individuals.

Subpart D—Notification and Payment

§ 74.7 Notification of eligibility.

(a) Each individual who has been found to be eligible or their statutory heirs will be sent written notification of such status by the Office. Enclosed with the notification will be a declaration to be completed by the person so notified, or by his or her legal guardian, and a request for documentation of identity.

(b) The declaration and submitted documents (appendix A to part 74) will be used for a final verification of eligibility in order to ensure that the person identified as eligible by the Office is in fact the person who will receive payment, and shall include a request for the following information:

(1) Current legal name;

(2) Proof of name change if the current legal name is different from the name used when evacuated or interned,

such as a marriage certificate or other evidence of the name change as described in appendix A;

(3) Date of birth;

(4) Proof of date of birth as set forth in appendix A;

(5) Current address;

(6) Proof of current address as set forth in appendix A;

(7) Current telephone number;

(8) Social Security Number;

(9) Name when evacuated or interned;

(10) Proof of guardianship by a person executing a declaration on behalf of an eligible person as set forth in appendix A.

(11) Proof of the relationship to a deceased eligible individual by a statutory heir as set forth in § 74.13 and appendix A;

(12) Proof of the death of a deceased eligible person as set forth in appendix A.

(c) The individual must submit a signed and dated statement swearing under penalty of perjury to the truth of all the information provided on the declaration. A natural or legal guardian, or any other person, including the spouse of an eligible person, who the Administrator determines is charged with the care of the individual, may submit a signed and dated statement on behalf of the eligible individual who is incompetent or otherwise under a legal disability.

(d) Upon receipt of an individual's declaration and documentation, the Administrator shall make a determination of verification of the identity of the eligible person.

(e) Each person determined not to be preliminarily eligible after review of the submitted documentation will be notified by the Redress Administrator of the finding of ineligibility and the right to petition for a reconsideration of such a finding.

§ 74.8 Notification of payment.

The Administrator shall, when funds are appropriated for payment, notify an eligible individual in writing of his or her eligibility for payment. Section 104 of the Act limits any appropriation to not more than $500,000,000 for any fiscal year.

§ 74.9 Conditions of acceptance of payment.

(a) Each eligible individual will be deemed to have accepted payment if, after receiving notification of eligibility from the Redress Administrator, the eligible individual does not refuse payment in the manner described in § 74.11.

(b) Acceptance of payment shall be in full satisfaction of all claims arising out of the acts described in § 74.3(a)(4).

§ 74.10 Authorization for payment.

(a) Upon determination by the Administrator of the eligibility of an individual, the authorization for payment of $20,000 to the eligible individual will be certified by the Assistant Attorney General of the Civil Rights Division to the Assistant Attorney General of the Justice Management Division, who will give final authorization to the Secretary of the Treasury for payment out of the funds appropriated for this purpose.

(b) Authorization of payments made to survivors of eligible persons will be certified in the manner described in paragraph (a) of this section to the Secretary of the Treasury for payment to the individual member or members of the class of survivors entitled to receive payment under the procedures set forth in § 74.13. Payments to statutory heirs of a deceased eligible individual will be made only after all the statutory heirs of the deceased person have been identified and verified by the Office.

(c) Any payment to an eligible person under a legal disability, may, in the discretion of the Assistant Attorney General for Civil Rights, be certified for payment for the use of the eligible person, to the natural or legal guardian, committee, conservator or curator, or, if there is no such natural or legal guardian, committee, conservator or curator, to any other person, including the spouse of such eligible person, who the Administrator determines is charged with the care of the eligible person.

§ 74.11 Effect of refusal to accept payment.

If an eligible individual who has been notified by the Administrator of his or

her eligibility refuses in writing within eighteen months of the notification to accept payment, the written record of refusal will be filed with the Office and the amount of payment as described in § 74.10 shall remain in the Fund and no payment may be made as described in § 74.12 to such individual or his or her survivors at any time after the date of receipt of the written refusal.

§ 74.12 Order of payment.

Payment will be made in the order of date of birth pursuant to section 105(b) of the Act. Therefore, when funds are appropriated, payment will be made to the oldest eligible individual living on the date of the enactment of the Act, August 10, 1988, (or his or her statutory heirs) who has been located by the Administrator at that time. Payments will continue to be made until all eligible individuals have received payment.

§ 74.13 Payment in the case of a deceased eligible individual.

In the case of an eligible individual as described in § 74.3 who is deceased, payment shall be made only as follows—

(a) If the eligible individual is survived by a spouse who is living at the time of payment, such payment shall be made to such surviving spouse.

(b) If there is no surviving spouse as described in paragraph (a) of this subsection, such payment shall be made in equal shares to all children of the eligible individual who are living at the time of payment.

(c) If there is no surviving spouse described in paragraph (a) of this section, and if there are no surviving children as described in paragraph (b) of this section, such payment shall be made in equal shares to the parents of the deceased eligible individual who are living at the time of payment.

(d) If there are no surviving spouses, children or parents as described in paragraphs (a), (b), and (c) of this section, the amount of such payment shall remain in the Fund and may be used only for the purposes set forth in section 106(b) of the Act.

§ 74.14 Determination of the relationship of statutory heirs.

(a) A spouse of a deceased eligible individual must establish his or her marriage by one (or more) of the following:

(1) A copy of the public record of marriage, certified or attested;

(2) An abstract of the public record, containing sufficient data to identify the parties, the date and place of marriage, and the number of prior marriages by either party if shown on the official record, issued by the officer having custody of the record or other public official authorized to certify the record;

(3) A certified copy of the religious record of marriage;

(4) The official report from a public agency as to a marriage which occurred while the deceased eligible individual was employed by such agency;

(5) An affidavit of the clergyman or magistrate who officiated;

(6) The original certificate of marriage accompanied by proof of its genuineness;

(7) The affidavits or sworn statements of two or more eyewitnesses to the ceremony;

(8) In jurisdictions where ''Common Law'' marriages are recognized, the affidavits or certified statements of the spouse setting forth all of the facts and circumstances concerning the alleged marriage, such as the agreement between the parties at the beginning of their cohabitation, places and dates of residences, and whether children were born as the result of the relationship. This evidence should be supplemented by affidavits or certified statements from two or more persons who know as the result of personal observation the reputed relationship which existed between the parties to the alleged marriage, including the period of cohabitation, places of residences, whether the parties held themselves out as husband and wife and whether they were generally accepted as such in the communities in which they lived; or

(9) Any other evidence which would reasonably support a finding by the Administrator that a valid marriage actually existed.

(b) A child should establish that he or she is the child of a deceased eligible

individual by one of the following types of evidence:

(1) A birth certificate showing that the deceased eligible individual was the child's parent;

(2) An acknowledgment in writing signed by the deceased eligible individual;

(3) Evidence that the deceased eligible individual has been identified as the child's parent by a judicial decree ordering the deceased eligible individual to contribute to the child's support or for other purposes; or

(4) Any other evidence that reasonably supports a finding of a parent-child relationship, such as—

(i) A certified copy of the public record of birth or a religious record showing that the deceased eligible individual was the informant and was named as the parent of the child;

(ii) Affidavits or sworn statements of a person who knows that the deceased eligible individual accepted the child as his or hers; or

(iii) Information obtained from public records or a public agency, such as school or welfare agencies, which shows that with the deceased eligible individual's knowledge, the deceased eligible individual was named as the parent of the child.

(c) Except as may be provided in paragraph (b) of this section, evidence of the relationship by an adopted child must be shown by a certified copy of the decree of adoption. In jurisdictions where petition must be made to the court for release of adoption documents or information, or where the release of such documents or information is prohibited, a revised birth certificate will be sufficient to establish the fact of adoption.

(d) The relationship of a step-child to a deceased eligible individual shall be demonstrated by—

(1) Evidence of birth to the spouse of the deceased eligible individual as required by paragraphs (e) and (f) of this section;

(2) Evidence of adoption as required by section (b) of this section when the step-child was adopted by the spouse;

(3) Other evidence which reasonably supports the finding of a parent-child relationship between the child and the spouse;

(4) Evidence that the step-child was either living with or in a parent-child relationship with the deceased eligible individual at the time of the eligible individual's death; and

(5) Evidence of the marriage of the deceased eligible individual and the step-child's natural or adoptive parent, as required by paragraph (a) of this section.

(e) A parent of a deceased eligible individual may establish his or her parenthood of the deceased eligible individual by providing one of the following types of evidence:

(1) A birth certificate that shows the person to be the deceased eligible individual's parent;

(2) An acknowledgment in writing signed by the person before the eligible individual's death; or

(3) Any other evidence which reasonably supports a finding of such a parent-child relationship, such as—

(i) A certified copy of the public record of birth or a religious record showing that the person was the informant and was named as the parent of the deceased eligible individual;

(ii) Affidavits or sworn statements of persons who know the person had accepted the deceased eligible individual as his or her child; or

(iii) Information obtained from public records or a public agency such as school or welfare agencies, which shows that with the deceased eligible individual's knowledge, the person had been named as parent of the child.

(f) An adoptive parent of a deceased eligible individual must show one of the following as evidence—

(1) A certified copy of the decree of adoption and such other evidence as may be necessary; or

(2) In jurisdictions where petition must be made to the court for release of such documents or information, or where release of such documents or information is prohibited, a revised birth certificate showing the person as the deceased eligible individual's parent will suffice.

Subpart E—Appeal Procedures

§ 74.15 Notice of the right to appeal a finding of ineligibility.

Persons determined to be ineligible by the Administrator will be notified in writing of the determination, the right to petition for a reconsideration of the determination of ineligibility to the Assistant Attorney General for Civil Rights, and the right to submit any documentation in support of eligibility.

§ 74.16 Procedures for filing an appeal.

A request for reconsideration shall be made to the Assistant Attorney General for Civil Rights within 60 days of the receipt of the notice from the Administrator of a determination of ineligibility. The request shall be made in writing, addressed to the Assistant Attorney General of the Civil Rights Division, P.O. Box 65808, Washington, DC 20035–5808. Both the envelope and the letter of appeal itself must be clearly marked: ''Redress Appeal.'' A request not so addressed and marked shall be forwarded to the Office of the Assistant Attorney General for Civil Rights, or the official designated to act on his behalf, as soon as it is identified as an appeal of eligibility. An appeal that is improperly addressed shall be deemed not to have been received by the Department until the Office receives the appeal, or until the appeal would have been so received with the exercise of due diligence by Department personnel.

§ 74.17 Action on appeal.

(a) The Assistant Attorney General or the official designated to act on his behalf shall:

(1) Review the original determination;

(2) Review additional information or documentation submitted by the individual to support a finding of eligibility;

(3) Notify the petitioner when a determination of ineligibility is reversed on appeal; and

(4) Inform the Redress Administrator.

(b) Where there is a decision affirming the determination of ineligibility, the letter to the individual shall include a statement of the reason or reasons for the affirmance.

(c) A decision of affirmance shall constitute the final action of the Department on that redress appeal.

APPENDIX A TO PART 74—DECLARATIONS OF ELIGIBILITY BY PERSONS IDENTIFIED BY THE OFFICE OF REDRESS ADMINISTRATION AND REQUESTS FOR DOCUMENTATION

Form A:

Declaration of Eligibility by Persons Identified by the Office of Redress Administration

U.S. Department of Justice
Civil Rights Division
Office of Redress Administration

This declaration shall be executed by the identified eligible person or such person's designated representative.

Complete the following information:

(1) Current Legal Name: _____

(2) Current Address:

Street: _____

City, State and Zip Code: _____

_____

(3) Telephone Number:

_____

(Home)

_____

(Business)

(4) Social Security Number: _____

(5) Date of Birth: _____

(6) Name Used When Evacuated or Interned:

Read the following carefully before signing this document. A False Statement may be grounds for punishment by fine (U.S. Code, title 31, section 3729), and fine or imprisonment or both (U.S. Code, title 18, section 287 and section 1001).

I declare under penalty of perjury that the foregoing is true and correct.

_____

Signature

_____

Date

Privacy Act Statement: The authority for collecting this information is contained in 50 U.S.C. app. 1989b. The information that you provide will be used principally for verifying eligible persons for payment under the restitution provision of the Civil Liberties Act of 1988.

Required Documentation: The following documentation must be submitted with the above Declaration to complete your verification.

DOCUMENTATION:

I. Identification

A document with your current legal name and address. For example, you might send a bank or financial statement, or a monthly utility bill. Submit either a notarized copy of the record or an original that you do not need back.

II. *One* Document of Date of Birth

A certified copy of a birth certificate or a copy of another record of birth that has been certified by the custodian of the records. For example, you might send a religious record which shows your date of birth, or a hospital birth record. If you do not have any record of your birth the Administrator will accept affidavits of two or more persons attesting to the date of your birth.

If your notification letter says that the Social Security Administration has confirmed your date of birth, you *do not* have to send us any further evidence of your birth date.

III. *One* Document of Name Change

If your current legal name is the same as your name when evacuated or interned, this section does not apply.

This section is only required for persons whose current legal name is different from the name used when evacuated or interned.

1. A certified copy of the public record of marriage.
2. A certified copy of the divorce decree.
3. A certified copy of the court order of a name change.
4. Affidavits or sworn statements of two or more persons attesting to the name change.

IV. *One* Document of Evidence of Guardianship

If you are executing this document for the person identified as eligible, you must submit evidence of your authority.

If you are the legally-appointed guardian, committee, or other legally-designated representative of such an individual, the evidence shall be a certificate executed by the proper official of the court appointment.

If you are not such a legally-designated representative, the evidence shall be an affidavit describing your relationship to the recipient or the extent to which you have the care of the recipient or your position as an officer of the institution in which the recipient is institutionalized.

Form B:

Declaration of Verification by Persons Identified as Statutory Heirs by the Office of Redress Administration

U.S. Department of Justice
Civil Rights Division
Office of Redress Administration

This declaration shall be executed by the spouse of a deceased eligible individual as statutory heir in accordance with section 105(a)(7) of the Civil Liberties Act of 1988, 50 U.S.C. app. 1989b.

Complete the following information:

(1) Current Legal Name: _____
(2) Current Address:
Street: _____
City, State and Zip Code: _____
_____
(3) Telephone Number:
_____
(Home)
_____
(Business)
(4) Social Security Number: _____
(5) Date of Birth: _____
(6) Relationship to the Deceased: _____
(8) Date of marriage to the Deceased: _____

Read the following carefully before signing this document.

A False Statement may be grounds for punishment by fine (U.S. Code, title 31, section 3729), and fine or imprisonment or both (U.S. Code, title 18, sections 287 and section 1001).

I declare under penalty of perjury that the foregoing is true and correct.

_____
Signature
_____
Date

Privacy Act Statement: The authority for collecting this information is contained in 50 U.S.C. app. 1989b. The information that you provide will be used principally for verifying eligible persons for payment under the restitution provision of the Civil Liberties Act of 1988.

Required Documentation: The following documentation must be submitted with the above Declaration to complete your verification.

DOCUMENTATION:

I. *One* Document as Evidence of the Deceased Eligible Individual's Death

1. A certified copy or extract from the public records of death, coroner's report of death, or verdict of a coroner's jury.
2. A certificate by the custodian of the public record of death.
3. A statement of the funeral director or attending physician, or intern of the institution where death occurred.
4. A certified copy, or extract from an official report or finding of death made by an agency or department of the United States.
5. If death occurred outside the United States, an official report of death by a United States Consul or other employee of the State Department, or a copy of public record of death in the foreign country.

6. If you cannot obtain any of the above evidence of your spouse's death, you must submit other convincing evidence to ORA such as the signed statements of two or more people with personal knowledge of the death, giving the place, date, and cause of death.

II. *One* Document as Evidence of Your Marriage to the Deceased Eligible Individual

1. A copy of the public records of marriage, certified or attested, or an abstract of the public records, containing sufficient data to identify the parties, the date and place of marriage, and the number of prior marriages by either party if shown on the official record, issued by the officer having custody of the record or other public official authorized to certify the record, or a certified copy of the religious record of marriage.
2. An offical report from a public agency as to a marriage which occurred while the deceased eligible individual who was employed by such agency.
3. The affidavit of the clergyman or magistrate who officiated.
4. The certified copy of a certificate of marriage attested to by the custodian of the records.
5. The affidavits or sworn statements of two or more eyewitnesses to the ceremony.
6. In jurisdictions where ''Common Law'' marriages are recognized, the affidavits or certified statements of the spouse setting forth all of the facts and circumstances concerning the alleged marriage, such as the agreement between the parties at the beginning of their cohabitation, places and dates of residences, and whether children were born as the result of the relationship. This evidence should be supplemented by affidavits or certified statements from two or more persons who know as the result of personal observation the reputed relationship which existed between the parties to the alleged marriage, including the period of cohabitation, places of residences, whether the parties held themselves out as husband and wife and whether they were generally accepted as such in the communities in which they lived.
7. Any other evidence which would reasonably support a belief by the Administrator that a valid marriage actually existed.

III. Identification

A document with your current legal name and address. For example, you might send a bank or financial statement or a monthly utility bill. Submit either a notarized copy of the record or an original that you do not need back.

IV. *One* Document of Date of Birth

A certified copy of a birth certificate or a copy of another record of birth that has been certified by the custodian of the records. For example, you might send a copy of a religious record which shows your date of birth, or a hospital birth record. If you do not have any record of your birth, the Administrator will accept affidavits of two or more persons attesting to the date of your birth.

If your notification letter says that the Social Security Administration has confirmed your date of brith, you *do not* have to send us any further evidence of your birth date.

V. *One* Document of Name Change

If your current legal last name is the same as the last name of the deceased eligible individual or the same as at the time of marriage this section does not apply.

This section is only required for persons whose current legal last name is different from the last name of the deceased eligible.

1. A certified copy of the public record of marriage.
2. A certified copy of the divorce decree.
3. A certified copy of the court order of a name change.
4. Affidavits or sworn statements of two or more persons attesting to the name change.

VI. *One* Document of Evidence of Guardianship

If you are executing this document for the person identified as eligible, you must submit evidence of your authority.

If you are the legally-appointed guardian, committee, or other legally-designated representative of such an individual, the evidence shall be a certificate executed by the proper official of the court appointment.

If you are not such a legally-designated representative, the evidence shall be an affidavit describing your relationship to the recipient or the extent to which you have the care of the recipient or your position as an officer of the institution in which the recipient is institutionalized.

Form C:

Declaration of Verification by Persons Identified by the Office of Redress Administration as Statutory Heirs

U.S. Department of Justice
Civil Rights Division
Office of Redress Administration

This declaration shall be executed by the child of a deceased eligible individual as a statutory heir in accordance with section 105(a)(7) of the Civil Liberties Act of 1988, 50 U.S.C. app. 1988b.

Complete the following information:

(1) Current Legal Name: _____
(2) Current Address:
Street: _____
City, State and Zip Code: _____
_____
(3) Telephone Number:
_____

(Home)

(Business)

(4) Social Security Number: _____

(5) Date of Birth: _____

(6) Relationship to the Deceased: _____

(7) List the names and address (if known) of all other children of the deceased eligible individual. This includes all recognized natural children, step-children who lived with the deceased eligible and adopted children. Enter the date of death for any persons who are deceased.

Read the following carefully before signing this document. A False Statement may be grounds for punishment by fine (U.S. Code, title 31, section 3729), and fine or imprisonment or both (U.S. Code, title 18, section 287 and section 1001).

I declare under penalty or perjury that the foregoing is true and correct.

Signature

Date

Privacy Act Statement: The authority for collecting this information is contained in 50 U.S.C. app. 1989b. The information that you provide will be used principally for verifying eligible persons for payment under the restitution provision of the Civil Liberties Act of 1988.

Required Documentation for Children of Deceased Eligible Individual

The following documentation must be submitted with the above Declaration to complete your verification.

DOCUMENTATION:

I. *One* Document as Evidence of Your Parent's Death

1. A certified copy or extract from the public records of death, coroner's report of death, or verdict of a coroner's jury.

2. A certificate by the custodian of the public record of death.

3. A statement of the funeral director or attending physician, or intern of the institution where death occurred.

4. A certified copy, or extract from an official report or finding of death made by an agency or department of the United States.

5. If death occurred outside the United States, an official report of death by a United States Consul or other employee of the State Department, or a copy of public record of death in the foreign country.

6. If you cannot obtain any of the above evidence of your parent's death, you must submit other convincing evidence to ORA such as the signed statements of two or more people with personal knowledge of the death, giving the place, date, and cause of death.

II. *One* Document as Evidence of Your Relationship to Your Parent

Natural Child

1. A certified copy of a birth certificate showing that the deceased eligible individual was your parent.

2. If the birth certificate does not show the deceased eligible individual as your parent, other proof would be a certified copy of:

(a) An acknowledgment in writing signed by the deceased eligible individual.

(b) A judicial decree ordering the deceased eligible individual to contribute to your support or for other purposes.

(c) A certified copy of the public record of birth or a religious record showing that the deceased eligible individual was the informant and was named as your parent.

(d) Affidavits or sworn statements of a person who knows that the deceased eligible individual accepted the child as his or hers.

(e) A record obtained from a public agency or public records, such as school or welfare agencies, which shows that with the deceased eligible individual's knowledge, the deceased eligible individual was named as the parent of the child.

Adopted Child

Evidence of the relationship by an adopted child must be shown by a certified copy of the decree of adoption. In jurisdictions where petition must be made to the court for release of adoption documents or information, or where the release of such documents or information is prohibited, a revised birth certificate will be sufficient to establish the fact of adoption.

Step-Child

Submit all *three* as evidence of the step-child relationship.

1. One document as evidence of birth to the spouse of the deceased eligible individual as listed under the ''natural child'' and ''adoptive child'' sections to show that you were born to or adopted by the deceased individual's spouse, or other evidence which reasonably supports the existence of a parent-child relationship between you and the spouse of the deceased eligible person.

2. One document as evidence that you were either living with or in a parent-child relationship with the deceased eligible individual at the time of the eligible individual's death.

3. One document as evidence of the marriage of the deceased eligible individual and the spouse, such as a copy of the record of marriage, certified or attested, or by an abstract of the public records, containing sufficient data to identify the parties and the

date and place of marriage issued by the officer having custody of the record, or a certified copy of a religious record of marriage.

III. Identification

A document with your current legal name and address. For example, you might send a bank or financial statement, or a monthly utility bill. Submit either a notarized copy of the record or an original that you do not want back.

IV. *One* Document of Date of Birth

A certified copy of a birth certificate or a copy of another record of birth that has been certified by the custodian of the records. For example, you might send a copy of a religious record which shows your date of birth, or a hospital birth record. If you do not have any record of your birth, the Administrator will accept affidavits of two or more persons attesting to the date of your birth.

If your notification letter says that the Social Security Administration has confirmed your date of birth, you *do not* have to send us any further evidence of your birth date.

V. *One* Document of Name Change

If your current legal last name is the same as the last name of the deceased eligible, this section does not apply.

This section is only required for persons whose current legal last name is different from the last name of the deceased eligible.

Submit *one* of the following as evidence of the change of legal name.

1. A certified copy of the public record of marriage.
2. A certified copy of the divorce decree.
3. A certified copy of the court order of a name change.
4. Affidavits or sworn statements of two or more persons attesting to the name change.

VI. *One* Document of Evidence of Guardianship

If your are executing this document for the person identified as an eligible beneficiary, you must submit evidence of your authority.

If you are a legally-appointed guardian, committee, or other legally-designated representative of such an individual, the evidence shall be a certificate executed by the proper official of the court appointment.

If you are not such a legally-designated representative, the evidence shall be an affidavit describing your relationship to the recipient or the extent to which you have the care of the recipient or your position as an officer of the institution in which the recipient is institutionalized.

Form D:

Declaration of Verification by Persons Identified by the Office of Redress Administration as Statutory Heirs

U.S. Department of Justice Civil Rights Division Office of Redress Administration

This declaration shall be executed by the identified parent of a deceased eligible individual as statutory heir in accordance with

Section 105(a)(7) of the Civil Liberties Act of 1988, 50 U.S.C. app. 1989b.

Complete the following information:
(1) Current Legal Name: _____
(2) Current Address: _____
Street: _____
City, State and Zip Code: _____
(3) Telephone Number: _____
(Home) _____
(Business) _____
(4) Social Security Number: _____
(5) Date of Birth: _____
(6) Relationship to the Deceased: _____
(7) The name of the child's other parent and the address if known. This includes fathers and mothers through adoption. If the parent is deceased provide the date and place of death. _____

_____

Read the following carefully before signing this document. A False Statement may be grounds for punishment by fine (U.S. Code, title 31, section 3729), and fine or imprisonment or both (U.S. Code, title 18, section 287 and section 1001).

I declare under penalty of perjury that the foregoing is true and correct.

Signature _____
Date _____

Privacy Act Statement: The authority for collecting this information is contained in 50 U.S.C. app. 1989b. The information that you provide will be used principally for verifying eligible persons for payment under the restitution provision of the Civil Liberties Act of 1988.

Required Documentation.

The following documentation must be submitted with the above Declaration to complete your verification.

DOCUMENTATION:

I. *One* Document as Evidence of Your Child's Death

1. A certified copy or extract from the public records of death, coroner's report of death, or verdict of a coroner's jury.
2. A certificate by the custodian of the public record of death.
3. A statement of the funeral director or attending physician, or intern of the institution where death occurred.
4. A certified copy, or extract from an official report or finding of death made by an agency or department of the United States.
5. If death occurred outside the United States, an official report of death by a United States Consul or othe employee of

the State Department, or a copy of public record of death in the foreign country.

6. If you cannot obtain any of the above evidence, you must submit other convincing evidence to ORA such as the signed statements of two or more people with personal knowledge of the death, giving the place, date, and cause of death.

II. *One* Document as Evidence of Your Parent-Child Relationship Natural Parent

1. A certified copy of a birth certificate that shows you to be the deceased eligible individual's parent.

2. A certified acknowledgment in writing signed by you before the eligible individual's death.

3. Any other evidence which reasonably supports a finding of such a parent-child relationship, such as a certified copy of the public record of birth or a religious record showing that you were the informant and were named as the parent of the deceased eligible individual.

4. Affidavits or sworn statements of persons who know that you had accepted the deceased eligible individual as his or her child.

5. Information obtained from a public agency or public records, such as school or welfare agencies, which shows that with the deceased eligible individual's knowledge, you were named as parent.

Adoptive Parent

1. A certified copy of the decree of adoption and such other evidence as may be necessary.

2. In jurisdictions where petition must be made to the court for release of such documents or information, or where release of such documents or information is prohibited, a revised birth certificate showing the person as the deceased eligible individual's parent will suffice.

III. Identification

A document with your current legal name and address. For example, you might send a bank or financial statement, or a monthly utility bill. Submit either a notarized copy or an original that you do not need back.

IV. *One* Document of Date of Birth

A certified copy of a birth certificate or a copy of another record of birth that has been certified by the custodian of the records. For example, you might send a copy of a religious record which shows your date of birth, or a hospital birth record. If you do not have any record of your birth, the Administrator will accept affidavits of two or more persons attesting to the date of your birth.

If your notification letter says that the Social Security Administration has confirmed your date of birth, you *do not* have to send any further evidence of your birth date.

V. *One* Document of Name Change

If your current legal last name is the same as the last name of the deceased eligible individual this section does not apply.

This section is only required for persons whose current legal last name is different from the last name of the deceased eligible.

1. A certified copy of the public record of marriage.

2. A certified copy of the divorce decree.

3. A certified copy of the court order of a name change.

4. Affidavits or sworn statements of two or more persons attesting to the name change.

VI. *One* Document of Evidence of Guardianship

If you are executing this document for the person identified as eligible, you must submit evidence of your authority.

If you are the legally-appointed guardian, committee, or other legally-designated representative of such an individual, the evidence shall be a certificate executed by the proper official of the court appointment.

If you are not such a legally-designated representative, the evidence shall be an affidavit describing your relationship to the recipient or the extent to which you have the care of the recipient or your position as an officer of the institution in which the recipient is institutionalized.

PART 75—CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990; PROTECT ACT; ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006; RECORDKEEPING AND RECORD-INSPECTION PROVISIONS

Sec.

75.1 Definitions.
75.2 Maintenance of records.
75.3 Categorization of records.
75.4 Location of records.
75.5 Inspection of records.
75.6 Statement describing location of books and records.
75.7 Exemption statement.
75.8 Location of the statement.
75.9 Certification of records.

AUTHORITY: 18 U.S.C. 2257, 2257A.

SOURCE: Order No. 2765–2005, 70 FR 29619, May 24, 2005, unless otherwise noted.

§ 75.1 Definitions.

(a) Terms used in this part shall have the meanings set forth in 18 U.S.C. 2257, and as provided in this section. The

terms used and defined in these regulations are intended to provide common-language guidance and usage and are not meant to exclude technologies or uses of these terms as otherwise employed in practice or defined in other regulations or federal statutes (*i.e.*, 47 U.S.C. 230, 231).

(b) *Picture identification card* means a document issued by the United States, a State government, or a political subdivision thereof, or a United States territory, that bears the photograph, the name of the individual identified, and the date of birth of that individual, and provides specific information sufficient for the issuing authority to confirm its validity, such as a passport, Permanent Resident Card (commonly known as a ''Green Card''), or employment authorization document issued by the United States, a driver's license or other form of identification issued by a State or the District of Columbia; or a foreign government-issued equivalent of any of the documents listed above when the person who is the subject of the picture identification card is a non-U.S. citizen located outside the United States at the time of original production and the producer maintaining the required records, whether a U.S. citizen or non-U.S. citizen, is located outside the United States on the original production date. The picture identification card must be valid as of the original production date.

(c) *Producer* means any person, including any individual, corporation, or other organization, who is a primary producer or a secondary producer.

(1) *Primary producer* is any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image, a digital image, or a picture of, or who digitizes an image of, a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. When a corporation or other organization is the primary producer of any particular image or picture, then no individual employee or agent of that corporation or other organization will be considered to be a primary producer of that image or picture.

(2) *Secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or digitally- or computer-manipulated image, picture, or other matter intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of, an actual human being engaged in actual or simulated sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing. When a corporation or other organization is the secondary producer of any particular image or picture, then no individual of that corporation or other organization will be considered to be the secondary producer of that image or picture.

(3) The same person may be both a primary and a secondary producer.

(4) Producer does not include persons whose activities relating to the visual depiction of actual or simulated sexually explicit conduct are limited to the following:

(i) Photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

(ii) Distribution;

(iii) Any activity, other than those activities identified in paragraphs (c)(1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

(iv) The provision of a telecommunications service, or of an Internet access service of Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231));

(v) The transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material

made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; or

(vi) Unless the activity or activities are described in section 2257(h)(2)(A), the dissemination of a depiction without having created it or altered its content.

(d) *Sell, distribute, redistribute, and rerelease* refer to commercial distribution of a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that contains a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct, but does not refer to noncommercial or educational distribution of such matter, including transfers conducted by bona fide lending libraries, museums, schools, or educational organizations.

(e) *Copy*, when used:

(1) In reference to an identification document or a picture identification card, means a photocopy, photograph, or digitally scanned reproduction;

(2) In reference to a visual depiction of sexually explicit conduct, means a duplicate of the depiction itself (e.g., the film, the image on a Web site, the image taken by a webcam, the photo in a magazine); and

(3) In reference to an image on a webpage for purposes of §§ 75.6(a), 75.7(a), and 75.7(b), means every page of a Web site on which the image appears.

(f) *Internet* means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which constitute the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(g) *Computer site or service* means a computer server-based file repository or file distribution service that is accessible over the Internet, World Wide Web, Usenet, or any other interactive computer service (as defined in 47 U.S.C. 230(f)(2)). Computer site or service includes without limitation, sites or services using hypertext markup language, hypertext transfer protocol, file transfer protocol, electronic mail transmission protocols, similar data transmission protocols, or any successor protocols, including but not limited to computer sites or services on the World Wide Web.

(h) *URL* means uniform resource locator.

(i) *Electronic communications service* has the meaning set forth in 18 U.S.C. 2510(15).

(j) *Remote computing service* has the meaning set forth in 18 U.S.C. 2711(2).

(k) *Manage content* means to make editorial or managerial decisions concerning the sexually explicit content of a computer site or service, but does not mean those who manage solely advertising, compliance with copyright law, or other forms of non-sexually explicit content.

(l) *Interactive computer service* has the meaning set forth in 47 U.S.C. 230(f)(2).

(m) *Date of original production* or *original production date* means the date the primary producer actually filmed, videotaped, or photographed, or created a digitally- or computer-manipulated image or picture of, the visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct. For productions that occur over more than one date, it means the single date that was the first of those dates. For a performer who was not 18 as of this date, the date of original production is the date that such a performer was first actually filmed, videotaped, photographed, or otherwise depicted. With respect to matter that is a secondarily produced compilation of individual, primarily produced depictions, the date of original production of the matter is the earliest date after July 3, 1995, on which any individual depiction in that compilation was produced. For a performer in one of the individual depictions contained in that compilation who was not 18 as of this date, the date of original production is the date that the performer was first actually filmed, videotaped, photographed, or otherwise depicted for the individual depiction at issue.

(n) *Sexually explicit conduct* has the meaning set forth in 18 U.S.C. 2256(2)(A).

(o) *Simulated sexually explicit conduct* means conduct engaged in by performers that is depicted in a manner that would cause a reasonable viewer to believe that the performers engaged in actual sexually explicit conduct, even if they did not in fact do so. It does not mean not sexually explicit conduct that is merely suggested.

(p) *Regularly and in the normal course of business collects and maintains* means any business practice(s) that ensure that the producer confirms the identity and age of all employees who perform in visual depictions.

(q) *Individually identifiable information* means information about the name, address, and date of birth of employees that is capable of being retrieved on the basis of a name of an employee who appears in a specified visual depiction.

(r) *All performers, including minor performers* means all performers who appear in any visual depiction, no matter for how short a period of time.

(s) *Employed by* means, in reference to a performer, one who receives pay for performing in a visual depiction or is otherwise in an employer-employee relationship with the producer of the visual depiction as evidenced by oral or written agreements.

[Order No. 2765–2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77468, Dec. 18, 2008]

§ 75.2 Maintenance of records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that is produced in whole or in part with materials that have been mailed or shipped in interstate or foreign commerce, or is shipped, transported, or intended for shipment or transportation in interstate or foreign commerce, and that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or one or more visual depictions of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, shall, for each performer portrayed in such visual depiction, create and maintain records containing the following:

(1) The legal name and date of birth of each performer, obtained by the producer's examination of a picture identification card prior to production of the depiction. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, the records shall also include a legible hard copy or legible digitally scanned or other electronic copy of a hard copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible hard copy of a picture identification card. For any performer portrayed in a depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after June 23, 2005, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, the records shall include a copy of the depiction, and, where the depiction is published on an Internet computer site or service, a copy of any URL associated with the depiction. If no URL is associated with the depiction, the records shall include another uniquely identifying reference associated with the location of the depiction on the Internet. For any performer in a depiction performed live on the Internet, the records shall include a copy of the depiction with running-time sufficient to identify the performer in the depiction and to associate the performer with the records needed to confirm his or her age.

(2) Any name, other than the performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in a visual depiction of an actual human being engaged in actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) made after July 3, 1995, or of an actual human being engaged in simulated sexually explicit conduct or in actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter. Producers may rely in good faith on representations by performers regarding accuracy of the names, other than legal names, used by performers.

(3) Records required to be created and maintained under this part shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter.

(4) The primary producer shall create a record of the date of original production of the depiction.

(b) A producer who is a secondary producer as defined in § 75.1(c) may satisfy the requirements of this part to create and maintain records by accepting from the primary producer, as defined in § 75.1(c), copies of the records described in paragraph (a) of this section. Such a secondary producer shall also keep records of the name and address of the primary producer from whom he received copies of the records. The copies of the records may be redacted to eliminate non-essential information, including addresses, phone numbers, social security numbers, and other information not necessary to confirm the name and age of the performer. However, the identification number of the picture identification card presented to confirm the name and age may not be redacted.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the date of original production of the visual depiction to which the records are associated. If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer may add the additional title or identifying number and the names of the performer to the existing records maintained pursuant to § 75.2(a)(2). Producers of visual depictions made after July 3, 1995, and before June 23, 2005, may rely on picture identification cards that were valid forms of required identification under the provisions of part 75 in effect during that time period.

(d) For any record of a performer in a visual depiction of actual sexually explicit conduct (except lascivious exhibition of the genitals or pubic area of any person) created or amended after June 23, 2005, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, all such records shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service). If the producer subsequently produces an additional book, magazine, film, videotape,

digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual or simulated sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer shall add the additional title or identifying number and the names of the performer to the existing records, and such records shall thereafter be maintained in accordance with this paragraph.

(e) Records required to be maintained under this part shall be segregated from all other records, shall not contain any other records, and shall not be contained within any other records.

(f) Records required to be maintained under this part may be kept either in hard copy or in digital form, provided that they include scanned copies of forms of identification and that there is a custodian of the records who can authenticate each digital record.

(g) Records are not required to be maintained by either a primary producer or by a secondary producer for a visual depiction of sexually explicit conduct that consists only of lascivious exhibition of the genitals or pubic area of a person, and contains no other sexually explicit conduct, whose original production date was prior to March 18, 2009.

(h) A primary or secondary producer may contract with a non-employee custodian to retain copies of the records that are required under this part. Such custodian must comply with all obligations related to records that are required by this Part, and such a contract does not relieve the producer of his liability under this part.

[Order No. 2765–2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77469, Dec. 18, 2008]

§ 75.3 Categorization of records.

Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

§ 75.4 Location of records.

Any producer required by this part to maintain records shall make such records available at the producer's place of business or at the place of business of a non-employee custodian of records. Each record shall be maintained for seven years from the date of creation or last amendment or addition. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business or at the place of business of a non-employee custodian of records. If the organization is dissolved, the person who was responsible for maintaining the records, as described in § 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

[73 FR 77470, Dec. 18, 2008]

§ 75.5 Inspection of records.

(a) *Authority to inspect.* Investigators authorized by the Attorney General (hereinafter ''investigators'') are authorized to enter without delay and at reasonable times any establishment of a producer where records under § 75.2 are maintained to inspect during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements

of the Act and any other provision of the Act (hereinafter ''investigator'').

(b) *Advance notice of inspections.* Advance notice of record inspections shall not be given.

(c) *Conduct of inspections.* (1) Inspections shall take place during normal business hours and at such places as specified in § 75.4. For the purpose of this part, ''normal business hours'' are from 9 a.m. to 5 p.m., local time, Monday through Friday, or, for inspections to be held at the place of business of a producer, any other time during which the producer is actually conducting business relating to producing a depiction of actual sexually explicit conduct. To the extent that the producer does not maintain at least 20 normal business hours per week, the producer must provide notice to the inspecting agency of the hours during which records will be available for inspection, which in no case may be less than 20 hours per week.

(2) Upon commencing an inspection, the investigator shall:

(i) Present his or her credentials to the owner, operator, or agent in charge of the establishment;

(ii) Explain the nature and purpose of the inspection, including the limited nature of the records inspection, and the records required to be kept by the Act and this part; and

(iii) Indicate the scope of the specific inspection and the records that he or she wishes to inspect.

(3) The inspections shall be conducted so as not to unreasonably disrupt the operations of the establishment.

(4) At the conclusion of an inspection, the investigator may informally advise the producer or his non-employee custodian of records of any apparent violations disclosed by the inspection. The producer or non-employee custodian or records may bring to the attention of the investigator any pertinent information regarding the records inspected or any other relevant matter.

(d) *Frequency of inspections.* Records may be inspected once during any four-month period, unless there is a reasonable suspicion to believe that a violation of this part has occurred, in which case an additional inspection or inspections may be conducted before the four-month period has expired.

(e) *Copies of records.* An investigator may copy, at no expense to the producer or to his non-employee custodian of records, during the inspection, any record that is subject to inspection.

(f) *Other law enforcement authority.* These regulations do not restrict the otherwise lawful investigative prerogatives of an investigator while conducting an inspection.

(g) *Seizure of evidence.* Notwithstanding any provision of this part or any other regulation, a law enforcement officer may seize any evidence of the commission of any felony while conducting an inspection.

[Order No. 2765–2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77470, Dec. 18, 2008]

§ 75.6 Statement describing location of books and records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to an Internet computer site or service) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995, and produced, manufactured, published, duplicated, reproduced, or reissued after July 3, 1995, or of a performer in a visual depiction of simulated sexually explicit conduct or actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person made after March 18, 2009, shall cause to be affixed to every copy of the matter a statement describing the location of the records required by this part. A producer may cause such statement to be affixed, for example, by instructing the manufacturer of the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter to affix the statement. In this paragraph, the term ''copy'' includes every page of a Web site on which a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears.

(b) Every statement shall contain:

(1) The title of the book, magazine, periodical, film, or videotape, digitally- or computer-manipulated image, digital image, picture, or other matter (unless the title is prominently set out elsewhere in the book, magazine, periodical, film, or videotape, digitally- or computer-manipulated image, digital image, picture, or other matter) or, if there is no title, an identifying number or similar identifier that differentiates this matter from other matters which the producer has produced;

(2) [Reserved]

(3) A street address at which the records required by this part may be made available. A post office box address does not satisfy this requirement.

(c) If the producer is an organization, the statement shall also contain the title and business address of the person who is responsible for maintaining the records required by this part.

(d) The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, digitally or computer-manipulated image, digital image, picture, or other matter is produced or reproduced.

(e) For the purposes of this section, the required statement shall be displayed in typeface that is no less than 12-point type or no smaller than the second-largest typeface on the material and in a color that clearly contrasts with the background color of the material. For any electronic or other display of the notice that is limited in time, the notice must be displayed for a sufficient duration and of a sufficient size to be capable of being read by the average viewer.

(f) If the producer contracts with a non-employee custodian of records to serve as the person responsible for maintaining his records, the statement shall contain the name and business address of that custodian and may contain that information in lieu of the information required in paragraphs (b)(3) and (c) of this section.

[Order No. 2765–2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77470, Dec. 18, 2008]

§ 75.7 Exemption statement.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter may cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)–(c) or 18 U.S.C. 2257A(a)–(c), as applicable, and of this part if:

(1) The matter contains visual depictions of actual sexually explicit conduct made only before July 3, 1995, or was last produced, manufactured, published, duplicated, reproduced, or reissued before July 3, 1995. Where the matter consists of a compilation of separate primarily produced depictions, the entirety of the conduct depicted was produced prior to July 3, 1995, regardless of the date of secondary production;

(2) The matter contains only visual depictions of simulated sexually explicit conduct or of actual sexually explicit conduct limited to lascivious exhibition of the genitals or pubic area of any person, made before March 18, 2009;

(3) The matter contains only some combination of the visual depictions described in paragraphs (a)(1) and (a)(2) of this section.

(b) If the primary producer and the secondary producer are different entities, the primary producer may certify to the secondary producer that the visual depictions in the matter satisfy the standards under paragraphs (a)(1) through (a)(3) of this section. The secondary producer may then cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)–(c) or 18 U.S.C. 2257A(a)–(c), as applicable, and of this part.

[73 FR 77471, Dec. 18, 2008]

§ 75.8 Location of the statement.

(a) All books, magazines, and periodicals shall contain the statement required in § 75.6 or suggested in § 75.7 either on the first page that appears after the front cover or on the page on which copyright information appears.

(b) In any film or videotape which contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in § 75.6 or § 75.7 shall be presented at the

end of the end titles or final credits and shall be displayed for a sufficient duration to be capable of being read by the average viewer.

(c) Any other film or videotape shall contain the required statement within one minute from the start of the film or videotape, and before the opening scene, and shall display the statement for a sufficient duration to be read by the average viewer.

(d) A computer site or service or Web address containing a digitally- or computer-manipulated image, digital image, or picture shall contain the required statement on every page of a Web site on which a visual depiction of an actual human being engaged in actual or simulated sexually explicit conduct appears. Such computer site or service or Web address may choose to display the required statement in a separate window that opens upon the viewer's clicking or mousing-over a hypertext link that states, ''18 U.S.C. 2257 [and/or 2257A, as appropriate] Record-Keeping Requirements Compliance Statement.''

(e) For purpose of this section, a digital video disc (DVD) containing multiple depictions is a single matter for which the statement may be located in a single place covering all depictions on the DVD.

(f) For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.

[Order No. 2765–2005, 70 FR 29619, May 24, 2005, as amended at 73 FR 77471, Dec. 18, 2008]

§ 75.9 Certification of records.

(a) *In general*. The provisions of §§ 75.2 through 75.8 shall not apply to a visual depiction of actual sexually explicit conduct constituting lascivious exhibition of the genitals or pubic area of a person or to a visual depiction of simulated sexually explicit conduct if all of the following requirements are met:

(1) The visual depiction is intended for commercial distribution;

(2) The visual depiction is created as a part of a commercial enterprise;

(3) Either—

(i) The visual depiction is not produced, marketed or made available in circumstances such that an ordinary person would conclude that the matter contains a visual depiction that is child pornography as defined in 18 U.S.C. 2256(8), or,

(ii) The visual depiction is subject to regulation by the Federal Communications Commission acting in its capacity to enforce 18 U.S.C. 1464 regarding the broadcast of obscene, indecent, or profane programming; and

(4) The producer of the visual depiction certifies to the Attorney General that he regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer. (A producer of materials depicting sexually explicit conduct not covered by the certification regime is not disqualified from using the certification regime for materials covered by the certification regime.)

(b) *Form of certification*. The certification shall take the form of a letter addressed to the Attorney General signed either by the chief executive officer or another executive officer of the entity making the certification, or in the event the entity does not have a chief executive officer or other executive officer, the senior manager responsible for overseeing the entity's activities.

(c) *Content of certification*. The certification shall contain the following:

(1) A statement setting out the basis under 18 U.S.C. 2257A and this part under which the certifying entity and any sub-entities, if applicable, are permitted to avail themselves of this exemption, and basic evidence justifying that basis.

(2) The following statement: ''I hereby certify that [name of entity] [and all sub-entities listed in this letter] regularly and in the normal course of business collect and maintain individually identifiable information regarding all performers employed by [name of entity]''; and

(3) If applicable because the visual depictions at issue were produced outside the United States, the statement that: ''I hereby certify that the foreign producers of the visual depictions produced by [name of entity] either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or have certified to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer, in accordance with 28 CFR part 75; and [name of entity] has copies of those records or certifications.'' The producer may provide the following statement instead: ''I hereby certify that with respect to foreign primary producers who do not either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or certify to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, whom they employ pursuant to tax, labor, or other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names, addresses, and dates of birth of the performers, in accordance with 28 CFR part 75, [name of entity] has taken reasonable steps to confirm that the performers in any depictions that may potentially constitute simulated sexually explicit conduct or lascivious exhibition of the genitals or pubic area of any person were not minors at the time the depictions were originally produced.'' ''Reasonable steps'' for purposes of this statement may include, but are not limited to, a good-faith review of the visual depictions themselves or a good-faith reliance on representations or warranties from a foreign producer.

(d) *Entities covered by each certification.* A single certification may cover all or some subset of all entities owned by the entity making the certification. However, the names of all sub-entities covered must be listed in such certification and must be cross-referenced to the matter for which the sub-entity served as the producer.

(e) *Timely submission of certification.* An initial certification is due June 16, 2009. Initial certifications of producers who begin production after December 18, 2008, but before June 16, 2009, are due on June 16, 2009. Initial certifications of producers who begin production after June 16, 2009 are due within 60 days of the start of production. A subsequent certification is required only if there are material changes in the information the producer certified in the initial certification; subsequent certifications are due within 60 days of the occurrence of the material change. In any case where a due date or last day of a time period falls on a Saturday, Sunday, or federal holiday, the due date or last day of a time period is considered to run until the next day that is not a Saturday, Sunday, or federal holiday.

[73 FR 77471, Dec. 18, 2008]

PART 76—RULES OF PROCEDURE FOR ASSESSMENT OF CIVIL PENALTIES FOR POSSESSION OF CERTAIN CONTROLLED SUBSTANCES

Sec.

76.1 Purpose.
76.2 Definitions.
76.3 Basis for civil penalty.
76.4 Enforcement procedures.
76.5 Complaint.
76.6 Service and filing of documents.
76.7 Content of pleadings.
76.8 Time computations.
76.9 Responsive pleading—answer.
76.10 Motions and requests.
76.11 Notice of hearing.
76.12 Prehearing statements.
76.13 Parties to the hearing.
76.14 Separation of functions.
76.15 *Ex parte* communications.
76.16 Disqualification of a Judge.
76.17 Rights of parties.
76.18 Authority of the Judge.
76.19 Prehearing conferences.
76.20 Consent Order or settlement prior to hearing.
76.21 Discovery.
76.22 Exchange of witness lists, statements and exhibits.
76.23 Subpoenas.
76.24 Protective order.
76.25 Fees.
76.26 Sanctions.
76.27 The hearing and burden of proof.

76.28 Location of hearing.
76.29 Witnesses.
76.30 Evidence.
76.31 Standards of conduct.
76.32 Hearing room conduct.
76.33 Legal assistance.
76.34 Record of hearings.
76.35 Decision and Order of the Judge.
76.36 Administrative and judicial review.
76.37 Collection of civil penalties.
76.38 Deposit in the United States Treasury.
76.39 Compromise or settlement after Decision and Order of a Judge.
76.40 Records to be public.
76.41 Expungement of records.
76.42 Limitations.

AUTHORITY: 5 U.S.C. 301; 21 U.S.C. 844a, 875, 876; 28 U.S.C. 509, 510,; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321.

SOURCE: Order No. 1462–90, 56 FR 1089, Jan. 11, 1991, unless otherwise noted.

§ 76.1 Purpose.

This part implements section 6486 of the Anti-Drug Abuse Act of 1988 (the Act), 21 U.S.C. 844a. This part establishes procedures for imposing civil penalties against persons who knowingly possess a controlled substance for personal use that is listed in 21 CFR 1316.91(j)(2) in violation of 21 U.S.C. 844a and specifies the appeal rights of persons subject to a civil penalty pursuant to section 6486 of the Act.

§ 76.2 Definitions.

(a) *Act* means the Anti-Drug Abuse Act of 1988, Public Law 100–690.

(b) *Adjudicatory proceeding* means a judicial-type proceeding leading to the formulation of a final order.

(c) *Administrative Procedure Act* means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559.

(d) *Attorney General* means the Attorney General of the United States or his or her designee.

(e) *Department* means the United States Department of Justice.

(f) *Judge* means an Administrative Law Judge appointed pursuant to the provisions of 5 U.S.C. 3105.

(g) *Penalty* means the amount described in 28 CFR 76.3 and includes the plural of that term.

(h) The term *Personal Use Amount* means possession of controlled substances in circumstances where there is no other evidence of an intent to distribute, or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of any controlled substance. Evidence of personal use amounts shall not include sweepings or other evidence of possession of amounts of a controlled substance for other than personal use. The following criteria shall be used to determine whether an amount of controlled substance in a particular case is in fact a personal use amount. The absence of any of the factors listed in paragraphs (h)(1) through (h)(5) of this section and the existence of the factor in paragraph (h)(6) of this section shall be relevant, although not necessarily conclusive, to establish that the possession was for personal use, and amounts in excess of those listed in paragraph (h)(6) of this section may be determined to be personal use amounts where circumstances indicate possession of the substance without an intent to distribute or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of the controlled substance.

(1) Evidence, such as drug scales, drug distribution paraphernalia, drug records, drug packaging material, method of drug packaging, drug ''cutting'' agents and other equipment, that indicates an intent to process, package or distribute a controlled substance;

(2) Other information indicating possession of a controlled substance with intent to distribute;

(3) The controlled substance is related to large amounts of cash or any amount of prerecorded government funds;

(4) The controlled substance is possessed under circumstances that indicate such a controlled substance is a sample intended for distribution in anticipation of a transaction involving large amounts, or is part of a larger delivery; or

(5) Statements by the possessor, or otherwise attributable to the possessor, including statements of co-conspirators, that indicate possession with intent to distribute.

(6) The amounts do not exceed the following:

(i) One gram of a mixture or substance containing a detectable amount of heroin;

(ii) One gram of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivations of ecgonine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (h)(6)(ii) (A) through (C) of this section;

(iii) 1/10 gram of a mixture or substance described in paragraph (h)(6)(ii) of this section which contains cocaine base;

(iv) 1/10 gram of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 500 micrograms of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) One ounce of a mixture or substance containing a detectable among of marijuana;

(vii) One gram of methamphetamine, its salts, isomers, and salts of its isomers, or one gram of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

(i) *United States Attorney* means the United States Attorney in the federal district in which the alleged violation occurred, or his or her designees, or an Assistant Attorney General.

(j) *Commencement of proceeding* is the service upon a respondent of a Notice of Intent to Assess a Civil Penalty.

(k) *Complainant* means the United States.

(l) *Complaint* means the formal document initiating adjudicatory proceedings.

(m) *Consent Order* means any written document containing a specified remedy or other relief agreed to by all parties and entered as an order by the Judge.

(n) *Hearing* means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission.

(o) *Motion* means an oral or written request, made by a person or party, for some action by a Judge.

(p) *Order* means the whole or any part of a final procedural or substantive disposition of a matter by the Judge.

(q) *Party* includes the United States of America and any person named as a respondent.

(r) *Respondent* means any person alleged in a Notice of Intent to Assess a Civil Penalty or Complaint under 28 CFR 76.4 and 76.5 to be liable for a civil penalty under 28 CFR 76.3.

§ 76.3 Basis for civil penalty.

(a) Any individual who knowingly possesses a controlled substance that is listed in § 76.2(h) in violation of 21 U.S.C. 844a shall be liable to the United States for a civil penalty in an amount of not to exceed $10,000 for each such violation occurring before September 29, 1999, and not to exceed $11,000 for each such violation occurring on or after September 29, 1999.

(b) The income and net assets of an individual shall not be relevant to the determination whether to assess a civil penalty under this part or to prosecute the individual criminally. However, if a decision is made to assess a civil penalty, the income and net assets of an individual shall be considered in determining the amount of a penalty under this part.

(c) A civil penalty may not be assessed under this part if the individual previously was convicted of a federal or state offense relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(d) A civil penalty may not be assessed on an individual under this part on more than two separate occasions.

(e) A civil penalty under this part may be assessed by the Attorney General only after an order has been issued on the record and after an opportunity for a hearing has been given in accordance with 5 U.S.C. 554. The Attorney General by and through the United States Attorney having jurisdiction over the matter shall provide written

notice to the individual who is the subject of the proposed order informing the individual of the opportunity to receive such a hearing with respect to the proposed order. The hearing may be held only if the individual makes a request for the hearing before the expiration of the thirty (30) day period beginning on the date such notice is served.

[Order No. 1462–90, 56 FR 1089, Jan. 11, 1991, as amended by Order No. 2249–99, 64 FR 47103, Aug. 30, 1999]

§ 76.4 Enforcement procedures.

(a) *Commencement of proceedings*. If the United States Attorney's office having jurisdiction over the matter determines that a person has violated section 6486 of the Act, the proceeding to assess a civil penalty under section 6486 of the Act shall be commenced by the United States Attorney issuing a Notice of Intent to Assess Civil Penalty. Service of this Notice shall be accomplished pursuant to 28 CFR 76.6.

(b) *Notice of intent to assess a civil penalty*. The Notice of Intent to Assess Civil Penalty (Notice) will contain a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of law, the statutory and regulatory provisions alleged to have been violated, and the amount of penalty for which the respondent could be liable. The Notice will advise the respondent of the following, in addition to any other specific information determined by the United States Attorney to be necessary:

(1) That the respondent has the right to representation by counsel, but not at government expense;

(2) That any statement given during the course of the proceeding may be used against the person in this or any other proceeding, including any criminal prosecution;

(3) That a respondent may be able to assert a privilege, such as the privilege against self-incrimination;

(4) That failure to file a response to the allegations listed in the Notice within thirty (30) days of the date of service may result in the entry of a non-appealable final order assessing a penalty in an amount to be determined by the Attorney General;

(5) That the respondent has the right to request an adjudicatory proceeding, including a hearing, before a Judge pursuant to 5 U.S.C. 554–557 and this part, and that such request, in accordance with paragraph (c) of this section, must be made within thirty (30) days from the date the notice is served;

(6) That a respondent may waive an adjudicatory proceeding at any time and agree to pay a penalty in an amount to be determined by the Attorney General; and

(7) That in determining the amount of the penalty the respondent's income and net assets must be considered.

(c) *Answer to notice*. To timely request an adjudicatory proceeding in response to a Notice, a respondent must serve upon the United States Attorney designated in the Notice a written answer responding to each allegation listed in the Notice and request a hearing, in accordance with 28 CFR 76.4(b), within thirty (30) days from the date the Notice was served upon the respondent. If the respondent does not serve an answer within thirty (30) days, the Attorney General or his designee may enter a final order, from which there is no appeal, ordering a payment of a civil penalty.

§ 76.5 Complaint.

(a) If the respondent requests an adjudicatory proceeding, the United States Attorney, within fifteen (15) days after receipt of the request, shall file a complaint against the respondent with a Judge who has been assigned to hear and decide the case and shall serve a copy of the complaint on the respondent as provided in 28 CFR 76.6(b).

(b) The complaint shall contain a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of law, the approximate date, place and location of the alleged violation including the federal district, the statutory provisions alleged to have been violated, the amount of penalty for which the respondent could be held liable, and the amount of the proposed penalty. It shall also indicate the date upon which the Notice of Intent to Assess Civil Penalty was served and shall

be accompanied by a copy of that notice.

§ 76.6 Service and filing of documents.

(a) *Generally*. Unless ordered otherwise, an original and one copy of the complaint and all other pleadings shall be filed with the Judge who has been assigned to the case. Each party shall deliver or mail, in accordance with paragraph (b) of this section, a copy of all pleadings, including any attachments to the other party. Each pleading filed shall be clear and legible.

(b) *By and on parties*. The Notice of Intent to Assess Civil Penalty and the Complaint shall be served by personal delivery or by certified or registered mail, return receipt requested, to the respondent. When it is known that a party is represented by an attorney, service of any other pleading, paper or document subsequent to the Notice and Complaint shall be made upon the party's attorney. Service of such other pleadings, papers, or documents may be made by personal delivery or by mailing, by first class mail, a copy to the party or attorney at the party's or attorney's last known address. The party serving the document shall certify the manner and date of service.

(c) *By the judge*. Except as provided in paragraph (d) of this section, service of Notices, Orders and Decisions shall be made by first class mail to the last known address of a party or, if the party is known to be represented by an attorney, to the attorney.

(d) *Service of notice of hearing*. Service of Notice of the Date Set for Hearing shall be made by the Judge with whom the complaint has been filed either by delivering a copy to the individual party or, if known, to the attorney of record of a party; or by mailing, by certified or registered mail, return receipt requested, a copy to the last known address of a party or a party's attorney.

(e) Service is complete upon delivery to the addressee or, in the case of service by mail, upon mailing.

(f) Filing of pleadings, papers or other documents shall be deemed completed upon delivery to the Judge assigned to the case or the Judge's designee.

§ 76.7 Content of pleadings.

(a) Every pleading shall contain a caption setting forth the statutory provision under which the proceeding is instituted, the title of the proceeding, the docket number assigned by the Judge, the names of all parties, and a designation of the type of pleading or paper (e.g., complaint, motion to dismiss). The pleading shall be signed and shall contain the address and telephone number of the party or person representing the party. The pleadings should be typewritten when possible on standard-size (8½ × 11) paper. Legal size (8½ × 14) paper will not be accepted, except upon approval by the Judge.

(b) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process, provided all copies are clear and legible.

(c) All documents presented by a party in a proceeding must be in English or, if in a foreign language, accompanied by a certified translation.

§ 76.8 Time computations.

(a) *Generally*. In computing any period of time under this part or in an order issued hereunder, the time begins with the day following the act, event, or default requiring service, and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday observed by the federal government, in which case the time period includes the next business day. When the period of time prescribed is eleven (11) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) *Date of entry of orders*. In computing any period of time involving the date of the entry of an order, the date of entry shall be the date the order is signed by the Judge.

(c) *Computation of time for service by mail*. Whenever a party has a right or is required to do some act or take some action within a prescribed period after service of a pleading, paper, or notice and the pleading, paper, or notice is served upon the party by mail, three (3) days shall be added to the prescribed period.

§ 76.9 Responsive pleading—answer.

(a) *Time for answer*. A respondent shall file and serve on the United States Attorney having jurisdiction over the matter an answer within thirty (30) days after the service of a complaint.

(b) *Default*. Failure of the respondent to file and serve an answer within the time provided shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. In such cases, the Judge may enter a judgment by default.

(c) *Answer*. Any respondent contesting any material fact alleged in a complaint, or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing.

(1) The answer shall include a statement of the facts supporting each affirmative defense.

(2) The answer shall include a statement that the respondent admits, denies, does not have and is unable to obtain sufficient information to admit or deny each allegation, or that an answer to the allegation is protected by a privilege, including the privilege against self-incrimination.

(3) A statement of lack of information or a statement that the answer to the allegation is privileged shall have the effect of a denial.

(4) Any allegation not denied shall be deemed to be admitted.

(d) *Reply*. A complainant may file a reply responding to each affirmative defense arrested if the Judge, pursuant to 28 CFR 76.10, so provides.

(e) *Amendments and supplemental pleadings*. If it will facilitate resolution of the controversy, the Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Judge's order based on the complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make the pleadings conform to the evidence. The Judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events which have happened or new law promulgated since the date of the pleadings and which are relevant to any of the issues involved.

§ 76.10 Motions and requests.

(a) *Generally*. Any application for an order or any other request shall: be made by motion which shall be in writing (unless the Judge in the course of an oral hearing or appearance consents to accept such motion orally), state with particularity the grounds therefor, and set forth the relief or order sought. Motions or requests made during the course of any oral hearing or appearance before a Judge may be stated orally or in writing and made part of the transcript. All parties shall be given reasonable opportunity to respond or object to the motion or request.

(b) *Responses to motions*. Within ten (10) days after a written motion is served, or within such other period as the Judge may fix, the other party to the proceeding may file a response to the motion, accompanied by such affidavits or other evidence as the party desires to rely upon. Unless the Judge provides otherwise, no reply to a response shall be filed.

(c) *Oral arguments or briefs*. No oral argument will be heard on motions unless the Judge otherwise directs. Written memoranda or briefs may be filed with motions or responses to motions, stating the points and authorities relied upon in support of the position taken.

§ 76.11 Notice of hearing.

(a) When the Judge receives the complaint and answer, the Judge shall cause to be served a Notice of Hearing upon the parties in the manner prescribed by 28 CFR 76.6(d).

(b) Such notice shall include:

(1) The time and place and nature of the hearing. In fixing the time and place of the hearing, the Judge will attempt to minimize the costs to the parties;

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

(3) The description of the procedures for the conduct of the hearing;

(4) A notice that the respondent party may waive the right to an oral hearing and request that the matter be determined on written motions and written submission of the evidence; and

(5) Such other matters as the Judge deems appropriate.

§ 76.12 Prehearing statements.

(a) At any time prior to the commencement of the hearing, the Judge may order any party to file a prehearing statement of position.

(b) A prehearing statement shall state the name of the party on whose behalf it is presented and shall briefly set forth the following matters, unless otherwise ordered by the Judge:

(1) Issues involved in the proceedings and whether the respondent requests an oral hearing;

(2) Facts stipulated;

(3) Facts in dispute;

(4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;

(5) A brief statement of applicable law;

(6) The conclusions to be drawn;

(7) The estimated time required for presentation of the party's case; and

(8) Any appropriate comments, suggestions, or information which might assist the parties or the Judge in preparing for the hearing or otherwise aid in the disposition of the proceeding.

§ 76.13 Parties to the hearing.

The parties to the hearing shall be the United States of America and the respondent.

§ 76.14 Separation of functions.

An employee or an agent of the Department who is or was engaged in investigative or prosecutive functions for or on behalf of the United States in a case may not participate in the decision of that case.

§ 76.15 *Ex parte* communications.

(a) *Generally*. The Judge shall not consult with any party, attorney or person (except persons in the office of the Judge) on any legal or factual issue unless upon notice and opportunity for all parties to participate. No party or attorney representing a party shall communicate in any instance with the Judge on any matter at issue in a case, unless notice and opportunity has been afforded for the other party to participate. This provision does not prohibit a party or attorney from inquiring about the status of a case or asking questions concerning administrative functions or procedures.

(b) *Sanctions*. A party or participant who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanctions. An attorney who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to sanctions, including, but not limited to, exclusion from the proceedings.

§ 76.16 Disqualification of a Judge.

(a) When a Judge deems himself or herself disqualified to preside in a particular proceeding, such Judge shall withdraw therefrom by notice on the record directed to the Chief Administrative Hearing Officer for the district in which the case is brought or, if there is no Chief Administrative Hearing Officer, to the Attorney General.

(b) Whenever any party shall deem the Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The Judge shall rule upon the motion.

(c) In the event of disqualification or recusal of a Judge as provided in paragraph (a) or (b) of this section, the Chief Administrative Hearing Officer or the Attorney General shall refer the matter to another Judge for further proceedings.

(d) If the Judge denies a motion to disqualify, the Attorney General may determine the matter only as part of the Attorney General's review of the initial decision on appeal, if any.

§ 76.17 Rights of parties.

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

(a) Be represented, advised and accompanied by an attorney at law who is a member in good standing of the bar of the District of Columbia or of any state, territory or commonwealth of the United States;

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

(c) Conduct discovery in accordance with 28 CFR 76.18 and 76.21;

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

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

(f) Present and cross-examine witnesses;

(g) Present oral argument at the adjudicatory proceeding as permitted by the Judge; and

(h) Submit a written brief and a proposed final order after the hearing.

§ 76.18 Authority of the Judge.

(a) The Judge shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The Judge 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 in accordance with 21 U.S.C. 875 and 876 requiring the attendance of witnesses and the production of documents at dispositions 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 necessary to carry out the responsibilities of the Judge under this part.

(c) The Judge does not have the authority to rule upon the validity of federal statutes or regulations.

§ 76.19 Prehearing conferences.

(a) *Purpose and scope.* Upon motion of a party or in the Judge's discretion, the Judge may direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to a hearing, or during the course of a hearing, when the Judge finds that the proceeding would be expedited by such a conference. Prehearing conferences normally shall be conducted by telephone unless, in the opinion of the Judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance. Reasonable notice of the time, place, and manner of the prehearing conference shall be given. At the conference, the following matters may be considered:

(1) The simplification of issues;

(2) The necessity of amendments to pleadings;

(3) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(4) The limitations on the number of expert or other witnesses;

(5) Negotiation, compromise, or settlement of issues;

(6) The exchange of copies of proposed exhibits;

(7) The identification of documents or matters of which official notice may be required;

(8) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(9) Such other matters, including the disposition of pending motions and resolution of issues regarding the admissibility of evidence, as may expedite and aid in the disposition of the proceeding.

(b) *Reporting*. A verbatim record of the conference shall not be kept unless directed by the Judge.

(c) *Order*. Actions taken as a result of a prehearing conference shall be reduced to a written order unless the Judge concludes that a stenographic report shall suffice or, if the conference takes place within seven (7) days of the beginning of a hearing, and the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

§ 76.20 Consent Order or settlement prior to hearing.

(a) *Generally*. At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of reaching an agreement which will result in a just disposition of the issue involved. The Judge may require the parties to submit progress reports on a regular basis as to the status of negotiations.

(b) *Consent orders*. Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint or notice of administrative determination (or amended notice, if one is filed), as appropriate, and the agreement;

(3) A waiver of any further procedural steps before the Judge; and

(4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

(c) *Submission*. On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order for consideration by the Judge; or

(2) Notify the Judge that the parties have reached a full settlement and have agreed to dismissal of the action; or

(3) Inform the Judge that agreement cannot be reached.

(d) *Disposition*. In the event that an agreement containing consent findings and an order is submitted, the Judge, within thirty (30) days or as soon as practicable thereafter may, if satisfied with its timeliness, form, and substance, accept such agreement by issuing a decision based upon the agreed findings. The Judge has the discretionary authority to conduct a hearing to determine the fairness of the agreement, consent findings, and proposed order.

§ 76.21 Discovery.

(a) *Scope*. Discovery under this part covers any matter not otherwise privileged or protected by law, which is directly relevant to the issues involved in the case, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons having knowledge of relevant facts. To the extent not inconsistent with this part, the Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Judge. However, unless otherwise stated in this part, the Federal Rules shall be deemed to be instructive rather than controlling.

(b) *Methods*. Discovery may be obtained by one or more of the methods provided under the Federal Rules of Civil Procedure, including: written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission addressed to parties.

(c) *Procedures governing discovery*—(1) *Discovery from a party*. A party seeking

discovery from another party shall initiate the process by serving a request for discovery on the other party. The request for discovery shall:

(i) State the time limit for responding, as prescribed in 28 CFR 76.21(c)(4);

(ii) In the case of a request for a deposition of a party or an employee of a party shall

(A) Specify the time and place of the taking of the deposition, and

(B) Be served on the person to be deposed.

(2) *Discovery from a nonparty*. Whenever possible, a party seeking a deposition and/or production of documents from a nonparty shall attempt to obtain the nonparty's voluntary cooperation. A party seeking such discovery from a nonparty may initiate such discovery by serving a request for discovery on the nonparty directly and by serving the other party. Upon failure to obtain voluntary cooperation, discovery from a nonparty may be sought by a written motion directed to the Judge in accordance with paragraph (c)(3) of this section.

(3) *Discovery motions*. (i) A party shall answer a discovery request within the time provided by 28 CFR 76.21(c)(4), either by furnishing to the requesting party the information or testimony requested, agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for objection. Upon the failure of a party to respond in full to a discovery request, the requesting party may file with the Judge a motion to compel. A copy of the motion shall be served on the other party. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance and materiality of the information sought; and

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received.

(ii) If a nonparty will not voluntarily respond to a discovery request in full, the requesting party may file with the Judge a written motion seeking a subpoena. A copy of the motion shall be served on the other party in accordance with 28 CFR 76.23. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance, materiality and reasonable scope of the information sought;

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received; and

(C) In the case of a deposition, the date, time, and place of the proposed deposition.

(iii) The other party may respond to a motion to compel discovery or for issuance of a subpoena requiring a deposition or production of documents under this section by filing an opposition and/or a motion for a protective order in accordance with 28 CFR 76.24 within the time limits set forth in paragraph (c)(4)(iv) of this section.

(4) *Time limits*. (i) Discovery may be initiated after the filing of a complaint and shall be completed within the time designated by the Judge, but no later than seventy-five (75) days after the filing of the answer, unless a different time limit is set by the Judge after due consideration of the particular situation, including the dates set for hearing.

(ii) A party or nonparty shall file and serve a response to a discovery request promptly, but not later than twenty (20) days after the date of service of the request or order of the Judge.

(iii) A motion seeking a subpoena for the deposition testimony of a nonparty or for the production of documents by a nonparty, or a motion for an order compelling discovery from a party, shall be filed with the Judge and served upon the other party within ten (10) days of the date of service of objections, or within ten (10) days of the expiration of the time limit for response when no response is received, unless otherwise ordered by the Judge.

(iv) An opposition to a motion to compel, an opposition to a motion for an order to depose a nonparty or for the production of documents by a nonparty, or a motion for a protective order must be filed with the Judge and served upon the other party within ten (10) days of the date of service of the motion to which such motion relates.

(5) *Orders for discovery*. (i) Any order issued compelling discovery shall include, as appropriate:

(A) Provision for notice to the person to be deposed as to the time and place of such deposition;

(B) Such conditions or limitations concerning the conduct or scope of the discovery or the subject matter of the discovery as may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment or oppression;

(C) Limitations upon the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(D) Other restrictions upon the discovery process as determined by the Judge.

(ii) The order will be served on the parties by the Judge, together with a subpoena, if approved in the case of discovery sought from nonparties, directed to the individual or entity from which discovery is sought, specifying the manner and time limit for compliance. It shall be the responsibility of the party seeking discovery from a nonparty to serve or arrange for service of an approved discovery request and subpoena on the nonparty from whom discovery is sought and on the other party.

(iii) Failure to comply with an order compelling discovery may subject the noncomplying party to sanctions under 28 CFR 76.26.

(6) *Costs*. Each party shall bear its own costs of discovery unless otherwise agreed by the parties or ordered by the Judge. The party seeking the deposition shall provide for a verbatim transcript of the description, which shall be available to all parties for inspection and copying.

§ 76.22 Exchange of witness lists, statements and exhibits.

(a) At least twenty-one (21) days before the hearing or at such other time as may be ordered by the Judge, 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 respondent intends to offer in lieu of live testimony in accordance with 28 CFR 76.29. At the time these 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 Judge, 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 to admission, the Judge may 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 Judge finds good cause for the failure and that there is no prejudice to the objecting party.

(c) Unless a party objects within the times set by the Judge, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 76.23 Subpoenas.

(a) Requests for the issuance of subpoenas requiring the attendance and testimony of witnesses or the production of documents or other evidence under 21 U.S.C. 875 and 876 shall be filed with the Judge. Subpoenas are not ordinarily required to obtain the attendance of federal employees as witnesses, but such testimony shall be sought first by filing a request with the United States Attorney.

(b) Requests for subpoenas shall be filed with the Judge in writing and shall specify with particularity the books, papers, or testimony desired, supported by a showing of general relevance and reasonable scope, and a statement of the facts expected to be proven thereby. 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 or documents to be found.

(c) A party seeking a subpoena for the attendance of a witness at a hearing shall file a written request therefor not less than fifteen (15) days before the date fixed for the hearing unless otherwise allowed by the Judge upon a showing of good cause.

(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) Unless otherwise ordered by the Judge, the party seeking the subpoena is responsible for service of the subpoena. A subpoena may be served by any person at least eighteen (18) years of age who is not a party, including a private process server or other person authorized to serve process in actions brought in state courts of general jurisdiction or in Federal courts. Service shall be by personal delivery. Proof of service shall be made by affidavit of the person serving a subpoena entered on a true copy of the subpoena.

(f) A party or the individual to whom the subpoena is directed may file with the Judge a motion to quash the subpoena within ten (10) days after service of the subpoena, or on or before the time specified in the subpoena for compliance if it is less than ten (10) days after service.

(g) Upon failure of any person to comply with a subpoena issued by the Judge, the Attorney General, in the name of the Judge, but on relation of the party, shall institute proceedings in the appropriate district court for the enforcement of the subpoena, unless the enforcement of the subpoena would be inconsistent with law. Neither the Attorney General nor the Judge shall be deemed thereby to have assumed responsibility for prosecution of the same before the court.

§ 76.24 Protective order.

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

(b) In issuing a protective order, the Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to protect privileged information including one or more of the following orders:

(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 the subject of inquiry, 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 Judge;

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

(7) That a sealed deposition be opened only by order of the Judge;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Judge.

§ 76.25 Fees.

Unless otherwise ordered by the Judge, the party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed. Such costs shall be 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 complainant, a check for witness fees and mileage need not accompany the subpoena.

§ 76.26 Sanctions.

(a) As necessary to meet the ends of justice, the Judge may impose sanctions upon any party or a party's counsel, including, but not limited to sanctions based upon the following reasons:

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

(2) Failure to prosecute an action; or

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

(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 Judge may, as appropriate under law:

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

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

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

(4) Strike any appropriate part of the pleadings or other submissions of the party failing to comply with such order; and

(5) Permit the requesting party to introduce secondary evidence concerning the information sought.

(d) If a party fails to prosecute an action under this part commenced by service of a notice of hearing, the Judge may dismiss the action.

(e) If a respondent who has requested a hearing pursuant to 28 CFR 76.4, and who has been served with a Notice of a Hearing under 28 CFR 76.6, fails to appear at the hearing, absent good cause shown by the respondent, the Judge may issue an initial decision imposing a penalty.

(f) The Judge may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 76.27 The hearing and burden of proof.

(a) The Judge shall conduct a hearing on the record in order to determine whether the respondent is liable for a civil penalty under 28 CFR 76.3 and, if so, the appropriate amount of any such civil penalty, considering the income and net assets of the respondent.

(b) The United States Attorney shall prove respondent's liability and appropriateness of the amount of the penalty by a preponderance of the evidence.

(c) The respondent shall prove any affirmative defenses by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise closed by the Judge for good cause shown.

§ 76.28 Location of hearing.

The hearing shall be held in the judicial district of the United States Attorney's Office having jurisdiction over the matter.

§ 76.29 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 Judge and to the extent otherwise permitted by law, 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, if necessary, 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 28 CFR 76.22.

(c) The Judge 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 Judge 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 Judge, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination.

(f) Upon motion of any party, the Judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This part does not authorize exclusion of the following:

(1) The respondent;

(2) An individual whose presence is shown by a party to be essential to the presentation of its case.

§ 76.30 Evidence.

(a) The Judge shall determine the admissibility of evidence.

(b) Except as provided in this part, the Judge shall not be bound by the Federal Rules of Evidence. However, the Judge may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The Judge 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) 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 Judge 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 Judge pursuant to 28 CFR 76.27.

§ 76.31 Standards of conduct.

(a) All persons appearing in proceedings before a Judge are expected to act with integrity and in an ethical manner.

(b) The Judge may exclude parties, witnesses, and their attorneys for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against *ex parte* communications. The Judge shall state in the record the cause for suspending or barring an attorney from participation in a proceeding. Any attorney so suspended or barred may appeal to the Chief Administrative Hearing Officer for the District, or if there is no Chief Administrative Hearing Officer, to the Attorney General but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney.

§ 76.32 Hearing room conduct.

Proceedings shall be conducted in an orderly manner. The consumption of food or beverage, smoking, or rearranging of courtroom furniture, unless specifically authorized by the Judge, is prohibited.

§ 76.33 Legal assistance.

The Judge does not have authority to appoint counsel, nor can it refer a party to an attorney.

§ 76.34 Record of hearings.

(a) *General*. Unless otherwise agreed by the parties, a verbatim written record of all hearings shall be kept. All evidence upon which the Judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits introduced as evidence shall be marked for identification and incorporated into the record. Upon completion of the transcript, the transcript shall be filed by the official court reporter with the Judge, who will notify the parties. Transcripts may be obtained by the parties and the public from the official court reporter of record. Unless otherwise ordered by the Judge, any fees in connection therewith shall be the responsibility of the parties.

(b) *Corrections*. Corrections to the official transcript will be permitted upon motion. Motions for corrections must be submitted within ten (10) days of the service by the Judge of the notice of the filing of the transcript, or such other time as may be permitted by the Judge. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the Judge.

(c) The record of the proceedings shall consist of the notices, pleadings, motions, rulings, exhibits, orders, the findings, decisions or opinions of the Judge, the stipulations and briefs, and the transcript(s) of the hearing(s).

§ 76.35 Decision and Order of the Judge.

(a) *Proposed decision and order*. Within twenty (20) days of the filing of the transcript of the testimony, or such additional time as the Judge may allow, a party, if authorized by the Judge,

may file proposed Findings of Fact, Conclusions of Law, and Order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision*. Within a reasonable time, but not later than forty-five (45) days after the filing of the hearing transcript, and the time allowed for the filing of the post-hearing briefs, proposed Findings of Fact, Conclusions of Law, and Order, if any, or within thirty (30) days after receipt of an agreement containing Consent Findings and Order disposing of the disputed matter in whole, the Judge shall make a decision. The decision of the Judge shall include Findings of Fact and Conclusions of Law upon each material issue of fact or law presented on the record. The decision of the Judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. The standard of proof shall be a preponderance of the evidence. Such decision shall be in accordance with the regulations and the statutes conferring jurisdiction. If the Judge fails to meet the deadline contained in this paragraph, he or she shall notify the parties and the Attorney General of the reason for the delay and shall set a new deadline.

(c) *Order*. If the Judge determines, by a preponderance of the evidence, that the respondent knowingly possessed a controlled substance that is listed in section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)) in violation of 21 U.S.C. 844, in an amount that, as specified by this part, is a personal use amount, the order shall require the respondent to pay a civil penalty of not more than $10,000 for each violation. If the Judge determines that a preponderance of the evidence does not establish that the respondent knowingly possessed a controlled substance as described above, for his or her personal use, then the order shall dismiss the complaint. A copy of the decision and order together with a record of the proceedings will be forwarded to the Attorney General.

§ 76.36 Administrative and judicial review.

(a) Upon entry of an order by a Judge, any party may file with the Attorney General, within ten (10) days of the date of the Judge's decision and order, a written request for review of the decision and order together with supporting arguments. Within thirty (30) days from the date of the filing of the request for review, the Attorney General may enter an order which adopts, affirms, modifies or vacates the Judge's order.

(b) If a party does not seek review of the Judge's decision, or if the Attorney General enters no order within thirty (30) days from the date of the filing of the request for review, the order of the Judge becomes the final order of the Attorney General. If the Attorney General modifies or vacates the order, the order of the Attorney General becomes the final order.

(c) An individual subject to an order assessing a penalty after a hearing may, before the expiration of the thirty (30) day period beginning on the date the final order is entered, either by the Judge or the Attorney General, whichever is applicable, bring a civil action in the appropriate District Court of the United States pursuant to the provisions of 21 U.S.C. 844a(g) and obtain *de novo* judicial review of the final order.

§ 76.37 Collection of civil penalties.

(a) Collection of any penalty shall be the responsibility of the United States Attorney having jurisdiction over the matter.

(b) The United States Attorney having jurisdiction over the matter may commence a civil action in any appropriate district court of the United States for the purpose of recovering the amount assessed and an amount representing interest at a rate computed in accordance with 28 U.S.C. 1961.

§ 76.38 Deposit in the United States Treasury.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the United States Treasury.

§ 76.39 Compromise or settlement after Decision and Order of a Judge.

(a) The United States Attorney having jurisdiction over the case may, at any time before the Attorney General issues an order, compromise, modify, or remit, with or without conditions, any civil penalty imposed under this section.

(b) Any compromise or settlement must be in writing.

§ 76.40 Records to be public.

All documents contained in the records of formal proceedings for imposing a penalty under this part may be inspected and copied, unless ordered sealed by the Judge.

§ 76.41 Expungement of records.

(a) The Attorney General shall expunge all official Department records created pursuant to this part upon application of a respondent at any time after the expiration of three (3) years from the date of the final order of assessment if:

(1) The respondent has not previously been assessed a civil penalty under this section;

(2) The respondent has paid the penalty;

(3) The respondent has complied with any conditions imposed by the Attorney General;

(4) The respondent has not been convicted of a federal or state offense relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); and

(5) The respondent agrees to submit to a drug test, and such test shows the individual to be drug free.

(b) A non-public record of a disposition under this part shall be retained by the Department solely for the purpose of determining in any subsequent proceeding whether the person qualifies for a civil penalty or expungement under this part.

(c) If a record is expunged under this part, the individual for whom such an expungement was made shall not be held guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this part or the results thereof in response to an inquiry made of him for any purpose.

§ 76.42 Limitations.

No action under this part shall be entertained unless commenced within five (5) years from the date on which the violation occurred.

PART 77—ETHICAL STANDARDS FOR ATTORNEYS FOR THE GOVERNMENT

Sec.
77.1 Purpose and authority.
77.2 Definitions.
77.3 Application of 28 U.S.C. 530B.
77.4 Guidance.
77.5 No private remedies.

AUTHORITY: 28 U.S.C. 530B.

SOURCE: Order No. 2216–99, 64 FR 19275, Apr. 20, 1999, unless otherwise noted.

§ 77.1 Purpose and authority.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to implement 28 U.S.C. 530B and to provide guidance to attorneys concerning the requirements imposed on Department attorneys by 28 U.S.C. 530B.

(b) Section 530B requires Department attorneys to comply with state and local federal court rules of professional responsibility, but should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States.

(c) Section 530B imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys or to alter rules of professional responsibility that expressly exempt government attorneys from their application.

(d) The regulations set forth in this part seek to provide guidance to Department attorneys in determining the rules with which such attorneys should comply.

§ 77.2 Definitions.

As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) The phrase *attorney for the government* means the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel for the DEA and any attorney employed in that office; the Chief Counsel for ATF and any attorney employed in that office; the General Counsel of the FBI and any attorney employed in that office or in the (Office of General Counsel) of the FBI; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; and any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The phrase *attorney for the government* also includes any independent counsel, or employee of such counsel, appointed under chapter 40 of title 28, United States Code. The phrase *attorney for the government* does not include attorneys employed as investigators or other law enforcement agents by the Department of Justice who are not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

(b) The term *case* means any proceeding over which a state or federal court has jurisdiction, including criminal prosecutions and civil actions. This term also includes grand jury investigations and related proceedings (such as motions to quash grand jury subpoenas and motions to compel testimony), applications for search warrants, and applications for electronic surveillance.

(c) The phrase *civil law enforcement investigation* means an investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

(d) The phrase *civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the authority of the United States to enforce federal laws or regulations, and includes proceedings related to the enforcement of an administrative subpoena or summons or civil investigative demand.

(e) The terms *conduct* and *activity* means any act performed by a Department attorney that implicates a rule governing attorneys, as that term is defined in paragraph (h) of this section.

(f) The phrase *Department attorney[s]* is synonymous with the phrase ''attorney[s] for the government'' as defined in this section.

(g) The term *person* means any individual or organization.

(h) The phrase *state laws and rules and local federal court rules governing attorneys* means rules enacted or adopted by any State or Territory of the United States or the District of Columbia or by any federal court, that prescribe ethical conduct for attorneys *and* that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility. The phrase does not include:

(1) Any statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law, whether or not such rule is included in a code of professional responsibility for attorneys;

(2) Any statute, rule, or regulation that purports to govern the conduct of any class of persons other than attorneys, such as rules that govern the conduct of all litigants and judges, as well as attorneys; or

(3) A statute, rule, or regulation requiring licensure or membership in a particular state bar.

(i) The phrase *state of licensure* means the District of Columbia or any State

or Territory where a Department attorney is duly licensed and authorized to practice as an attorney. This term shall be construed in the same manner as it has been construed pursuant to the provisions of Pub. L. 96–132, 93 Stat. 1040, 1044 (1979), and Sec. 102 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agency Appropriations Act, 1999, Pub. L. 105–277.

(j)(1) The phrase *where such attorney engages in that attorney's duties* identifies which rules of ethical conduct a Department attorney should comply with, and means, with respect to particular conduct:

(i) If there is a case pending, the rules of ethical conduct adopted by the local federal court or state court before which the case is pending; or

(ii) If there is no case pending, the rules of ethical conduct that would be applied by the attorney's state of licensure.

(2) A Department attorney does not ''engage[] in that attorney's duties'' in any states in which the attorney's conduct is not substantial and continuous, such as a jurisdiction in which an attorney takes a deposition (related to a case pending in another court) or directs a contact to be made by an investigative agent, or responds to an inquiry by an investigative agent. Nor does the phrase include any jurisdiction that would not ordinarily apply its rules of ethical conduct to particular conduct or activity by the attorney.

(k) The phrase *to the same extent and in the same manner as other attorneys* means that Department attorneys shall only be subject to laws and rules of ethical conduct governing attorneys in the same manner as such rules apply to non-Department attorneys. The phrase does not, however, purport to eliminate or otherwise alter state or federal laws and rules and federal court rules that expressly exclude some or all government attorneys from particular limitations or prohibitions.

[Order No. 2216–99, 64 FR 19275, Apr. 20, 1999, as amended by Order No. 2650–2003, 68 FR 4929, Jan. 31, 2003]

§ 77.3 Application of 28 U.S.C. 530B.

In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in § 77.2 of this part.

§ 77.4 Guidance.

(a) *Rules of the court before which a case is pending.* A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) *Inconsistent rules where there is a pending case.* (1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

(i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;

(ii) Whether the local federal court rule preempts contrary state rules; and

(iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

(2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(c) *Choice of rules where there is no pending case.* (1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of

this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(d) *Rules that impose an irreconcilable conflict.* If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) *Supervisory attorneys.* Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the other attorney's ethical obligations should not be deemed to violate these rules.

(f) *Investigative Agents.* A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

§ 77.5 No private remedies.

The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including criminal defendants, targets or subjects of criminal investigations, witnesses in criminal or civil cases (including civil law enforcement proceedings), or plaintiffs or defendants in civil investigations or litigation; or any other person, whether or not a party to litigation with the United States, or their counsel; and shall not be a basis for dismissing criminal or civil charges or proceedings or for excluding relevant evidence in any judicial or administrative proceeding. Nor are any limitations placed on otherwise lawful litigative prerogatives of the Department of Justice as a result of this part.

PART 79—CLAIMS UNDER THE RADIATION EXPOSURE COMPENSATION ACT

Subpart A—General

Sec.
79.1 Purpose.
79.2 General definitions.
79.3 Compensable claim categories under the Act.
79.4 Determination of claims and affidavits.
79.5 Requirements for medical documentation, contemporaneous records, and other records or documents.

Subpart B—Eligibility Criteria for Claims Relating to Leukemia

79.10 Scope of subpart.
79.11 Definitions.
79.12 Criteria for eligibility for claims relating to leukemia.
79.13 Proof of physical presence for the requisite period and proof of participation onsite during a period of atmospheric nuclear testing.
79.14 Proof of initial exposure prior to age 21.
79.15 Proof of onset of leukemia more than two years after first exposure.
79.16 Proof of medical condition.

Subpart C—Eligibility Criteria for Claims Relating to Certain Specified Diseases Contracted After Exposure in an Affected Area (''Downwinders'')

79.20 Scope of subpart.
79.21 Definitions.
79.22 Criteria for eligibility for claims relating to certain specified diseases contracted after exposure in an affected area (''downwinders'').
79.23 Proof of physical presence for the requisite period.
79.24 Proof of initial or first exposure after age 20 for claims under § 79.22(b)(1).
79.25 Proof of onset of leukemia at least two years after first exposure, and proof of onset of a specified compensable disease more than five years after first exposure.
79.26 Proof of medical condition.
79.27 Indication of the presence of hepatitis B or cirrhosis.

Subpart D—Eligibility Criteria for Claims by Onsite Participants

79.30 Scope of subpart.
79.31 Definitions.
79.32 Criteria for eligibility for claims by onsite participants.
79.33 Proof of participation onsite during a period of atmospheric nuclear testing.
79.34 Proof of medical condition.
79.35 Proof of onset of leukemia at least two years after first exposure, and proof of onset of a specified compensable disease more than five years after first exposure.
79.36 Indication of the presence of hepatitis B or cirrhosis.

Subpart E—Eligibility Criteria for Claims by Uranium Miners

79.40 Scope of subpart.
79.41 Definitions.
79.42 Criteria for eligibility for claims by miners.
79.43 Proof of employment as a miner.
79.44 Proof of working level month exposure to radiation.
79.45 Proof of primary lung cancer.
79.46 Proof of nonmalignant respiratory disease.

Subpart F—Eligibility Criteria for Claims by Uranium Millers

79.50 Scope of subpart.
79.51 Definitions.
79.52 Criteria for eligibility for claims by uranium millers.
79.53 Proof of employment as a miller.
79.54 Proof of primary lung cancer.
79.55 Proof of nonmalignant respiratory disease.
79.56 Proof of primary renal cancer.
79.57 Proof of chronic renal disease.

Subpart G—Eligibility Criteria for Claims by Ore Transporters

79.60 Scope of subpart.
79.61 Definitions.
79.62 Criteria for eligibility for claims by ore transporters.
79.63 Proof of employment as an ore transporter.
79.64 Proof of primary lung cancer.
79.65 Proof of nonmalignant respiratory disease.
79.66 Proof of primary renal cancer.
79.67 Proof of chronic renal disease.

Subpart H—Procedures

79.70 Attorney General's delegation of authority.
79.71 Filing of claims.
79.72 Review and resolution of claims.
79.73 Appeals procedures.
79.74 Representatives and attorney's fees.
79.75 Procedures for payment of claims.

APPENDIX A TO PART 79—FVC AND FEV–1 LOWER LIMITS OF NORMAL VALUES
APPENDIX B TO PART 79—BLOOD GAS STUDY TABLES
APPENDIX C TO PART 79—RADIATION EXPOSURE COMPENSATION ACT OFFSET WORKSHEET—ON SITE PARTICIPANTS

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SOURCE: Order No. 2711–2004, 69 FR 13634, Mar. 23, 2004, unless otherwise noted.

Subpart A—General

§ 79.1 Purpose.

The purpose of the regulations in this part is to implement the Radiation Exposure Compensation Act (''Act''), as amended by the Radiation Exposure Compensation Act Amendments of 2000 (''2000 Amendments'') and by the 21st Century Department of Justice Appropriations Authorization Act (''Appropriations Authorization Act''). The Act authorizes the Attorney General of the United States to establish procedures for making certain payments to qualifying individuals who contracted one of the diseases listed in the Act. The amount of each payment and a general statement of the qualifications are indicated in §79.3(a). The procedures established in this part are designed to utilize existing records so that claims can be resolved in a reliable, objective, and non-adversarial manner, quickly and with little administrative cost to the United States or to the person filing the claim.

§ 79.2 General definitions.

(a) *Act* means the Radiation Exposure Compensation Act, Public Law 101–426, as amended by sections 3139 and 3140 of Public Law 101–510, the Radiation Exposure Compensation Act Amendments of 2000, Public Law 106–245 (*see* 42 U.S.C. 2210 note), and the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273.

(b) *Child* means a recognized natural child of the claimant, a stepchild who lived with the claimant in a regular

parent-child relationship, or an adopted child of the claimant.

(c) *Claim* means a petition for compensation under the Act filed with the Radiation Exposure Compensation Program by a claimant or by his or her eligible surviving beneficiary or beneficiaries.

(d) *Claimant* means the individual, living or deceased, who is alleged to satisfy the criteria for compensation set forth either in section 4 or in section 5 of the Act.

(e) *Contemporaneous record* means any document created at or around the time of the event that is recorded in the document.

(f) *Eligible surviving beneficiary* means a spouse, child, parent, grandchild or grandparent who is entitled under section 6(c)(4)(A) or (B) of the Act to file a claim or receive a payment on behalf of a deceased claimant.

(g) *Grandchild* means a child of a child of the claimant.

(h) *Grandparent* means a parent of a parent of the claimant.

(i) *Immediate family member* of a person means a spouse or child if the person is an adult; but if the person is a minor, *immediate family member* means a parent.

(j) *Indian Tribe* means any Indian Tribe, band, nation, pueblo, or other organized group or community that is recognized as eligible for special programs and services provided by the United States to Indian Tribes.

(k) *Medical document, documentation, or record* means any contemporaneous record of any physician, hospital, clinic, or other certified or licensed health care provider, or any other records routinely and reasonably relied on by physicians in making a diagnosis.

(l) *Onset* or *incidence* of a specified compensable disease means the date a physician first diagnosed the disease.

(m) *Parent* means the natural or adoptive father or mother of the claimant.

(n) *Program* or *Radiation Exposure Compensation Program* means the component of the Constitutional and Specialized Torts Litigation Section of the Torts Branch of the Civil Division of the United States Department of Justice designated by the Attorney General to execute the powers, duties, and responsibilities assigned to the Attorney General pursuant to pertinent provisions of the Act.

(o) *Spouse* means a wife or husband who was married to the claimant for a period of at least one (1) year immediately before the death of the claimant.

(p) *Tribal organization* means any formally organized group or other entity that is chartered, registered or sponsored by an Indian Tribe to perform duties for an Indian Tribe and is accountable for its actions to the tribal government.

(q) *Trust Fund* or *Fund* means the Radiation Exposure Compensation Trust Fund in the Department of the Treasury, administered by the Secretary of the Treasury pursuant to section 3 of the Act.

§ 79.3 Compensable claim categories under the Act.

(a) In order to receive a compensation payment, each claimant or eligible surviving beneficiary must establish that the claimant meets each and every criterion of eligibility for at least one of the following compensable categories designated in the Act:

(1) *Claims of leukemia.* (i) For persons exposed to fallout from the atmospheric detonation of nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period, the amount of compensation is $50,000.

(ii) For persons exposed to fallout from the atmospheric detonation of nuclear devices due to their participation onsite in a test involving the atmospheric detonation of a nuclear device, the amount of compensation is $75,000. The regulations governing these claims are set forth in subpart B of this part.

(2) *Claims related to the Nevada Test Site fallout.* For persons who contracted certain specified diseases after being exposed to fallout from the atmospheric detonation of nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period, the amount of compensation is $50,000. The regulations governing these claims are set forth in subpart C of this part.

(3) *Claims of onsite participants.* For persons who contracted certain specified diseases after onsite participation in the atmospheric detonation of a nuclear device, the amount of compensation is $75,000. The regulations governing these claims are set forth in subpart D of this part.

(4) *Miners' claims.* For persons who contracted lung cancer or certain nonmalignant respiratory diseases after being employed in uranium mines located in specified states during the designated time period who were exposed to a specified minimum level of radiation during the course of their employment or worked for at least one year (12 consecutive or cumulative months) in a uranium mine in specified states during the designated time period, the amount of compensation is $100,000. The regulations governing these claims are set forth in subpart E of this part.

(5) *Millers' claims.* For persons who contracted lung cancer, certain nonmalignant respiratory diseases, renal cancer, or chronic renal disease (including nephritis and kidney tubal tissue injury) following employment for at least one year (12 consecutive or cumulative months) in a uranium mill in specified states during the designated time period, the amount of compensation is $100,000. The regulations governing these claims are set forth in subpart F of this part.

(6) *Ore transporters' claims.* For persons who contracted lung cancer, certain nonmalignant respiratory diseases, renal cancer, or chronic renal disease (including nephritis and kidney tubal tissue injury) following employment for at least one year (12 consecutive or cumulative months) as a transporter of uranium ore or vanadium-uranium ore from a uranium mine or uranium mill located in specified states during the designated time period, the amount of compensation is $100,000. The regulations governing these claims are set forth in subpart G of this part.

(b) Any claim that does not meet all the criteria for at least one of these categories, as set forth in paragraph (a) of this section, must be denied.

(c) All claims for compensation under the Act must comply with the claims procedures and requirements set forth in subpart H of this part before any payment can be made from the Fund.

§ 79.4 Determination of claims and affidavits.

(a) The claimant, eligible surviving beneficiary, or beneficiaries bear the burden of providing evidence of the existence of each element necessary to establish eligibility under any compensable claim category set forth in § 79.3(a).

(b) In the event that reasonable doubt exists with regard to whether a claim meets the requirements of the Act, that doubt shall be resolved in favor of the claimant or eligible surviving beneficiary.

(c) Written affidavits or declarations, subject to penalty for perjury, will be accepted only for the following purposes:

(1) To establish eligibility of family members as set forth in § 79.71(e), (f), (g), (h), or (i);

(2) To establish other compensation received as set forth in § 79.75(c) or (d);

(3) To establish employment in a uranium mine, mill or as an ore transporter on the standard claim form in the manner set forth in §§ 79.43(d), 79.53(d) and 79.63(d), respectively; and

(4) To substantiate the claimant's uranium mining employment history for purposes of determining working level months of radiation exposure by providing the types of information set forth in § 79.43(d), so long as the affidavit or declaration:

(i) Is provided in addition to any other material that may be used to substantiate the claimant's employment history as set forth in § 79.43;

(ii) Is made subject to penalty for perjury;

(iii) Attests to the employment history of the claimant; and

(iv) Is made by a person other than the individual filing the claim.

§ 79.5 Requirements for medical documentation, contemporaneous records, and other records or documents.

(a) All medical documentation, contemporaneous records, and other records or documents submitted by a claimant or eligible surviving beneficiary to prove any criterion provided

for in this part must be originals, or certified copies of the originals, unless it is impossible to obtain an original or certified copy of the original. If it is impossible for a claimant to provide an original or certified copy of an original, the claimant or eligible surviving beneficiary must provide a written statement with the uncertified copy setting forth the reason why it is impossible to provide an original or a certified copy of an original.

(b) All documents submitted by a claimant or eligible surviving beneficiary must bear sufficient indicia of authenticity or a sufficient guarantee of trustworthiness. The Program shall not accept as proof of any criterion of eligibility any document that does not bear sufficient indicia of authenticity, or is in such a physical condition, or contains such information, that otherwise indicates the record or document is not reliable or trustworthy. When a record or document is not accepted by the Program under this section, the claimant or eligible surviving beneficiary shall be notified and afforded the opportunity to submit additional documentation in accordance with § 79.72(b) or (c).

(c) To establish eligibility the claimant or eligible surviving beneficiary may be required to provide additional records to the extent they exist. Nothing in this section shall be construed to limit the Assistant Director's (specified in § 79.70(a)) ability to require additional documentation.

Subpart B—Eligibility Criteria for Claims Relating to Leukemia

§ 79.10 Scope of subpart.

The regulations in this subpart describe the criteria for eligibility for compensation under section 4(a)(1) of the Act and the evidence that will be accepted as proof of the various eligibility criteria. Section 4(a)(1) of the Act provides for a payment of $50,000 to individuals exposed to fallout from the detonation of atmospheric nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period and who later developed leukemia, and $75,000 to individuals who participated onsite in a test involving the atmospheric detonation of a nuclear device and who later developed leukemia.

§ 79.11 Definitions.

(a) *Affected area* means one of the following geographical areas, as they were recognized by the state in which they are located, as of July 10, 2000:

(1) In the State of Utah, the counties of Beaver, Garfield, Iron, Kane, Millard, Piute, San Juan, Sevier, Washington, and Wayne;

(2) In the State of Nevada, the counties of Eureka, Lander, Lincoln, Nye, White Pine, and that portion of Clark County that consists of townships 13 through 16 at ranges 63 through 71;

(3) In the State of Arizona, the counties of Coconino, Yavapai, Navajo, Apache, Gila, and that part of Arizona that is north of the Grand Canyon.

(b) *Atmospheric detonation of a nuclear device* means only a test conducted by the United States prior to January 1, 1963, as listed in § 79.31(d).

(c) *Designated time period* means the period beginning on January 21, 1951, and ending on October 31, 1958, or the period beginning on June 30, 1962, and ending on July 31, 1962, whichever is applicable.

(d) *First exposure* or *initial exposure* means the date on which the claimant was first physically present in the affected area during the designated time period, or the date on which the claimant first participated onsite in an atmospheric detonation of a nuclear device, whichever is applicable.

(e) *Leukemia* means any medically recognized form of acute or chronic leukemia other than chronic lymphocytic leukemia.

(f) *Onsite* means physical presence above or within the official boundaries of any of the following locations:

(1) The Nevada Test Site (NTS), Nevada;

(2) The Pacific Test Sites (Bikini Atoll, Enewetak Atoll, Johnston Island, Christmas Island, the test site for the shot during Operation Wigwam, the test site for Shot Yucca during Operation Hardtack I, and the test sites for Shot Frigate Bird and Shot Swordfish during Operation Dominic I) and the official zone around each site from which non-test affiliated ships were excluded for security and safety purposes;

(3) The Trinity Test Site (TTS), New Mexico;

(4) The South Atlantic Test Site for Operation Argus and the official zone around the site from which non-test affiliated ships were excluded for security and safety purposes;

(5) Any designated location within a Naval Shipyard, Air Force Base, or other official government installation where ships, aircraft, or other equipment used in an atmospheric nuclear detonation were decontaminated; or

(6) Any designated location used for the purpose of monitoring fallout from an atmospheric nuclear test conducted at the Nevada Test Site.

(g) *Participant* means an individual—

(1) Who was:

(i) A member of the armed forces;

(ii) A civilian employee or contract employee of the Manhattan Engineer District, the Armed Forces Special Weapons Project, the Defense Atomic Support Agency, the Defense Nuclear Agency, or the Department of Defense or its components or agencies or predecessor components or agencies;

(iii) An employee or contract employee of the Atomic Energy Commission, the Energy Research and Development Administration, or the Department of Energy;

(iv) A member of the Federal Civil Defense Administration or the Office of Civil and Defense Mobilization; or

(v) A member of the United States Public Health Service; and

(2) Who:

(i) Performed duties within the identified operational area around each atmospheric detonation of a nuclear device;

(ii) Participated in the decontamination of any ships, planes, or equipment used during the atmospheric detonation of a nuclear device;

(iii) Performed duties as a cloud tracker or cloud sampler;

(iv) Served as a member of the garrison or maintenance forces on the atoll of Enewetak between June 21, 1951, and July 1, 1952; between August 7, 1956, and August 7, 1957; or between November 1, 1958, and April 30, 1959; or

(v) Performed duties as a member of a mobile radiological safety team monitoring the pattern of fallout from an atmospheric detonation of a nuclear device.

(h) *Period of atmospheric nuclear testing* means any of the periods associated with each test operation specified in § 79.31(d), plus an additional six-month period thereafter.

(i) *Physically present* (or *physical presence*) means present (or presence) for a substantial period of each day.

§ 79.12 Criteria for eligibility for claims relating to leukemia.

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary must establish each of the following:

(a)(1) That the claimant was physically present at any place within the affected area for a period of at least one year (12 consecutive or cumulative months) during the period beginning on January 21, 1951, and ending on October 31, 1958;

(2) That the claimant was physically present at any place within the affected area for the entire, continuous period beginning on June 30, 1962, and ending on July 31, 1962; or

(3) That the claimant was present onsite at any time during a period of atmospheric nuclear testing and was a participant during that period in the atmospheric detonation of a nuclear device;

(b) That after such period of physical presence or onsite participation the claimant contracted leukemia;

(c) That the claimant's initial exposure occurred prior to age 21; and

(d) That the onset of the leukemia occurred more than two years after the date of the claimant's first exposure to fallout.

§ 79.13 Proof of physical presence for the requisite period and proof of participation onsite during a period of atmospheric nuclear testing.

(a) Proof of physical presence may be made by the submission of any trustworthy contemporaneous record that, on its face or in conjunction with other such records, establishes that the claimant was present in the affected area for the requisite period during the designated time period. Examples of such records include:

(1) Records of the federal government (including verified information submitted for a security clearance), any tribal government, or any state, county, city or local governmental office, agency, department, board or other entity, or other public office or agency;

(2) Records of any accredited public or private educational institution;

(3) Records of any private utility licensed or otherwise approved by any governmental entity, including any such utility providing telephone services;

(4) Records of any public or private library;

(5) Records of any state or local historical society;

(6) Records of any religious organization;

(7) Records of any regularly conducted business activity or entity;

(8) Records of any recognized civic or fraternal association or organization; and

(9) Medical records created during the designated time period.

(b) Proof of physical presence by contemporaneous records may also be made by submission of original postcards and envelopes from letters (not copies) addressed to the claimant or an immediate family member during the designated time period that bear a postmark and a cancelled stamp(s).

(c) The Program will presume that an individual who resided or was employed on a full-time basis within the affected area was physically present during the time period of residence or full-time employment.

(d) For purposes of establishing eligibility under § 79.12(a)(1), the Program will presume that proof of a claimant's residence at one or more addresses or proof of full-time employment at one location within the affected area on any two dates less than three years apart during the period beginning on January 21, 1951, and ending on October 31, 1958, establishes the claimant's presence within the affected area for the period between the two dates reflected in the documentation submitted as proof of presence.

(e) For purposes of establishing eligibility under § 79.12(a)(1), the Program will presume that proof of residence at one or more addresses or proof of full-time employment at one location within the affected area on two dates, one of which is before January 21, 1951, and another of which is within the specified time period, establishes the claimant's presence in the affected area between January 21, 1951, and the date within the specified time period, provided the dates are not more than three years apart.

(f) For purposes of establishing eligibility under § 79.12(a)(1), the Program will presume that proof of residence at one or more addresses or proof of full-time employment at one location within the affected area on two dates, one of which is after October 31, 1958, and another of which is within the specified time period, establishes the claimant's presence in the affected area between the date within the specified time period and October 31, 1958, provided the dates are not more than three years apart.

(g) For purposes of establishing eligibility under § 79.12(a)(2), the Program will presume that proof of residence or proof of full-time employment within the affected area at least one day during the period beginning June 30, 1962, and ending July 31, 1962, and proof of residence or proof of full-time employment at the same address or location within six months before June 30, 1962, and six months after July 31, 1962, establishes the claimant's physical presence for the necessary one-month-and-one-day period.

(h) For purposes of establishing eligibility under § 79.12(a)(2), the Program will presume that proof of residence or full-time employment at the same address or location on two separate dates at least 14 days apart within the time period beginning June 30, 1962, and ending July 31, 1962, establishes the claimant's physical presence for the necessary one-month-and-one-day period.

(i) For purposes of establishing eligibility under § 79.12(a)(3), the claimant must establish, in accordance with § 79.33, that he or she participated on-site in the atmospheric detonation of a nuclear device.

§ 79.14 Proof of initial exposure prior to age 21.

(a) Proof of the claimant's date of birth must be established by the submission of any of the following:

(1) Birth certificate;

(2) Baptismal certificate;

(3) Tribal records; or

(4) Hospital records of birth.

(b) Absent any indication to the contrary, the Program will assume that the earliest date within the designated time period indicated on any records accepted by the Program as proof of the claimant's physical presence in the affected area or participation during a period of atmospheric nuclear testing was also the date of initial exposure.

§ 79.15 Proof of onset of leukemia more than two years after first exposure.

The Program will presume that the date of onset was the date of diagnosis as indicated in the medical documentation accepted by the Program as proof of the claimant's leukemia. The date of onset must be more than two years after the date of first exposure as determined under § 79.14(b).

§ 79.16 Proof of medical condition.

(a) Medical documentation is required in all cases to prove that the claimant suffered from or suffers from leukemia. Proof that the claimant contracted leukemia must be made either by using the procedure outlined in paragraph (b) of this section or by submitting the documentation required in paragraph (c) of this section.

(b) If a claimant was diagnosed as having leukemia in Arizona, Colorado, Nevada, New Mexico, Utah or Wyoming, the claimant or eligible surviving beneficiary need not submit any medical documentation of disease at the time the claim is filed (although medical documentation may subsequently be required). Instead, the claimant or eligible surviving beneficiary must submit with the claim an Authorization To Release Medical and Other Information, valid in the state of diagnosis, that authorizes the Program to contact the appropriate state cancer or tumor registry. The Program will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of one type of leukemia. If the designated state does not possess medical records or abstracts of medical records that contain a verified diagnosis of leukemia, the Radiation Exposure Compensation Program will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit the medical documentation required in paragraph (c) of this section, in accordance with the provisions of § 79.72(b).

(c)(1) Proof that the claimant contracted leukemia may be made by the submission of one or more of the following contemporaneous medical records provided that the specified document contains an explicit statement of diagnosis or such other information or data from which appropriate authorities at the National Cancer Institute can make a diagnosis of leukemia to a reasonable degree of medical certainty:

(i) Bone marrow biopsy or aspirate report;

(ii) Peripheral white blood cell differential count report;

(iii) Autopsy report;

(iv) Hospital discharge summary;

(v) Physician summary report;

(vi) History and physical report; or

(vii) Death certificate, provided that it is signed by a physician at the time of death.

(2) If the medical record submitted does not contain sufficient information or data to make such a diagnosis, the Program will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit additional medical records identified in this paragraph, in accordance with the provisions of § 79.72(b). Any such additional medical documentation submitted must also contain sufficient information from which appropriate authorities at the National Cancer Institute can determine the type of leukemia contracted by the claimant.

Subpart C—Eligibility Criteria for Claims Relating to Certain Specified Diseases Contracted After Exposure in an Affected Area (''Downwinders'')

§ 79.20 Scope of subpart.

The regulations in this subpart describe the criteria for eligibility for compensation under sections 4(a)(2) (A) and (B) of the Act and the evidence that will be accepted as proof of the various eligibility criteria. Sections 4(a)(2) (A) and (B) of the Act provide for a payment of $50,000 to individuals who were exposed to fallout from the atmospheric detonation of nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period and who later developed one or more specified compensable diseases.

§ 79.21 Definitions.

(a) The definitions listed in § 79.11 (a) through (e) and (i) apply to this subpart.

(b) *Indication of disease* means any medically significant information that suggests the presence of a disease, whether or not the presence of the disease is later confirmed.

(c) *Leukemia, chronic lymphocytic leukemia, multiple myeloma, lymphomas, Hodgkin's disease, primary cancer of the thyroid, primary cancer of the male breast, primary cancer of the female breast, primary cancer of the esophagus, primary cancer of the stomach, primary cancer of the pharynx, primary cancer of the small intestine, primary cancer of the pancreas, primary cancer of the bile ducts, primary cancer of the gallbladder, primary cancer of the salivary gland, primary cancer of the urinary bladder, primary cancer of the brain, primary cancer of the colon, primary cancer of the ovary, primary cancer of the liver, and primary cancer of the lung* mean the physiological conditions that are recognized by the National Cancer Institute under those names or nomenclature, or under any previously accepted or commonly used names or nomenclature.

(d) *Specified compensable diseases* means leukemia (other than chronic lymphocytic leukemia), provided that initial exposure occurred after the age of 20 and that the onset of the disease was at least two years after first exposure, and the following diseases, provided onset was at least five years after first exposure: multiple myeloma; lymphomas (other than Hodgkin's disease); and primary cancer of the thyroid, male or female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gallbladder, salivary gland, urinary bladder, brain, colon, ovary, liver (except if cirrhosis or hepatitis B is indicated), or lung.

§ 79.22 Criteria for eligibility for claims relating to certain specified diseases contracted after exposure in an affected area (''downwinders'').

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary must establish each of the following:

(a)(1) That the claimant was physically present at any place within the affected area for a period of at least two years (24 consecutive or cumulative months) during the period beginning on January 21, 1951, and ending on October 31, 1958; or

(2) That the claimant was physically present at any place within the affected area for the entire, continuous period beginning on June 30, 1962, and ending on July 31, 1962; and

(b) That after such period of physical presence the claimant contracted one of the following specified compensable diseases:

(1) Leukemia (other than chronic lymphocytic leukemia), provided that:

(i) The claimant's initial exposure occurred after the age of 20; and

(ii) The onset of the disease occurred at least two years after first exposure;

(2) Multiple myeloma, provided onset occurred at least five years after first exposure;

(3) Lymphomas, other than Hodgkin's disease, provided onset occurred at least five years after first exposure;

(4) Primary cancer of the thyroid, provided onset occurred at least five years after first exposure;

(5) Primary cancer of the male or female breast, provided onset occurred at least five years after first exposure;

(6) Primary cancer of the esophagus, provided onset occurred at least five years after first exposure;

(7) Primary cancer of the stomach, provided onset occurred at least five years after first exposure;

(8) Primary cancer of the pharynx, provided onset occurred at least five years after first exposure;

(9) Primary cancer of the small intestine, provided onset occurred at least five years after first exposure;

(10) Primary cancer of the pancreas, provided onset occurred at least five years after first exposure;

(11) Primary cancer of the bile ducts, provided onset occurred at least five years after first exposure;

(12) Primary cancer of the gallbladder, provided onset occurred at least five years after first exposure;

(13) Primary cancer of the salivary gland, provided onset occurred at least five years after first exposure;

(14) Primary cancer of the urinary bladder, provided onset occurred at least five years after first exposure;

(15) Primary cancer of the brain, provided onset occurred at least five years after first exposure;

(16) Primary cancer of the colon, provided onset occurred at least five years after first exposure;

(17) Primary cancer of the ovary, provided onset occurred at least five years after first exposure;

(18) Primary cancer of the liver, provided,

(i) Onset occurred at least five years after first exposure;

(ii) There is no indication of the presence of hepatitis B; and

(iii) There is no indication of the presence of cirrhosis; or

(19) Primary cancer of the lung, provided onset occurred at least five years after first exposure.

§ 79.23 Proof of physical presence for the requisite period.

(a) Proof of physical presence for the requisite period may be made in accordance with the provisions of § 79.13(a) and (b). An individual who resided or was employed on a full-time basis within the affected area is presumed to have been physically present during the time period of residence or full-time employment.

(b) For purposes of establishing eligibility under § 79.22(a)(1), the Program will presume that proof of residence at one or more addresses or proof of full-time employment at one location within the affected area on any two dates less than three years apart, during the period beginning on January 21, 1951, and ending on October 31, 1958, establishes the claimant's presence within the affected area for the period between the two dates reflected in the documentation submitted as proof of presence.

(c) For purposes of establishing eligibility under § 79.22(a)(1), the Program will presume that proof of residence at one or more addresses or proof of full-time employment at one location within the affected area on two dates, one of which is before January 21, 1951, and another of which is within the specified time period, establishes the claimant's presence in the affected area between January 21, 1951, and the date within the specified time period, provided the dates are not more than three years apart.

(d) For purposes of establishing eligibility under § 79.22(a)(1), the Program will presume that proof of residence at one or more addresses or proof of full-time employment at one location within the affected area on two dates, one of which is after October 31, 1958, and another of which is within the specified time period, establishes the claimant's presence in the affected area between the date within the specified time period and October 31, 1958, provided the dates are not more than three years apart.

(e) For purposes of establishing eligibility under § 79.22(a)(2), the Program will apply the presumptions contained in § 79.13(g) and (h).

§ 79.24 Proof of initial or first exposure after age 20 for claims under § 79.22(b)(1).

(a) Proof of the claimant's date of birth must be established in accordance with the provisions of § 79.14(a).

(b) Absent any indication to the contrary, the Program will presume that the earliest date within the designated time period indicated on any records accepted by the Program as proof of the claimant's physical presence in the

affected area was the date of initial or first exposure.

§ 79.25 Proof of onset of leukemia at least two years after first exposure, and proof of onset of a specified compensable disease more than five years after first exposure.

The date of onset will be the date of diagnosis as indicated in the medical documentation accepted by the Radiation Exposure Compensation Program as proof of the claimant's specified compensable disease. The date of onset must be at least five years after the date of first exposure as determined under § 79.24(b). In the case of leukemia, the date of onset must be at least two years after the date of first exposure.

§ 79.26 Proof of medical condition.

(a) Medical documentation is required in all cases to prove that the claimant suffered from or suffers from any specified compensable disease. Proof that the claimant contracted a specified compensable disease must be made either by using the procedure outlined in paragraph (b) of this section or by submitting the documentation required in paragraph (c) of this section. (For claims relating to primary cancer of the liver, the claimant or eligible surviving beneficiary must also submit the additional medical documentation prescribed in § 79.27.)

(b) If a claimant was diagnosed as having one of the specified compensable diseases in Arizona, Colorado, Nevada, New Mexico, Utah or Wyoming, the claimant or eligible surviving beneficiary need not submit any medical documentation of disease at the time the claim is filed (although medical documentation subsequently may be required). Instead, the claimant or eligible surviving beneficiary may submit with the claim an Authorization to Release Medical and Other Information, valid in the state of diagnosis, that authorizes the Program to contact the appropriate state cancer or tumor registry. The Program will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of one of the specified compensable diseases. If the designated state does not possess medical records or abstracts of medical records that contain a verified diagnosis of one of the specified compensable diseases, the Program will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit the written medical documentation required in paragraph (c) of this section, in accordance with the provisions of § 79.72(b).

(c) Proof that the claimant contracted a specified compensable disease may be made by the submission of one or more of the contemporaneous medical records listed in this paragraph, provided that the specified document contains an explicit statement of diagnosis and such other information or data from which the appropriate authorities with the National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty. If the medical record submitted does not contain sufficient information or data to make such a diagnosis, the Program will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit additional medical records identified in this paragraph, in accordance with the provisions of § 79.72(b). The medical documentation submitted under this section to establish that the claimant contracted leukemia or a lymphoma must also contain sufficient information from which the appropriate authorities with the National Cancer Institute can determine the type of leukemia or lymphoma contracted by the claimant. Proof of leukemia shall be made by submitting one or more of the documents listed in § 79.16(c).

(1) *Multiple myeloma.*

(i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) Report of serum electrophoresis;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Hematology summary or consultation report;

(D) Medical oncology summary or consultation report; or

(E) X-ray report; or

(v) Death certificate, provided that it is signed by a physician at the time of death.

(2) *Lymphomas.*

(i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Hematology consultation or summary report; or

(D) Medical oncology consultation or summary report; or

(iv) Death certificate, provided that it is signed by a physician at the time of death.

(3) *Primary cancer of the thyroid.*

(i) Pathology report of tissue biopsy or fine needle aspirate;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative summary report;

(D) Medical oncology summary or consultation report; or

(iv) Death certificate, provided that it is signed by a physician at the time of death.

(4) *Primary cancer of the male or female breast.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Medical oncology summary or consultation report; or

(E) Radiotherapy summary or consultation report;

(iv) Report of mammogram;

(v) Report of bone scan; or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(5) *Primary cancer of the esophagus.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Endoscopy report;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Radiotherapy report; or

(E) Medical oncology consultation or summary report;

(v) One of the following radiological studies:

(A) Esophagram;

(B) Barium swallow;

(C) Upper gastrointestinal (GI) series;

(D) Computerized tomography (CT) scan; or

(E) Magnetic resonance imaging (MRI); or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(6) *Primary cancer of the stomach.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Endoscopy or gastroscopy report;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Radiotherapy report; or

(E) Medical oncology summary report;

(v) One of the following radiological studies:

(A) Barium swallow;

(B) Upper gastrointestinal (GI) series;

(C) Computerized tomography (CT) series; or

(D) Magnetic resonance imaging (MRI); or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(7) *Primary cancer of the pharynx.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Endoscopy report;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Report of otolaryngology examination;

(D) Radiotherapy summary report;

(E) Medical oncology summary report; or

(F) Operative report;

(v) Report of one of the following radiological studies:

(A) Laryngograms;

(B) Tomograms of soft tissue and lateral radiographs;

(C) Computerized tomography (CT) scan; or

(D) Magnetic resonance imaging (MRI); or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(8) *Primary cancer of the small intestine.*

(i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) Endoscopy report, provided that the examination covered the duodenum and parts of the jejunum;

(iv) Colonoscopy report, provided that the examination covered the distal ileum;

(v) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Report of gastroenterology examination;

(D) Operative report;

(E) Radiotherapy summary report; or

(F) Medical oncology summary or consultation report;

(vi) Report of one of the following radiologic studies:

(A) Upper gastrointestinal (GI) series with small bowel follow-through;

(B) Angiography;

(C) Computerized tomography (CT) scan; or

(D) Magnetic resonance imaging (MRI); or

(vii) Death certificate, provided that it is signed by a physician at the time of death.

(9) *Primary cancer of the pancreas.*

(i) Pathology report of tissue biopsy or fine needle aspirate;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Radiotherapy summary report; or

(D) Medical oncology summary report;

(iv) Report of one of the following radiographic studies:

(A) Endoscopic retrograde cholangiopancreatography (ERCP);

(B) Upper gastrointestinal (GI) series;

(C) Arteriography of the pancreas;

(D) Ultrasonography;

(E) Computerized tomography (CT) scan; or

(F) Magnetic resonance imaging (MRI); or

(v) Death certificate, provided that it is signed by a physician at the time of death.

(10) *Primary cancer of the bile ducts.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Gastroenterology consultation report; or

(E) Medical oncology summary or consultation report;

(iv) Report of one of the following radiographic studies:

(A) Ultrasonography;

(B) Endoscopic retrograde cholangiography;

(C) Percutaneous cholangiography; or

(D) Computerized tomography (CT) scan; or

(v) Death certificate, provided that it is signed by a physician at the time of death.

(11) *Primary cancer of the gallbladder.*

(i) Pathology report of tissue from surgical resection;

(ii) Autopsy report;

(iii) Report of one of the following radiological studies:

(A) Computerized tomography (CT) scan;

(B) Magnetic resonance imaging (MRI); or

(C) Ultrasonography (ultrasound);

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Radiotherapy report; or

(E) Medical oncology summary or report; or

(v) Death certificate, provided that it is signed by a physician at the time of death.

(12) *Primary cancer of the liver.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Medical oncology summary report;

(D) Operative report; or

(E) Gastroenterology report;

(iv) Report of one of the following radiological studies:

(A) Computerized tomography (CT) scan;

(B) Magnetic resonance imaging (MRI); or

(v) Death certificate, provided that it is signed by a physician at the time of death.

(13) *Primary cancer of the lung.*

(i) Pathology report of tissue biopsy or resection, including, but not limited to specimens obtained by any of the following methods:

(A) Surgical resection;

(B) Endoscopic endobronchial or transbronchial biopsy;

(C) Bronchial brushings and washings;

(D) Pleural fluid cytology;

(E) Fine needle aspirate;

(F) Pleural biopsy; or

(G) Sputum cytology;

(ii) Autopsy report;

(iii) Report of bronchoscopy, with or without biopsy;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Radiotherapy summary report;

(D) Medical oncology summary report; or

(E) Operative report;

(v) Report of one of the following radiology examinations:

(A) Computerized tomography (CT) scan;

(B) Magnetic resonance imaging (MRI);

(C) X-rays of the chest; or

(D) Chest tomograms; or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(14) *Primary cancer of the salivary gland.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Report of otolaryngology or oral maxillofacial examination;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Radiotherapy summary report;

(D) Medical oncology summary report; or

(E) Operative report;

(v) Report of one of the following radiology examinations:

(A) Computerized tomography (CT) scan; or

(B) Magnetic resonance imaging (MRI); or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(15) *Primary cancer of the urinary bladder.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Report of cytoscopy, with or without biopsy;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Radiotherapy summary report;

(D) Medical oncology summary report; or

(E) Operative report;

(v) Report of one of the following radiology examinations:

(A) Computerized tomography (CT) scan; or

(B) Magnetic resonance imaging (MRI); or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(16) *Primary cancer of the brain.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Radiotherapy summary report;

(D) Medical oncology summary report; or

(E) Operative report;

(iv) Report of one of the following radiology examinations:

(A) Computerized tomography (CT) scan;

(B) Magnetic resonance imaging (MRI); or

(C) CT or MRI with enhancement; or

(v) Death certificate, provided that it is signed by a physician at the time of death.

(17) *Primary cancer of the colon.*

(i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) Endoscopy report, provided the examination covered the duodenum and parts of the jejunum;

(iv) Colonoscopy report, provided that the examination covered the distal ileum;

(v) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Report of gastroenterology examination;

(D) Operative report;

(E) Radiotherapy summary report; or

(F) Medical oncology summary or consultation report;

(vi) Report of one of the following radiologic studies:

(A) Upper gastrointestinal (GI) series with small bowel follow-through;

(B) Angiography;

(C) Computerized tomography (CT) scan; or

(D) Magnetic resonance imaging (MRI); or

(vii) Death certificate, provided that it is signed by a physician at the time of death.

(18) *Primary cancer of the ovary.*

(i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Radiotherapy summary report;

(D) Medical oncology summary report; or

(E) Operative report; or

(iv) Death certificate, provided that it is signed by a physician at the time of death.

§ 79.27 Indication of the presence of hepatitis B or cirrhosis.

(a)(1) If the claimant or eligible surviving beneficiary is claiming eligibility under this subpart for primary cancer of the liver, the claimant or eligible surviving beneficiary must submit, in addition to proof of the disease, all medical records pertaining to the claimant listed below from any hospital, medical facility, or health care provider that were created within the period six months before and six months after the date of diagnosis of primary cancer of the liver:

(i) All history and physical examination reports;

(ii) All operative and consultation reports;

(iii) All pathology reports; and

(iv) All physician, hospital, and health care facility admission and discharge summaries.

(2) In the event that any of the records in paragraph (a)(1) of this section no longer exist, the claimant or eligible surviving beneficiary must submit a certified statement by the custodian(s) of those records to that effect.

(b) If the medical records listed in paragraph (a) of this section, or information possessed by the state cancer or tumor registries, indicates the presence of hepatitis B or cirrhosis, the Radiation Exposure Compensation Program will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit other written medical documentation or contemporaneous records in accordance with § 79.72(b) to establish that in fact there was no presence of hepatitis B or cirrhosis.

(c) The Program may also require that the claimant or eligible surviving beneficiary provide additional medical records or other contemporaneous records, or an authorization to release such additional medical and contemporaneous records, as may be needed to make a determination regarding the indication of the presence of hepatitis B or cirrhosis.

Subpart D—Eligibility Criteria for Claims by Onsite Participants

§ 79.30 Scope of subpart.

The regulations in this subpart describe the criteria for eligibility for compensation under section 4(a)(2)(C) of the Act, and the evidence that will be accepted as proof of the various eligibility criteria. Section 4(a)(2)(C) of the Act provides for a payment of $75,000 to individuals who participated onsite in the atmospheric detonation of a nuclear device and later developed a specified compensable disease.

§ 79.31 Definitions.

(a) The definitions listed in § 79.11(b), (e), (f), (g), and (h), and in § 79.21, apply to this subpart.

(b) *Atmospheric detonation of a nuclear device* means only a test conducted by the United States prior to January 1, 1963, as listed in paragraph (d) of this section.

(c) *First exposure* or initial exposure means the date on which the claimant first participated onsite in an atmospheric detonation of a nuclear device.

(d) *Period of atmospheric nuclear testing* means one of the periods listed in this paragraph that are associated with each test operation, plus an additional six-month period thereafter:

(1) For Operation Trinity, the period July 16, 1945, through August 6, 1945:

Event name	Date	Location
Trinity	07/16/45	Trinity Test Site

(2) For Operation Crossroads, the period June 28, 1946, through August 31, 1946, for all activities other than the decontamination of ships involved in Operation Crossroads; the period of atmospheric nuclear testing for the decontamination of ships involved in Operation Crossroads shall run from June 28, 1946, through November 30, 1946:

Event name	Date	Location
Able	07/01/46	Bikini
Baker	07/25/46	Bikini

(3) For Operation Sandstone, the period April 13, 1948, through May 20, 1948:

Event name	Date	Location
X-ray	04/15/48	Enewetak
Yoke	05/01/48	Enewetak
Zebra	05/15/48	Enewetak

(4) For Operation Ranger, the period January 27, 1951, through February 7, 1951:

Event name	Date	Location
Able	01/27/51	Nevada Test Site ("NTS")
Baker	01/28/51	NTS
Easy	02/01/51	NTS
Baker-2	02/02/51	NTS
Fox	02/06/51	NTS

(5) For Operation Greenhouse, the period April 5, 1951, through June 20, 1951, for all activities other than service as a member of the garrison or maintenance forces on the atoll of Enewetak between June 21, 1951, and July 1, 1952; the period of atmospheric nuclear testing for service as a member of the garrison or maintenance forces on the atoll of Enewetak shall run from April 5, 1951, through July 1, 1952:

Event name	Date	Location
Dog	04/08/51	Enewetak
Easy	04/21/51	Enewetak
George	05/09/51	Enewetak
Item	05/25/51	Enewetak

(6) For Operation Buster-Jangle, the period October 22, 1951, through December 20, 1951:

Event name	Date	Location
Able	10/22/51	NTS
Baker	10/28/51	NTS
Charlie	10/30/51	NTS
Dog	11/01/51	NTS
Sugar	11/19/51	NTS
Uncle	11/29/51	NTS

(7) For Operation Tumbler-Snapper, the period April 1, 1952, through June 20, 1952:

Event name	Date	Location
Able	04/01/52	NTS
Baker	04/15/52	NTS
Charlie	04/22/52	NTS
Dog	05/01/52	NTS
Easy	05/07/52	NTS
Fox	05/25/52	NTS
George	06/01/52	NTS

(8) For Operation Ivy, the period October 29, 1952, through December 31, 1952:

Event name	Date	Location
Mike	11/01/52	Enewetak
King	11/16/52	Enewetak

(9) For Operation Upshot-Knothole, the period March 17, 1953, through June 20, 1953:

Event name	Date	Location
Annie	03/17/53	NTS
Nancy	03/24/53	NTS
Ruth	03/31/53	NTS
Dixie	04/06/53	NTS
Ray	04/11/53	NTS
Badger	04/18/53	NTS
Simon	04/25/53	NTS
Encore	05/08/53	NTS
Harry	05/19/53	NTS
Grable	05/25/53	NTS
Climax	06/04/53	NTS

(10) For Operation Castle, the period February 27, 1954, through May 31, 1954

Event name	Date	Location
Bravo	03/01/54	Bikini
Romeo	03/27/54	Bikini
Koon	04/07/54	Bikini
Union	04/26/54	Bikini
Yankee	05/05/54	Bikini
Nectar	05/14/54	Enewetak

(11) For Operation Teapot, the period February 18, 1955, through June 10, 1955:

Event name	Date	Location
Wasp	02/18/55	NTS
Moth	02/22/55	NTS
Tesla	03/01/55	NTS
Turk	03/07/55	NTS
Hornet	03/12/55	NTS
Bee	03/22/55	NTS
Ess	03/23/55	NTS
Apple-1	03/29/55	NTS
Wasp Prime	03/29/55	NTS
Ha	04/06/55	NTS
Post	04/09/55	NTS
Met	04/15/55	NTS
Apple-2	05/05/55	NTS
Zucchini	05/15/55	NTS

(12) For Operation Wigwam, the period May 14, 1955, through May 15, 1955:

Event name	Date	Location
Wigwam	05/14/55	Pacific

(13) For Operation Redwing, the period May 2, 1956, through August 6, 1956, for all activities other than service as a member of the garrison or maintenance forces on the atoll of Enewetak from August 7, 1956, through August 7, 1957; the period of atmospheric nuclear testing for service as a member of the garrison or maintenance forces on the atoll of Enewetak shall run from May 2, 1956, through August 7, 1957:

Event name	Date	Location
Lacrosse	05/05/56	Enewetak
Cherokee	05/21/56	Bikini
Zuni	05/28/56	Bikini
Yuma	05/28/56	Enewetak
Erie	05/31/56	Enewetak
Seminole	06/06/56	Enewetak
Flathead	06/12/56	Bikini
Blackfoot	06/12/56	Enewetak
Kickapoo	06/14/56	Enewetak
Osage	06/16/56	Enewetak
Inca	06/22/56	Enewetak
Dakota	06/26/56	Bikini
Mohawk	07/03/56	Enewetak
Apache	07/09/56	Enewetak
Navajo	07/11/56	Bikini
Tewa	07/21/56	Bikini
Huron	07/22/56	Enewetak

(14) For Operation Plumbbob, the period May 28, 1957, through October 22, 1957:

Event name	Date	Location
Boltzmann	05/28/57	NTS
Franklin	06/02/57	NTS
Lassen	06/05/57	NTS
Wilson	06/18/57	NTS
Priscilla	06/24/57	NTS
Hood	07/05/57	NTS
Diablo	07/15/57	NTS
John	07/19/57	NTS
Kepler	07/24/57	NTS
Owens	07/25/57	NTS
Stokes	08/07/57	NTS
Shasta	08/18/57	NTS
Doppler	08/23/57	NTS
Franklin Prime	08/30/57	NTS
Smoky	08/31/57	NTS
Galileo	09/02/57	NTS
Wheeler	09/06/57	NTS
Laplace	09/08/57	NTS
Fizeau	09/14/57	NTS
Newton	09/16/57	NTS
Whitney	09/23/57	NTS
Charleston	09/28/57	NTS
Morgan	10/07/57	NTS

(15) For Operation Hardtack I, the period April 26, 1958, through October 31, 1958, for all activities other than service as a member of the garrison or maintenance forces on the atoll of Enewetak from November 1, 1958, through April 30, 1959; the period of atmospheric nuclear testing for service as a member of the garrison or maintenance forces on the atoll of Enewetak shall run from April 26, 1958, through April 30, 1959:

Event name	Date	Location
Yucca	04/28/58	Pacific
Cactus	05/06/58	Enewetak
Fir	05/12/58	Bikini
Butternut	05/12/58	Enewetak
Koa	05/13/58	Enewetak
Wahoo	05/16/58	Enewetak
Holly	05/21/58	Enewetak
Nutmeg	05/22/58	Bikini
Yellowwood	05/26/58	Enewetak
Magnolia	05/27/58	Enewetak
Tobacco	05/30/58	Enewetak
Sycamore	05/31/58	Bikini
Rose	06/03/58	Enewetak
Umbrella	06/09/58	Enewetak
Maple	06/11/58	Bikini
Aspen	06/15/58	Bikini
Walnut	06/15/58	Enewetak
Linden	06/18/58	Enewetak
Redwood	06/28/58	Bikini
Elder	06/28/58	Enewetak
Oak	06/29/58	Enewetak
Hickory	06/29/58	Bikini
Sequoia	07/02/58	Enewetak
Cedar	07/03/58	Bikini
Dogwood	07/06/58	Enewetak
Poplar	07/12/58	Bikini
Scaevola	07/14/58	Enewetak
Pisonia	07/18/58	Enewetak
Juniper	07/22/58	Bikini
Olive	07/23/58	Enewetak
Pine	07/27/58	Enewetak
Teak	07/31/58	Johnston Isl
Qunice	08/06/58	Enewetak
Orange	08/11/58	Johnston Isl
Fig	08/18/58	Enewetak

(16) For Operation Argus, the period August 25, 1958, through September 10, 1958:

Event name	Date	Location
Argus I	08/27/58	South Atlantic
Argus II	08/30/58	South Atlantic
Argus III	09/06/58	South Atlantic

(17) For Operation Hardtack II, the period September 19, 1958, through October 31, 1958:

Event name	Date	Location
Eddy	09/19/58	NTS
Mora	09/29/58	NTS
Quay	10/10/58	NTS
Lea	10/13/58	NTS
Hamilton	10/15/58	NTS
Dona Ana	10/16/58	NTS
Rio Arriba	10/18/58	NTS
Socorro	10/22/58	NTS
Wrangell	10/22/58	NTS
Rushmore	10/22/58	NTS
Sanford	10/26/58	NTS
De Baca	10/26/58	NTS
Humboldt	10/29/58	NTS
Mazama	10/29/58	NTS
Santa Fe	10/30/58	NTS

(18) For Operation Dominic I, the period April 23, 1962, through December 31, 1962:

Event name	Date	Location
Adobe	04/25/62	Christmas Isl
Aztec	04/27/62	Christmas Isl
Arkansas	05/02/62	Christmas Isl
Questa	05/04/62	Christmas Isl
Frigate Bird	05/06/62	Pacific
Yukon	05/08/62	Christmas Isl
Mesilla	05/09/62	Christmas Isl
Muskegon	05/11/62	Christmas Isl
Swordfish	05/11/62	Pacific
Encino	05/12/62	Christmas Isl
Swanee	05/14/62	Christmas Isl
Chetco	05/19/62	Christmas Isl
Tanana	05/25/62	Christmas Isl
Nambe	05/27/62	Christmas Isl
Alma	06/08/62	Christmas Isl
Truckee	06/09/62	Christmas Isl
Yeso	06/10/62	Christmas Isl
Harlem	06/12/62	Christmas Isl
Rinconada	06/15/62	Christmas Isl
Dulce	06/17/62	Christmas Isl
Petit	06/19/62	Christmas Isl
Otowi	06/22/62	Christmas Isl
Bighorn	06/27/62	Christmas Isl
Bluestone	06/30/62	Christmas Isl
Starfish	07/08/62	Johnston Isl
Sunset	07/10/62	Christmas Isl
Pamlico	07/11/62	Christmas Isl
Androscoggin	10/02/62	Johnston Isl
Bumping	10/06/62	Johnston Isl
Chama	10/18/62	Johnston Isl
Checkmate	10/19/62	Johnston Isl
Bluegill	10/25/62	Johnston Isl
Calamity	10/27/62	Johnston Isl
Housatonic	10/30/62	Johnston Isl
Kingfish	11/01/62	Johnston Isl
Tightrope	11/03/62	Johnston Isl

(19) For Operation Dominic II, the period July 7, 1962, through August 15, 1962:

Event name	Date	Location
Little Feller II	07/07/62	NTS
Johnie Boy	07/11/62	NTS
Small Boy	07/14/62	NTS
Little Feller I	07/17/62	NTS

(20) For Operation Plowshare, the period July 6, 1962, through July 7, 1962, covering Project Sedan.

§ 79.32 Criteria for eligibility for claims by onsite participants.

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary must establish each of the following:

(a) That the claimant was present onsite at any time during a period of atmospheric nuclear testing;

(b) That the claimant was a participant during that period in the atmospheric detonation of a nuclear device; and

(c) That after such participation, the claimant contracted a specified compensable disease as set forth in § 79.22(b).

§ 79.33 Proof of participation onsite during a period of atmospheric nuclear testing.

(a) *Claimants associated with Department of Defense (DoD) Components or DoD Contractors.* (1) A claimant or eligible surviving beneficiary who alleges that the claimant was present onsite during a period of atmospheric nuclear testing as a member of the armed forces or an employee or contractor employee of the DoD, or any of its components or agencies, must submit the following information on the claim form:

(i) The claimant's name;

(ii) The claimant's military service number;

(iii) The claimant's Social Security number;

(iv) The site at which the claimant participated in the atmospheric detonation of a nuclear device;

(v) The name or number of the claimant's military organization or unit assignment at the time of his or her onsite participation;

(vi) The dates of the claimant's assignment onsite; and

(vii) As full and complete a description as possible of the claimant's official duties, responsibilities, and activities while participating onsite.

(2) A claimant or eligible surviving beneficiary under this section need not submit any additional documentation of onsite participation during the atmospheric detonation of a nuclear device at the time the claim is filed; however, additional documentation may be required as set forth in paragraph (a)(3) of this section.

(3) Upon receipt under this subpart of a claim that contains the information set forth in paragraph (a)(1) of this section, the Radiation Exposure Compensation Program will forward the information to the DoD and request that the DoD conduct a search of its records for the purpose of gathering facts relating to the claimant's presence onsite and participation in the atmospheric detonation of a nuclear device. If the facts gathered by the DoD are insufficient to establish the eligibility criteria in § 79.32, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity to submit military, government, or business records in accordance with the procedure set forth in § 79.72(c).

(b) *Claimants Associated with the Atomic Energy Commission (AEC) or the Department of Energy (DOE), or Who Were Members of the Federal Civil Defense Administration or the Office of Civil and Defense Mobilization.* (1) A claimant or eligible surviving beneficiary who alleges that the claimant was present onsite during the atmospheric detonation of a nuclear device as an employee of the AEC, the DOE or any of their components, agencies or offices, or as an employee of a contractor of the AEC, or DOE, or as a member of the Federal Civil Defense Administration or the Office of Civil and Defense Mobilization, must submit the following information on the claim form:

(i) The claimant's name;

(ii) The claimant's Social Security number;

(iii) The site at which the claimant participated in the atmospheric detonation of a nuclear device;

(iv) The name or other identifying information associated with the claimant's organization, unit, assignment, or employer at the time of the claimant's participation onsite;

(v) The dates of the claimant's assignment onsite; and

(vi) As full and complete a description as possible of the claimant's official duties, responsibilities, and activities while participating onsite.

(2) A claimant or eligible surviving beneficiary under this section need not at the time the claim is filed submit any additional documentation demonstrating the claimant's presence onsite during the atmospheric detonation of a nuclear device; however, additional documentation may thereafter be required as set forth in paragraph (b)(3) of this section.

(3) Upon receipt under this subpart of a claim that contains the information set forth in paragraph (b)(1) of this section, the Radiation Exposure Compensation Program will forward the information to the Nevada Field Office of the Department of Energy (DOE/NV)

and request that the DOE/NV conduct a search of its records for the purpose of gathering facts relating to the claimant's presence onsite and participation in the atmospheric detonation of a nuclear device. If the facts gathered by the DOE/NV are insufficient to establish the eligibility criteria in § 79.32, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity to submit military, government, or business records in accordance with the procedure set forth in § 79.72(c).

§ 79.34 Proof of medical condition.

Proof of medical condition under this subpart will be made in the same manner and according to the same procedures and limitations as are set forth in § 79.16 and § 79.26.

§ 79.35 Proof of onset of leukemia at least two years after first exposure, and proof of onset of a specified compensable disease more than five years after first exposure.

Absent any indication to the contrary, the earliest date of onsite participation indicated on any records accepted by the Radiation Exposure Compensation Program as proof of the claimant's onsite participation will be presumed to be the date of first or initial exposure. The date of onset will be the date of diagnosis as indicated on the medical documentation accepted by the Radiation Exposure Compensation Program as proof of the specified compensable disease. Proof of the onset of leukemia shall be established in accordance with § 79.15.

§ 79.36 Indication of the presence of hepatitis B or cirrhosis.

Possible indication of hepatitis B or cirrhosis will be determined in accordance with the provisions of § 79.27.

Subpart E—Eligibility Criteria for Claims by Uranium Miners

§ 79.40 Scope of subpart.

The regulations in this subpart define the eligibility criteria for compensation under section 5 of the Act pertaining to miners, *i.e.*, uranium mine workers, and the nature of the evidence that will be accepted as proof of the various eligibility criteria. Section 5 of the Act provides for a payment of $100,000 to miners who contracted primary lung cancer or one of a limited number of nonmalignant respiratory diseases following exposure to a defined minimum level of radiation during employment in aboveground or underground uranium mines or following employment for at least one year in aboveground or underground uranium mines in specified states during the period beginning January 1, 1942, and ending December 31, 1971.

§ 79.41 Definitions.

(a) *Cor pulmonale* means heart disease, including hypertrophy of the right ventricle, due to pulmonary hypertension secondary to fibrosis of the lung.

(b) *Designated time period* means the period beginning on January 1, 1942, and ending on December 31, 1971.

(c) *Employment for at least one year* means employment for a total of at least one year (12 consecutive or cumulative months).

(d) *Fibrosis of the lung* or *pulmonary fibrosis* means chronic inflammation and scarring of the pulmonary interstitium and alveoli with collagen deposition and progressive thickening.

(e) *Miner* or *uranium mine worker* means a person who operated or otherwise worked in a uranium mine.

(f) *National Institute for Occupational Safety and Health (NIOSH) certified ''B'' reader* means a physician who is certified as such by NIOSH. A list of certified ''B'' readers is available from the Radiation Exposure Compensation Program upon request.

(g) *Nonmalignant respiratory disease* means fibrosis of the lung, pulmonary fibrosis, cor pulmonale related to fibrosis of the lung, silicosis, or pneumoconiosis.

(h) *Pneumoconiosis* means a chronic lung disease resulting from inhalation and deposition in the lung of particulate matter, and the tissue reaction to the presence of the particulate matter. For purposes of this subpart, the claimant's exposure to the particulate matter that led to the disease must have occurred during employment in a uranium mine.

(i) *Primary lung cancer* means any physiological condition of the lung, trachea, or bronchus that is recognized under that name or nomenclature by the National Cancer Institute. The term includes in situ lung cancers.

(j) *Readily available documentation* means documents in the possession, custody, or control of the claimant or an immediate family member.

(k) *Silicosis* means a pneumoconiosis due to the inhalation of the dust of stone, sand, flint, or other materials containing silicon dioxide, characterized by the formation of pulmonary fibrotic changes.

(l) *Specified state* means Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, or Texas. Additional states may be included, provided:

(1) A uranium mine was operated in such state at any time during the period beginning on January 1, 1942, and ending on December 31, 1971;

(2) The state submits an application to the Assistant Director (specified in § 79.70(a)) to include such state; and

(3) The Assistant Director makes a determination to include such state.

(m) *Uranium mine* means any underground excavation, including ''dog holes,'' as well as open-pit, strip, rim, surface, or other aboveground mines, where uranium ore or vanadium-uranium ore was mined or otherwise extracted.

(n) *Working level* means the concentration of the short half-life daughters of radon that will release (1.3×10^5) million electron volts of alpha energy per liter of air.

(o) *Working level month of radiation* means radiation exposure at the level of one working level every work day for a month, or an equivalent cumulative exposure over a greater or lesser amount of time.

(p) *Written diagnosis by a physician* means a written determination of the nature of a disease made from a study of the signs and symptoms of a disease that is based on a physical examination of the patient, medical imaging or a chemical, microscopic, microbiologic, immunologic or pathologic study of physiologic and functional tests, secretions, discharges, blood, or tissue. For purposes of satisfying the requirement of a ''written diagnosis by a physician'' for living claimants specified in § 79.46, a physician submitting a written diagnosis of a nonmalignant respiratory disease must be employed by the Indian Health Service or the Department of Veterans Affairs or be board certified, and must have a documented, ongoing physician-patient relationship with the claimant. An ''ongoing physician-patient relationship'' can include referrals made to specialists from a primary care provider for purposes of diagnosis or treatment. ''Board certification'' requires, in addition to physician licensing, the successful completion of a residency training program and passage of a Board exam in a relevant field or specialty. Relevant specialties include: family practice, internal medicine, pathology, preventive medicine, radiology, surgery, and thoracic surgery (and including subspecialties such as cardiovascular disease, medical oncology, pulmonary disease) as listed by the American Board of Medical Specialties.

§ 79.42 Criteria for eligibility for claims by miners.

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary must establish each of the following:

(a) The claimant was employed as a miner in a specified state;

(b) The claimant was so employed at any time during the period beginning on January 1, 1942, and ending on December 31, 1971;

(c) The claimant was exposed during the course of his or her mining employment to 40 or more working level months of radiation or worked for at least one year in a uranium mine or mines during the period identified in paragraph (b) of this section; and

(d) The claimant contracted lung cancer or a nonmalignant respiratory disease following such exposure.

§ 79.43 Proof of employment as a miner.

(a) The Department will accept, as proof of employment for a designated time period, information contained in any of the following records:

(1) Records created by or gathered by the Public Health Service (PHS) in the course of any health studies of uranium workers during or including the period 1942–1990;

(2) Records of a uranium worker census performed by the PHS at various times during the period 1942–1990;

(3) Records of the Atomic Energy Commission (AEC), or any of its successor agencies; and

(4) Records of federally supported, health-related studies of uranium workers, including:

(i) Studies conducted by Geno Saccamanno, M.D., St. Mary's Hospital, Grand Junction, Colorado; and

(ii) Studies conducted by Jonathan Samet, M.D., University of New Mexico School of Medicine.

(b) The Program will presume that the employment history for the time period indicated in records listed in paragraph (a) of this section is correct. If the claimant or eligible surviving beneficiary wishes to contest the accuracy of such records, then the claimant or eligible surviving beneficiary may provide one or more of the records identified in paragraph (c) of this section, and the Assistant Director will determine whether the employment history indicated in the records listed in paragraph (a) is correct.

(c) If the sources in paragraph (a) of this section do not contain information regarding the claimant's uranium mine employment history, do not contain sufficient information to establish exposure to at least 40 working level months of radiation, do not contain sufficient information to establish uranium mining employment for one year during the period identified in § 79.42(b), or if a claimant or eligible surviving beneficiary wishes to contest the accuracy of such records, then the claimant or eligible surviving beneficiary may submit records from any of the following sources, and the Assistant Director shall consider such records (in addition to any sources listed in paragraph (a) of this section) in order to determine whether the claimant has established the requisite employment history:

(1) Governmental records of any of the specified states, including records of state regulatory agencies, containing information on uranium mine workers and uranium mines;

(2) Records of any business entity that owned or operated a uranium mine, or its successor-in-interest;

(3) Records of the Social Security Administration reflecting the identity of the employer, the years and quarters of employment, and the wages received during each quarter;

(4) Federal or State income tax records that contain relevant statements regarding the claimant's employer and wages;

(5) Records containing factual findings by any governmental judicial body, state worker's compensation board, or any governmental administrative body adjudicating the claimant's rights to any type of benefits (which will be accepted only to prove the fact of and duration of employment in a uranium mine);

(6) Statements in medical records created during the period 1942–1971 indicating or identifying the claimant's employer and occupation;

(7) Records of an academic or scholarly study, not conducted in anticipation of or in connection with any litigation, and completed prior to 1990; and

(8) Any other contemporaneous record that indicates or identifies the claimant's occupation or employer.

(d) To the extent that the documents submitted from the sources identified in this section do not so indicate, the claimant or eligible surviving beneficiary must set forth under oath on the standard claim form the following information, if known:

(1) The names of the mine employers for which the claimant worked during the time period identified in the documents;

(2) The names and locations of any mines in which the claimant worked;

(3) The actual time period the claimant worked in each mine;

(4) The claimant's occupation in each mine; and

(5) Whether the mining employment was conducted aboveground or underground.

(e) If the claimant or eligible surviving beneficiary cannot provide the name or location of any uranium mine at which the claimant was employed as

required under paragraph (d)(2) of this section, then the Program shall, if possible, determine such information from records reflecting the types of mines operated or owned by the entity for which the claimant worked.

(f) If the information provided under paragraphs (a) and (c) of this section is inadequate to determine the time period during which the claimant was employed in each uranium mine, then the Program will, where possible, calculate such employment periods in the following manner, for purposes of calculating working level months of exposure:

(1) If records of the Social Security Administration exist that indicate the claimant's work history, the Program will estimate the period of employment by dividing the gross quarterly income by the average pay rate per hour for the claimant's occupation;

(2) If such Social Security Administration records do not exist, but other records exist that indicate that the claimant was employed in a uranium mine on the date recorded in the record, but do not indicate the period of employment, then the Program will apply the following presumptions:

(i) If the records indicate that the claimant worked at the same mine or for the same uranium mining company on two different dates at least three months apart but less than 12 months apart, then the Program will presume that the claimant was employed at the mine or for the mining company for the entire 12-month period beginning on the earlier date.

(ii) If the records indicate that the claimant worked at the same mine or for the same uranium mining company on two different dates at least one month apart but less than three months apart, then the Program will presume that the claimant was employed at the mine or for the mining company for the entire six-month period beginning on the earlier date.

(iii) If the records indicate that the claimant worked at any mine or for a uranium mining company on any date within the designated time period, but the presumptions listed in this paragraph (f) are not applicable, then the Program will presume that the claimant was employed at the mine or for the mining company for a six-month period, consisting of three months before and three months after the date indicated.

(g) In determining whether a claimant satisfies the employment and exposure criteria of the Act, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. If the Assistant Director concludes that the claimant has not satisfied the employment or exposure requirements of the Act, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity, in accordance with the provisions of § 79.72(c), to submit additional records to establish that the statutory criteria are satisfied.

§ 79.44 Proof of working level month exposure to radiation.

(a) If one or more of the sources in § 79.43(a) contain a calculated total of working level months (WLMs) of radiation for the claimant equal to or greater than 40 WLMs, then the Program will presume that total to be correct, absent evidence to the contrary, in which case the claimant or eligible surviving beneficiary need not submit additional records.

(b) If the sources in § 79.43(a) do not contain a calculated total of WLMs of radiation for the claimant, or contain a calculated total that is less than 40 WLMs, a claimant or eligible surviving beneficiary may submit the following records reflecting a calculated number of WLMs of radiation for periods of employment established under § 79.43(c):

(1) Certified copies of records of regulatory agencies of the specified states, provided that the records indicate the mines at which the claimant was employed, the time period of the claimant's employment in each mine, the exposure level in each mine during the claimant's employment, and the calculations on which the claimant's WLMs are based, unless the calculation is apparent;

(2) Certified copies of records of the owner or operator of a uranium mine in the specified states, provided that the records indicate the mines at which the claimant was employed, the time period of the claimant's employment in each mine, the exposure level in each

mine during the claimant's employment, and the calculations on which the claimant's WLMs are based, unless the calculation is apparent.

(c) If the number of WLMs established under paragraphs (a) and (b) of this section is equal to or greater than 40 WLMs of radiation, the claimant or eligible surviving beneficiary need not submit additional records. When the sources referred to in paragraphs (a) and (b) of this section do not establish a calculated number of at least 40 WLMs, the Program will, where possible, calculate additional WLMs in the manner set forth in paragraphs (d) through (g) of this section for the periods of employment for which the sources in paragraphs (a) and (b) do not establish calculated totals. When calculating an exposure level for a particular period of a claimant's employment history, the Program will apply aboveground exposure levels with respect to those periods in which the claimant worked principally aboveground and will apply underground exposure levels with respect to those periods in which the claimant worked principally underground.

(d) To the extent the sources referenced in paragraphs (a) and (b) of this section do not contain a calculated number of WLMs, but do contain annual exposure levels measured in Working Levels (WLs) for mines in which the claimant was employed, the Program will calculate the claimant's exposure to radiation measured in WLMs in the manner set forth in paragraph (h) of this section.

(e) For periods of employment in a uranium mine that a claimant establishes under § 79.43(c) as to which paragraph (d) of this section is not applicable, the Program will, where possible, use any or all of the following sources in computing the annual exposure level measured in WLs in each mine for the period of the claimant's employment, in the manner set forth in paragraph (g) of this section:

(1) Records of the AEC, or its successor agencies;

(2) Records of the PHS, including radiation-level measurements taken in the course of health studies conducted of uranium miners during or including the period 1942–1971;

(3) Records of the United States Bureau of Mines;

(4) Records of regulatory agencies of the specified states; or

(5) Records of the business entity that was the owner or operator of the mine.

(f) For periods of employment in unidentified or misidentified uranium mines that a claimant establishes under § 79.43(c) through (f), the Program will determine annual exposure levels measured in WLs in the unidentified or misidentified mines by calculating an average of the annual exposure levels measured in WLs in all the uranium mines owned or operated by the entities for which the claimant worked during the appropriate time periods and in the identified states.

(g) With respect to periods of employment in a uranium mine that a claimant establishes under § 79.43(c) as to which paragraph (d) of this section is not applicable, and periods of employment in unidentified or misidentified uranium mines that a claimant establishes under § 79.43(c) through (f), the Program will use the following methodology to calculate the annual exposure level measured in WLs for each mine:

(1) If one or more radiation measurements are available for a mine in a given year, such values will be averaged to generate the WLs for the mine for that year.

(2) If radiation measurements exist for the mine, but not for the year in which the claimant was employed in the mine, the WLs for the mine for that year will be estimated if possible as follows:

(i) If annual average measurements exist within four years of the year in which the claimant was employed in the mine, the measurements for the two closest years will be averaged, and that value will be assigned to the year the claimant was employed in the mine;

(ii) If one or more annual average measurements exist for a mine, but are not more than five years from the year the claimant was employed, the annual average closest in time will be assigned either forward or backward in time for two years.

(3) If the methods described in paragraph (g)(2) of this section interpolate or project the annual exposure level measured in WLs for a mine in a year in which the claimant was employed in the mine, the Program will use an estimated average for mines of the same or similar type, ventilation, and ore composition in the same geographical area for that year. An estimated area average will be calculated as follows:

(i) If actual measurements from three or more mines of the same or similar type, ventilation, and ore composition are available from mines in the same locality as the mine in which the claimant was employed, the average of the measurements for the mines within that locality will be used.

(ii) If there are insufficient actual measurements from mines in the same locality to use the method in paragraph (g)(3)(i) of this section, an average of exposure levels in mines in the same mining district will be used.

(iii) If there is no average of exposure levels from mines in the same mining district, the average of exposure levels in mines in the same state will be used.

(iv) If there are insufficient actual measurements from mines in the same state, the estimated average for the State of Colorado for the relevant year will be used.

(4) With respect to a year between 1942 and 1949, if the claimant was employed in a mine for which no exposure levels are available for that year, then the Program will estimate the annual exposure levels measured in WLs by averaging the two earliest exposure levels recorded from that mine after the year 1941. If there are not two exposure levels recorded from that mine, the Program will estimate the WLs by averaging the two earliest exposure levels after the year 1941 from the mines identified according to the methods set forth in paragraphs (g)(3)(i) through (iv).

(h) The Program will calculate a claimant's total exposure to radiation expressed in WLMs, for purposes of establishing eligibility under § 79.42(c), by adding together the WLMs for each period of employment that the claimant has established. For those periods of a claimant's employment for which the Program has obtained or calculated WLs pursuant to paragraphs (d) through (g) of this section, the Program shall determine WLMs by multiplying the WL by the pertinent time period, measured in months, yielding a claimant's exposure to radiation expressed in WLMs.

(i) In addition to any other material that may be used to substantiate employment history for purposes of determining WLMs, an individual filing a claim may make such a substantiation by means of an affidavit described in § 79.4(c)(4).

§ 79.45 Proof of primary lung cancer.

(a) In determining whether a claimant developed primary lung cancer following pertinent employment as a miner, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed primary lung cancer must be supported by medical documentation. To prove that a claimant developed primary lung cancer, the claimant or beneficiary may submit any form of medical documentation specified in paragraph (e) of this section. In all cases, the Program will review submitted medical documentation, and will, in addition and where appropriate, review any pertinent records discovered within the sources identified in paragraphs (b), (c), and (d) of this section.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. (In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary lung cancer.)

(c) If a claimant was diagnosed as having primary lung cancer in Arizona, Colorado, Nevada, New Mexico, Utah, or Wyoming, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release

Medical or Other Information, valid in the state of diagnosis, that authorizes the Radiation Exposure Compensation Program to contact the appropriate state cancer or tumor registry, the Program will, where appropriate, request the relevant information from that registry and will review records that it obtains from the registry. (In cases where the claimant is deceased, the Program will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary lung cancer.)

(d) If medical records regarding the claimant were gathered during the course of any federally supported, health-related study of uranium workers, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will, where appropriate, request such records from that custodian and will review records that it obtains from the custodian. (In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a verified diagnosis of primary lung cancer.)

(e)(1) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted primary lung cancer. Such documentation will be most useful where it contains an explicit statement of diagnosis or such other information or data from which the appropriate authorities at the National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty:

(i) Pathology report of tissue biopsy, including, but not limited to, specimens obtained by any of the following methods:

(A) Surgical resection;

(B) Endoscopic endobronchial or transbronchial biopsy;

(C) Bronchial brushings and washings;

(D) Pleural fluid cytology;

(E) Fine needle aspirate;

(F) Pleural biopsy; or

(G) Sputum cytology;

(ii) Autopsy report;

(iii) Bronchoscopy report;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Radiation therapy summary report; or

(E) Oncology summary or consultation report;

(v) Reports of radiographic studies, including:

(A) X-rays of the chest;

(B) Chest tomograms;

(C) Computer-assisted tomography (CT); or

(D) Magnetic resonance imaging (MRI); or

(vi) Death certificate, provided that it is signed by a physician at the time of death.

§ 79.46 Proof of nonmalignant respiratory disease.

(a) In determining whether a claimant developed a nonmalignant respiratory disease following pertinent employment as a miner, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed a nonmalignant respiratory disease must be supported by medical documentation. In cases where the claimant is deceased, the claimant's beneficiary may submit any form of medical documentation specified in paragraph (d)(1) of this section, and for proof of cor pulmonale must also submit one or more forms of documentation specified in paragraph (d)(2). A living claimant must at a minimum submit the medical documentation required in paragraph (d)(3) of this section, and for proof of cor pulmonale must also submit one or more forms of documentation specified in paragraph (d)(2). In all cases, the Program will review submitted medical documentation, and will, in addition and where appropriate,

review any pertinent records discovered within the sources referred to in paragraphs (b) and (c) of this section. With respect to a deceased claimant, the Program will treat as equivalent to a diagnosis of pulmonary fibrosis any diagnosis of ''restrictive lung disease'' made by a physician employed by the Indian Health Service.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of a nonmalignant respiratory disease.

(c) If medical records regarding the claimant were gathered during the course of any federally supported, health-related study of uranium workers and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will, where appropriate, request such records from that custodian and will review records that it obtains from the custodian. In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a verified diagnosis of a nonmalignant respiratory disease.

(d) (1) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted a nonmalignant respiratory disease, including pulmonary fibrosis, fibrosis of the lung, cor pulmonale related to fibrosis of the lung, silicosis, and pneumoconiosis:

(i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) If an x-ray exists, the x-ray and interpretive reports of the x-ray by a maximum of two NIOSH certified ''B'' readers classifying the existence of disease of category 1/0 or higher according to a 1989 report of the International Labor Office (known as the ''ILO''), or subsequent revisions;

(iv) If no x-rays exist, an x-ray report;

(v) Physician summary report;

(vi) Hospital discharge summary report;

(vii) Hospital admitting report;

(viii) Death certificate, provided that it is signed by a physician at the time of death; or

(ix) Documentation specified in paragraphs (d)(3)(i) and (d)(3)(ii) of this section.

(2) In order to demonstrate that the claimant developed cor pulmonale related to fibrosis of the lung, the claimant or beneficiary must, at a minimum, submit one or more of the following medical records:

(i) Right heart catheterization;

(ii) Cardiology summary or consultation report;

(iii) Electrocardiogram;

(iv) Echocardiogram;

(v) Physician summary report;

(vi) Hospital discharge summary report;

(vii) Autopsy report;

(viii) Report of physical examination; or

(ix) Death certificate, provided that it is signed by a physician at the time of death.

(3) Notwithstanding any other documentation provided, a living claimant must at a minimum provide the following medical documentation:

(i) Either:

(A) An arterial blood gas study administered at rest in a sitting position, or an exercise arterial blood gas test, reflecting values equal to or less than the values set forth in the tables in appendix B to this part; or

(B) A written diagnosis by a physician in accordance with § 79.41(p); and

(ii) One of the following:

(A) A chest x-ray administered in accordance with standard techniques accompanied by interpretive reports of the x-ray by a maximum of two NIOSH

certified ''B'' readers, classifying the existence of disease of category 1/0 or higher according to a 1989 report of the International Labor Office (known as the ''ILO''), or subsequent revisions;

(B) High-resolution computed tomography scans (commonly known as ''HRCT scans''), including computer-assisted tomography scans (commonly known as ''CAT scans''), magnetic resonance imaging scans (commonly known as ''MRI scans''), and positron emission tomography scans (commonly known as ''PET scans''), and interpretive reports of such scans;

(C) Pathology reports of tissue biopsies; or

(D) Pulmonary function tests indicating restrictive lung function and consisting of three reproducible time/volume tracings recording the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC) administered and reported in accordance with the Standardization of Spirometry—1994 Update by the American Thoracic Society, and reflecting values for FEV1 or FVC that are less than or equal to the lower limit of normal for an individual of the claimant's age, sex, height, and ethnicity as set forth in the tables in appendix A to this part.

(e) The Assistant Director shall treat any documentation described in paragraph (d)(3)(i)(B) or paragraph (d)(3)(ii)(A) of this section as conclusive evidence of the claimant's nonmalignant respiratory disease; provided, however, that the Program may subject such documentation to a fair and random audit to guarantee its authenticity and reliability for purposes of treating it as conclusive evidence; and provided further that, in order to be treated as conclusive evidence, a written diagnosis described in paragraph (d)(3)(i)(B) must be by a physician who is employed by the Indian Health Service or the Department of Veterans Affairs or who is board certified (as described in § 79.41(p)), and who must have a documented, ongoing physician-patient relationship with the claimant. Notwithstanding the conclusive effect given to certain evidence, nothing in this paragraph shall be construed as relieving a living claimant of the obligation to provide the Program with the forms of documentation required under paragraph (d)(3).

Subpart F—Eligibility Criteria for Claims by Uranium Millers

§ 79.50 Scope of subpart.

The regulations in this subpart define the eligibility criteria for compensation under section 5 of the Act pertaining to millers, *i.e.,* uranium mill workers, and the nature of evidence that will be accepted as proof that a claimant satisfies such eligibility criteria. Section 5 of the Act provides for a payment of $100,000 to ''millers'' who contracted primary lung cancer, one of a limited number of nonmalignant respiratory diseases, primary renal cancer, or chronic renal disease, following employment for at least one year as a uranium mill worker in specified states during the period beginning January 1, 1942, and ending December 31, 1971.

§ 79.51 Definitions.

(a) *Chronic renal disease* means the chronic, progressive, and irreversible destruction of the nephron. It is exhibited by diminution of renal function.

(b) *Cor pulmonale* means heart disease, including hypertrophy of the right ventricle, due to pulmonary hypertension secondary to fibrosis of the lung.

(c) *Designated time period* means the period beginning on January 1, 1942, and ending on December 31, 1971.

(d) *Employment for at least one year* means employment for a total of at least one year (12 consecutive or cumulative months).

(e) *Fibrosis of the lung* or *pulmonary fibrosis* means chronic inflammation and scarring of the pulmonary interstitium and alveoli with collagen deposition and progressive thickening.

(f) *Kidney tubal (tubular) tissue injury* means structural or functional damage to the kidney tubules that results in renal disease and dysfunction.

(g) *Miller* or *uranium mill worker* means a person who operated or otherwise worked in a uranium mill.

(h) *National Institute for Occupational Safety and Health (NIOSH) certified ''B'' reader* means a physician who is certified as such by NIOSH. A list of certified ''B'' readers is available from the

Radiation Exposure Compensation Program upon request.

(i) *Nephritis* means an inflammatory process of the kidneys resulting in chronic renal dysfunction.

(j) *Nonmalignant respiratory disease* means fibrosis of the lung, pulmonary fibrosis, cor pulmonale related to fibrosis of the lung, silicosis, and pneumoconiosis.

(k) *Pneumoconiosis* means a chronic lung disease resulting from inhalation and deposition in the lung of particulate matter, and the tissue reaction to the presence of the particulate matter. For purposes of this subpart, the claimant's exposure to the particulate matter that led to the disease must have occurred during employment in a uranium mill.

(l) *Primary lung cancer* means any physiological condition of the lung, trachea, or bronchus that is recognized under that name or nomenclature by the National Cancer Institute. The term includes in situ lung cancers.

(m) *Readily available documentation* means documents in the possession, custody, or control of the claimant or an immediate family member.

(n) *Primary renal cancer* means any physiological condition of the kidneys that is recognized under that name or nomenclature by the National Cancer Institute.

(o) *Silicosis* means a pneumoconiosis due to the inhalation of the dust of stone, sand, flint, or other materials containing silicon dioxide, characterized by the formation of pulmonary fibrotic changes.

(p) *Specified state* means Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, or Texas. Additional states may be included, provided:

(1) A uranium mine was operated in such state at any time during the period beginning on January 1, 1942, and ending on December 31, 1971;

(2) The state submits an application to the Assistant Director (specified in § 79.70(a)) to include such state; and

(3) The Assistant Director makes a determination to include such state.

(q) *Uranium mill* means any milling operation involving the processing of uranium ore or vanadium-uranium ore, including carbonate plants and acid leach plants. The term applies to ore-buying stations where ore was weighed and sampled prior to delivery to a mill for processing; ''upgrader'' or ''concentrator'' facilities located at the mill or at a remote location where uranium or vanadium-uranium ore was processed prior to delivery to a mill; and pilot plants where uranium ore or vanadium-uranium ore was processed.

(r) *Uranium mine* means any underground excavation, including ''dog holes,'' as well as open-pit, strip, rim, surface, or other aboveground mines, where uranium ore or vanadium-uranium ore was mined or otherwise extracted.

(s) *Written diagnosis by a physician* means a written determination of the nature of a disease made from a study of the signs and symptoms of a disease that is based on a physical examination of the patient, medical imaging or a chemical, microscopic, microbiologic, immunologic, or pathologic study of physiologic and functional tests, secretions, discharges, blood, or tissue. For purposes of satisfying the requirement of a ''written diagnosis by a physician'' for living claimants specified in § 79.55, a physician submitting a written diagnosis of a nonmalignant respiratory disease must be employed by the Indian Health Service or the Department of Veterans Affairs or be board certified, and must have a documented, ongoing physician-patient relationship with the claimant. An ''ongoing physician-patient relationship'' can include referrals made to specialists from a primary care provider for purposes of diagnosis or treatment. ''Board certification'' requires, in addition to physician licensing, the successful completion of a residency training program and passage of a Board exam in a relevant field or specialty. Relevant specialties include: family practice, internal medicine, pathology, preventive medicine, radiology, surgery, and thoracic surgery (and including subspecialties such as cardiovascular disease, medical oncology, pulmonary disease) as listed by the American Board of Medical Specialties.

§ 79.52 Criteria for eligibility for claims by uranium millers.

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary of a claimant must establish each of the following:

(a) The claimant was employed as a miller in a specified state;

(b) The claimant was so employed for at least one year (12 consecutive or cumulative months) during the period beginning on January 1, 1942, and ending on December 31, 1971; and

(c) The claimant contracted primary lung cancer, a nonmalignant respiratory disease, primary renal cancer, or chronic renal disease (including nephritis and kidney tubal tissue injury) following at least one year of such employment.

§ 79.53 Proof of employment as a miller.

(a) The Department will accept, as proof of employment for the time period indicated, information contained in any of the following records:

(1) Records created by or gathered by the Public Health Service (PHS) in the course of any health studies of uranium workers during or including the period 1942–1990;

(2) Records of a uranium worker census performed by the PHS at various times during the period 1942–1990;

(3) Records of the Atomic Energy Commission (AEC), or any of its successor agencies; and

(4) Records of federally supported, health-related studies of uranium workers.

(b) The Program will presume that the employment history for the time period indicated in records listed in paragraph (a) of this section is correct. If the claimant or eligible surviving beneficiary wishes to contest the accuracy of such records, then the claimant or eligible surviving beneficiary may provide one or more of the records identified in paragraph (c) of this section, and the Assistant Director will determine whether the employment history indicated in the records listed in paragraph (a) is correct.

(c) If the sources in paragraph (a) of this section do not contain information regarding the claimant's uranium mill employment history, do not contain sufficient information to establish employment for at least one year in a uranium mill during the specified time period to qualify under § 79.52(b), or if a claimant or eligible surviving beneficiary wishes to contest the accuracy of such records, then the claimant or eligible surviving beneficiary may submit records from any of the following sources, which the Assistant Director shall consider (in addition to any sources listed in paragraph (a) of this section) in order to determine whether the claimant has established the requisite employment history:

(1) Records of any of the specified states, including records of state regulatory agencies, containing information on uranium mill workers and uranium mills;

(2) Records of any business entity that owned or operated a uranium mill, or its successor-in-interest;

(3) Records of the Social Security Administration reflecting the identity of the employer, the years and quarters of employment, and the wages received during each quarter;

(4) Federal or state income tax records that contain relevant statements regarding the claimant's employer and wages;

(5) Records containing factual findings by any governmental judicial body, state worker's compensation board, or any governmental administrative body adjudicating the claimant's rights to any type of benefits (which will be accepted only to prove the fact of and duration of employment in a uranium mill);

(6) Statements in medical records created during the period 1942–1971 indicating or identifying the claimant's employer and occupation;

(7) Records of an academic or scholarly study, not conducted in anticipation of or in connection with any litigation, and completed prior to 1990; or

(8) Any other contemporaneous record that indicates or identifies the claimant's occupation or employer.

(d) To the extent that the documents submitted from the sources identified in this section do not so indicate, the claimant or eligible surviving beneficiary must set forth under oath on

the standard claim form the following information, if known:

(1) The names of the mill employers for which the claimant worked during the time period identified in the documents;

(2) The names and locations of any mills in which the claimant worked;

(3) The actual time period the claimant worked in each mill; and

(4) The claimant's occupation in each mill.

(e) The Program may, for the purpose of verifying information submitted pursuant to this section, require the claimant or any eligible surviving beneficiary to provide an authorization to release any record identified in this section, in accordance with the provisions of § 79.72(c).

(f) In determining whether a claimant satisfies the employment criteria of the Act, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. If the Assistant Director concludes that the claimant has not satisfied the employment requirements of the Act, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity, in accordance with the provisions of § 79.72(c), to submit additional records to establish that the statutory employment criteria are satisfied.

§ 79.54 Proof of primary lung cancer.

(a) In determining whether a claimant developed primary lung cancer following pertinent employment as a miller, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed primary lung cancer must be supported by medical documentation. To prove that a claimant developed primary lung cancer, the claimant or beneficiary may submit any form of medical documentation specified in paragraph (e) of this section. In all cases, the Program will review submitted medical documentation, and will, in addition and where appropriate, review any pertinent records discovered within the sources identified in paragraphs (b), (c) and (d) of this section.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. (In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary lung cancer.)

(c) If a claimant was diagnosed as having primary lung cancer in Arizona, Colorado, Nevada, New Mexico, Utah, or Wyoming, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information, valid in the state of diagnosis, that authorizes the Radiation Exposure Compensation Program to contact the appropriate state cancer or tumor registry, the Program will, where appropriate, request the relevant information from that registry and will review records that it obtains from the registry. (In cases where the claimant is deceased, the Program will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary lung cancer.)

(d) If medical records regarding the claimant were gathered during the course of any federally supported, health-related study of uranium workers, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will, where appropriate, request such records from that custodian and will review records that it obtains from the custodian. (In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a

verified diagnosis of primary lung cancer.)

(e) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted primary lung cancer. Such documentation will be most useful where it contains an explicit statement of diagnosis or such other information or data from which the appropriate authorities at the National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty:

(1) Pathology report of tissue biopsy, including, but not limited to, specimens obtained by any of the following methods:

(i) Surgical resection;

(ii) Endoscopic endobronchial or transbronchial biopsy;

(iii) Bronchial brushings and washings;

(iv) Pleural fluid cytology;

(v) Fine needle aspirate;

(vi) Pleural biopsy; or

(vii) Sputum cytology;

(2) Autopsy report;

(3) Bronchoscopy report;

(4) One of the following summary medical reports:

(i) Physician summary report;

(ii) Hospital discharge summary report;

(iii) Operative report;

(iv) Radiation therapy summary report; or

(v) Oncology summary or consultation report;

(5) Reports of radiographic studies, including:

(i) X-rays of the chest;

(ii) Chest tomograms;

(iii) Computer-assisted tomography (CT); or

(iv) Magnetic resonance imaging (MRI); or

(6) Death certificate, provided that it is signed by a physician at the time of death.

§ 79.55 Proof of nonmalignant respiratory disease.

(a) In determining whether a claimant developed a nonmalignant respiratory disease following pertinent employment as a miller, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed a nonmalignant respiratory disease must be supported by medical documentation. In cases where the claimant is deceased, the claimant's beneficiary may submit any form of medical documentation specified in paragraph (d)(1) of this section, and for proof of cor pulmonale must also submit one or more forms of documentation specified in paragraph (d)(2). A living claimant must at a minimum submit the medical documentation required in paragraph (d)(3) of this section, and for proof of cor pulmonale must also submit one or more forms of documentation specified in paragraph (d)(2). In all cases, the Program will review submitted medical documentation, and will, in addition and where appropriate, review any pertinent records discovered within the sources referred to in paragraphs (b) and (c) of this section. With respect to a deceased claimant, the Program will treat as equivalent to a diagnosis of pulmonary fibrosis any diagnosis of ''restrictive lung disease'' made by a physician employed by the Indian Health Service.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. (In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of a nonmalignant respiratory disease.)

(c) If medical records regarding the claimant were gathered during the course of any federally supported, health-related study of uranium workers, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will,

where appropriate, request such records from that custodian and will review records that it obtains from the custodian. (In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a verified diagnosis of a nonmalignant respiratory disease.)

(d) (1) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted a nonmalignant respiratory disease, including pulmonary fibrosis, fibrosis of the lung, cor pulmonale related to fibrosis of the lung, silicosis, and pneumoconiosis:

(i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) If an x-ray exists, the x-ray and interpretive reports of the x-ray by a maximum of two NIOSH certified ''B'' readers classifying the existence of disease of category 1/0 or higher according to a 1989 report of the International Labor Office (known as the ''ILO''), or subsequent revisions;

(iv) If no x-rays exist, an x-ray report;

(v) Physician summary report;

(vi) Hospital discharge summary report;

(vii) Hospital admitting report;

(viii) Death certificate, provided that it is signed by a physician at the time of death; or

(ix) Documentation specified in paragraphs (d)(3)(i) and (d)(3)(ii) of this section.

(2) In order to demonstrate that the claimant developed cor pulmonale related to fibrosis of the lung, the claimant or beneficiary must, at a minimum, submit one or more of the following medical records:

(i) Right heart catheterization;

(ii) Cardiology summary or consultation report;

(iii) Electrocardiogram;

(iv) Echocardiogram;

(v) Physician summary report;

(vi) Hospital discharge summary report;

(vii) Autopsy report;

(viii) Report of physical examination; or

(ix) Death certificate, provided that it is signed by a physician at the time of death.

(3) Notwithstanding any other documentation provided, a living claimant must at a minimum provide the following medical documentation:

(i) Either:

(A) An arterial blood gas study administered at rest in a sitting position, or an exercise arterial blood gas test, reflecting values equal to or less than the values set forth in the tables to appendix B of this part; or

(B) A written diagnosis by a physician in accordance with § 79.51(s); and

(ii) One of the following:

(A) A chest x-ray administered in accordance with standard techniques accompanied by interpretive reports of the x-ray by a maximum of two NIOSH certified ''B'' readers, classifying the existence of disease of category 1/0 or higher according to a 1989 report of the International Labor Office (known as the ''ILO'') or subsequent revisions;

(B) High-resolution computed tomography scans (commonly known as ''HRCT scans''), including computer-assisted tomography scans (commonly known as ''CAT scans''), magnetic resonance imaging scans (commonly known as ''MRI scans''), and positron emission tomography scans (commonly known as ''PET scans''), and interpretive reports of such scans;

(C) Pathology reports of tissue biopsies; or

(D) Pulmonary function tests indicating restrictive lung function and consisting of three reproducible time/volume tracings recording the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC) administered and reported in accordance with the Standardization of Spirometry—1994 Update by the American Thoracic Society, and reflecting values for FEV1 or FVC that are less than or equal to the lower limit of normal for an individual of the claimant's age, sex, height, and ethnicity as set forth in the tables in appendix A to this part.

(e) The Assistant Director shall treat any documentation described in paragraph (d)(3)(i)(B) or paragraph

(d)(3)(ii)(A) of this section as conclusive evidence of the claimant's nonmalignant respiratory disease; provided, however, that the Program may subject such documentation to a fair and random audit to guarantee its authenticity and reliability for purposes of treating it as conclusive evidence; and provided further that, in order to be treated as conclusive evidence, a written diagnosis described in paragraph (d)(3)(i)(B) must be by a physician who is employed by the Indian Health Service or the Department of Veterans Affairs or who is board certified (as described in § 79.51(s)), and who must have a documented, ongoing physician-patient relationship with the claimant. Notwithstanding the conclusive effect given to certain evidence, nothing in this paragraph shall be construed as relieving a living claimant of the obligation to provide the Program with the forms of documentation required under paragraph (d)(3).

§ 79.56 Proof of primary renal cancer.

(a) In determining whether a claimant developed primary renal cancer following pertinent employment as a miller, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed primary renal cancer must be supported by medical documentation. In all cases, the Program will review submitted medical documentation, and will, in addition and where appropriate, review any pertinent records discovered within the sources referred to in paragraphs (b) and (c) of this section.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. (In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary renal cancer.)

(c) If a claimant was diagnosed as having primary renal cancer in the State of Arizona, Colorado, Nevada, New Mexico, Utah, or Wyoming, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information, valid in the state of diagnosis, that authorizes the Radiation Exposure Compensation Program to contact the appropriate state cancer or tumor registry, the Program will, where appropriate, request the relevant information from that registry and will review records that it obtains from the registry. (In cases where the claimant is deceased, the Program will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary renal cancer.)

(d) If medical records regarding the claimant were gathered during the course of any federally supported, health-related study of uranium workers, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will, where appropriate, request such records from that custodian and will review records that it obtains from the custodian. (In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a verified diagnosis of primary renal cancer.)

(e) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted primary renal cancer. Such documentation will be most useful where it contains an explicit statement of diagnosis or such other information or data from which the appropriate authorities at the National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty:

(1) Pathology report of tissue biopsy or resection;

(2) Autopsy report;

(3) One of the following summary medical reports:

(i) Physician summary report;

(ii) Hospital discharge summary report;

(iii) Operative report;

(iv) Radiotherapy summary report; or

(v) Medical oncology summary or consultation report;

(4) Report of one of the following radiology examinations:

(i) Computerized tomography (CT) scan; or

(ii) Magnetic resonance imaging (MRI); or

(5) Death certificate, provided that it is signed by a physician at the time of death.

§ 79.57 Proof of chronic renal disease.

(a) In determining whether a claimant developed chronic renal disease following pertinent employment as a miller, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed chronic renal disease must be supported by medical documentation.

(b) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted chronic renal disease.

(1) Pathology report of tissue biopsy;

(2) If laboratory or radiographic tests exist:

(i) Abnormal plasma creatinine values; and

(ii) Abnormal glomerular filtration rate (by either measured creatinine or iothalamate clearance or calculated by MDRD equation); and

(iii) Renal tubular dysfunction as evidenced by:

(A) Glycosuria in the absence of diabetes mellitus;

(B) Proteinuria less than one gram daily without other known etiology; or

(C) Hyperphosphaturia, aminoaciduria, B–2 microglobinuria or alkaline phosphaturia or other marker of proximal tubular injury; or

(iv) Radiographic evidence of chronic renal disease;

(3) Autopsy report;

(4) Physician summary report;

(5) Hospital discharge summary report;

(6) Hospital admitting report; or

(7) Death certificate, provided that it is signed by a physician at the time of death.

Subpart G—Eligibility Criteria for Claims by Ore Transporters

§ 79.60 Scope of subpart.

The regulations in this subpart define the eligibility criteria for compensation under section 5 of the Act pertaining to uranium or vanadium-uranium ore transporters and the nature of evidence that will be accepted as proof that a claimant satisfies such eligibility criteria. Section 5 of the Act provides for a payment of $100,000 to persons who contracted lung cancer, one of a limited number of nonmalignant respiratory diseases, renal cancer, or chronic renal disease, following employment for at least one year as a transporter of uranium ore or vanadium-uranium ore from a uranium mine or uranium mill located in a specified state during the period beginning January 1, 1942, and ending December 31, 1971.

§ 79.61 Definitions.

(a) *Chronic renal disease* means the chronic, progressive, and irreversible destruction of the nephron. It is exhibited by diminution of renal function.

(b) *Cor pulmonale* means heart disease, including hypertrophy of the right ventricle, due to pulmonary hypertension secondary to fibrosis of the lung.

(c) *Designated time period* means the period beginning on January 1, 1942, and ending on December 31, 1971.

(d) *Employment as an ore transporter* means employment involving the transporting or hauling of uranium ore or vanadium-uranium ore from a uranium mine or uranium mill, including the transportation or hauling of ore from an ore buying station, ''upgrader,'' ''concentrator'' facility, or pilot plant by means of truck, rail or barge.

(e) *Employment for at least one year* means employment for a total of at

least one year (12 consecutive or cumulative months).

(f) *Fibrosis of the lung* or *pulmonary fibrosis* means chronic inflammation and scarring of the pulmonary interstitium and alveoli with collagen deposition and progressive thickening.

(g) *Kidney tubal (tubular) tissue injury* means structural or functional damage to the kidney tubules that results in renal disease and dysfunction.

(h) *National Institute for Occupational Safety and Health (NIOSH) certified ''B'' reader* means a physician who is certified as such by NIOSH. A list of certified ''B'' readers is available from the Radiation Exposure Compensation Program upon request.

(i) *Nephritis* means an inflammatory process of the kidneys resulting in chronic renal dysfunction.

(j) *Nonmalignant respiratory disease* means fibrosis of the lung, pulmonary fibrosis, cor pulmonale related to fibrosis of the lung, silicosis, and pneumoconiosis.

(k) *Pneumoconiosis* means a chronic lung disease resulting from inhalation and deposition in the lung of particulate matter, and the tissue reaction to the presence of the particulate matter. For the purposes of this Act, the claimant's exposure to the particulate matter that led to the disease must have occurred during employment as an ore transporter.

(l) *Primary lung cancer* means any physiological condition of the lung, trachea, or bronchus that is recognized under that name or nomenclature by the National Cancer Institute. The term includes in situ lung cancers.

(m) *Readily available documentation* means documents in the possession, custody, or control of the claimant or an immediate family member.

(n) *Primary renal cancer* means any physiological condition of the kidneys that is recognized under that name or nomenclature by the National Cancer Institute.

(o) *Silicosis* means a pneumoconiosis due to the inhalation of the dust of stone, sand, flint or other materials containing silicon dioxide, characterized by the formation of pulmonary fibrotic changes.

(p) *Specified state* means Colorado, New Mexico, Arizona, Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, or Texas. Additional states may be included, provided:

(1) A uranium mine was operated in such state at any time during the period beginning on January 1, 1942, and ending on December 31, 1971;

(2) The state submits an application to the Assistant Director (specified in § 79.70(a)) to include such state; and

(3) The Assistant Director makes a determination to include such state.

(q) *Uranium mill* means any milling operation involving the processing of uranium ore or vanadium-uranium ore, including carbonate plants and acid leach plants. The term applies to ore-buying stations where ore was weighed and sampled prior to delivery to a mill for processing; ''upgrader'' or ''concentrator'' facilities located at the mill or at a remote location where uranium or vanadium-uranium ore was processed prior to delivery to a mill; and pilot plants where uranium ore or vanadium-uranium ore was processed.

(r) *Uranium mine* means any underground excavation, including ''dog holes,'' as well as open-pit, strip, rim, surface, or other aboveground mines, where uranium ore or vanadium-uranium ore was mined or otherwise extracted.

(s) *Written diagnosis by a physician* means a written determination of the nature of a disease made from a study of the signs and symptoms of a disease that is based on a physical examination of the patient, medical imaging or a chemical, microscopic, microbiologic, immunologic, or pathologic study of physiologic and functional tests, secretions, discharges, blood, or tissue. For purposes of satisfying the requirement of a ''written diagnosis by a physician'' for living claimants specified in § 79.65, a physician submitting a written diagnosis of a nonmalignant respiratory disease must be employed by the Indian Health Service or the Department of Veterans Affairs or be board certified, and must have a documented, ongoing physician-patient relationship with the claimant. An ''ongoing physician-patient relationship'' can include referrals made to specialists from a primary care provider for purposes of diagnosis or treatment.

''Board certification'' requires, in addition to physician licensing, the successful completion of a residency training program and passage of a Board exam in a relevant field or specialty. Relevant specialties include: family practice, internal medicine, pathology, preventive medicine, radiology, surgery, and thoracic surgery (and including subspecialties such as cardiovascular disease, medical oncology, pulmonary disease) as listed by the American Board of Medical Specialties.

§ 79.62 Criteria for eligibility for claims by ore transporters.

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary of a claimant must establish each of the following:

(a) The claimant was employed as an ore transporter in a specified state;

(b) The claimant was so employed for at least one year (12 consecutive or cumulative months) during the period beginning on January 1, 1942, and ending on December 31, 1971; and

(c) The claimant contracted primary lung cancer, a nonmalignant respiratory disease, primary renal cancer, or chronic renal disease (including nephritis and kidney tubal tissue injury) following at least one year of such employment.

§ 79.63 Proof of employment as an ore transporter.

(a) The Department will accept, as proof of employment for the time period indicated, information contained in any of the following records:

(1) Records created by or gathered by the Public Health Service (PHS) in the course of any health studies of uranium workers during or including the period 1942–1990;

(2) Records of a uranium worker census performed by the PHS at various times during the period 1942–1990;

(3) Records of the Atomic Energy Commission (AEC), or any of its successor agencies; and

(4) Records of federally supported, health-related studies of uranium workers.

(b) The employment history for the time period indicated in such records will be presumed to be correct. If the claimant or eligible surviving beneficiary wishes to contest the accuracy of such records, then the claimant or eligible surviving beneficiary may provide one or more of the records identified in paragraph (c) of this section, and the Assistant Director will determine whether the employment history indicated in the records listed in paragraph (a) of this section is correct.

(c) If the sources in paragraph (a) of this section do not contain information regarding the claimant's ore transporting employment history, do not contain sufficient information to establish employment for at least one year as an ore transporter during the specified time period to qualify under § 79.62(b), or if a claimant or eligible surviving beneficiary wishes to contest the accuracy of such records, then the claimant or eligible surviving beneficiary may submit records from any of the following sources, which the Assistant Director shall consider (in addition to any sources listed in paragraph (a) of this section) in order to determine whether the claimant has established the requisite employment history:

(1) Records of any of the specified states, including records of state regulatory agencies, containing information on uranium ore transporters and ore-transporting companies;

(2) Records of any business entity that owned or operated an ore-transporting company, or its successor-in-interest;

(3) Records of the Social Security Administration reflecting the identity of the employer, the years and quarters of employment, and the wages received during each quarter;

(4) Federal or state income tax records that contain relevant statements regarding the claimant's employer and wages;

(5) Records containing factual findings by any governmental judicial body, state worker's compensation board, or any governmental administrative body adjudicating the claimant's rights to any type of benefits (which will be accepted only to prove the fact of and duration of employment as an ore transporter);

(6) Statements in medical records created during the period 1942–1971 indicating or identifying the claimant's employer and occupation;

(7) Records of an academic or scholarly study, not conducted in anticipation of or in connection with any litigation, and completed prior to 1990; or

(8) Any other contemporaneous record that indicates or identifies the claimant's occupation or employer.

(d) To the extent that the documents submitted from the sources identified in this section do not so indicate, the claimant or eligible surviving beneficiary must set forth under oath on the standard claim form the following information, if known:

(1) The name or other identifying symbol of each employer for which the claimant worked during the time period identified in the documents;

(2) The name of each mine or mill from which uranium or uranium-vanadium ore was transported;

(3) The county and state in which each mine or mill was located;

(4) The actual time period the claimant worked as an ore transporter; and

(5) The method of transportation used to transport the ore.

(e) The Program may, for the purpose of verifying information submitted pursuant to this section, require the claimant or any eligible surviving beneficiary to provide an authorization to release any record identified in this section, in accordance with the provisions of § 79.72(c).

(f) In determining whether a claimant satisfies the employment criteria of the Act, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. If the Assistant Director concludes that the claimant has not satisfied the employment requirements of the Act, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity, in accordance with the provisions of § 79.72(c), to submit additional records to establish that the statutory employment criteria are satisfied.

§ 79.64 Proof of primary lung cancer.

(a) In determining whether a claimant developed primary lung cancer following pertinent employment as an ore transporter, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed primary lung cancer must be supported by medical documentation. To prove that a claimant developed primary lung cancer, the claimant or beneficiary may submit any form of medical documentation specified in paragraph (e) of this section. In all cases, the Program will review submitted medical documentation, and will, in addition and where appropriate, review any pertinent records discovered within the sources identified in paragraphs (b), (c), and (d) of this section.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. (In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary lung cancer.)

(c) If a claimant was diagnosed as having primary lung cancer in Arizona, Colorado, Nevada, New Mexico, Utah or Wyoming, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information, valid in the state of diagnosis, that authorizes the Radiation Exposure Compensation Program to contact the appropriate state cancer or tumor registry, the Program will, where appropriate, request the relevant information from that registry and will review records that it obtains from the registry. (In cases where the claimant is deceased, the Program will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary lung cancer.)

(d) If medical records regarding the claimant were gathered during the course of any federally supported,

health-related study of uranium workers, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will, where appropriate, request such records from that custodian and will review records that it obtains from the custodian. (In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a verified diagnosis of primary lung cancer.)

(e) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted lung cancer. Such documentation will be most useful where it contains an explicit statement of diagnosis or such other information or data from which the appropriate authorities at the National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty:

(1) Pathology report of tissue biopsy, including, but not limited to, specimens obtained by any of the following methods:

(i) Surgical resection;

(ii) Endoscopic endobronchial or transbronchial biopsy;

(iii) Bronchial brushings and washings;

(iv) Pleural fluid cytology;

(v) Fine needle aspirate;

(vi) Pleural biopsy; or

(vii) Sputum cytology;

(2) Autopsy report;

(3) Bronchoscopy report;

(4) One of the following summary medical reports:

(i) Physician summary report;

(ii) Hospital discharge summary report;

(iii) Operative report;

(iv) Radiation therapy summary report; or

(v) Oncology summary or consultation report;

(5) Reports of radiographic studies, including:

(i) X-rays of the chest;

(ii) Chest tomograms;

(iii) Computer-assisted tomography (CT); or

(iv) Magnetic resonance imaging (MRI); or

(6) Death certificate, provided that it is signed by a physician at the time of death.

§ 79.65 Proof of nonmalignant respiratory disease.

(a) In determining whether a claimant developed a nonmalignant respiratory disease following pertinent employment as an ore transporter, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed a nonmalignant respiratory disease must be supported by medical documentation. In cases where the claimant is deceased, the claimant's beneficiary may submit any form of medical documentation specified in paragraph (d)(1) of this section, and for proof of cor pulmonale must also submit one or more forms of documentation specified in paragraph (d)(2). A living claimant must at a minimum submit the medical documentation required in paragraph (d)(3) of this section, and for proof of cor pulmonale must also submit one or more forms of documentation specified in paragraph (d)(2). In all cases, the Program will review submitted medical documentation, and will, in addition and where appropriate, review any pertinent records discovered within the sources referred to in paragraphs (b) and (c) of this section. With respect to a deceased claimant, the Program will treat as equivalent to a diagnosis of pulmonary fibrosis any diagnosis of ''restrictive lung disease'' made by a physician employed by the Indian Health Service.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. (In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of

the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of a nonmalignant respiratory disease.)

(c) If medical records regarding the claimant were gathered during the course of any federally supported, health-related study of uranium workers, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will, where appropriate, request such records from that custodian and will review records that it obtains from the custodian. (In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a verified diagnosis of a nonmalignant respiratory disease.)

(d)(1) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted a nonmalignant respiratory disease, including pulmonary fibrosis, fibrosis of the lung, cor pulmonale related to fibrosis of the lung, silicosis and pneumoconiosis:

(i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) If an x-ray exists, the x-ray and interpretive reports of the x-ray by a maximum of two NIOSH certified ''B'' readers classifying the existence of disease of category 1/0 or higher according to a 1989 report of the International Labor Office (known as the ''ILO''), or subsequent revisions;

(iv) If no x-rays exist, an x-ray report;

(v) Physician summary report;

(vi) Hospital discharge summary report;

(vii) Hospital admitting report;

(viii) Death certificate, provided that it is signed by a physician at the time of death; or

(ix) Documentation specified in paragraphs (d)(3)(i) and (d)(3)(ii) of this section.

(2) In order to demonstrate that the claimant developed cor pulmonale related to fibrosis of the lung, the claimant or beneficiary must, at a minimum, submit one or more of the following medical records:

(i) Right heart catheterization;

(ii) Cardiology summary or consultation report;

(iii) Electrocardiogram;

(iv) Echocardiogram;

(v) Physician summary report;

(vi) Hospital discharge summary report;

(vii) Autopsy report;

(viii) Report of physical examination; or

(ix) Death certificate, provided that it is signed by a physician at the time of death.

(3) Notwithstanding any other documentation provided, a living claimant must at a minimum provide the following medical documentation:

(i) Either:

(A) An arterial blood gas study administered at rest in a sitting position, or an exercise arterial blood gas test, reflecting values equal to or less than the values set forth in the tables in appendix B to this part; or

(B) A written diagnosis by a physician in accordance with § 79.61(s); and

(ii) One of the following:

(A) A chest x-ray administered in accordance with standard techniques accompanied by interpretive reports of the x-ray by a maximum of two NIOSH certified ''B'' readers, classifying the existence of disease of category 1/0 or higher according to a 1989 report of the International Labor Office (known as the ''ILO''), or subsequent revisions;

(B) High-resolution computed tomography scans (commonly known as ''HRCT scans''), including computer-assisted tomography scans (commonly known as ''CAT scans''), magnetic resonance imaging scans (commonly known as ''MRI scans''), and positron emission tomography scans (commonly known as ''PET scans''), and interpretive reports of such scans;

(C) Pathology reports of tissue biopsies; or

(D) Pulmonary function tests indicating restrictive lung function and consisting of three reproducible time/volume tracings recording the results

of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC) administered and reported in accordance with the Standardization of Spirometry—1994 Update by the American Thoracic Society, and reflecting values for FEV1 or FVC that are less than or equal to the lower limit of normal for an individual of the claimant's age, sex, height, and ethnicity as set forth in the tables in appendix A to this part.

(e) The Assistant Director shall treat any documentation described in paragraph (d)(3)(i)(B) or paragraph (d)(3)(ii)(A) of this section as conclusive evidence of the claimant's nonmalignant respiratory disease; provided, however, that the Program may subject such documentation to a fair and random audit to guarantee its authenticity and reliability for purposes of treating it as conclusive evidence; and provided further that, in order to be treated as conclusive evidence, a written diagnosis described in paragraph (d)(3)(i)(B) must be by a physician who is employed by the Indian Health Service or the Department of Veterans Affairs or who is board certified (as described in § 79.61(s)), and who must have a documented, ongoing physician-patient relationship with the claimant. Notwithstanding the conclusive effect given to certain evidence, nothing in this paragraph shall be construed as relieving a living claimant of the obligation to provide the Program with the forms of documentation required under paragraph (d)(3).

§ 79.66 Proof of primary renal cancer.

(a) In determining whether a claimant developed primary renal cancer following pertinent employment as an ore transporter, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed primary renal cancer must be supported by medical documentation. In all cases, the Program will review submitted medical documentation, and, in addition and where appropriate, will review any pertinent records discovered within the sources referred to in paragraphs (b) and (c) of this section.

(b) Where appropriate, the Radiation Exposure Compensation Program will search the records of the PHS (including NIOSH), created or gathered during the course of any health study of uranium workers conducted or being conducted by these agencies, to determine whether those records contain proof of the claimant's medical condition. (In cases where the claimant is deceased, the Program will accept as proof of medical condition the verification of the PHS or NIOSH that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary renal cancer.)

(c) If a claimant was diagnosed as having primary renal cancer in Arizona, Colorado, Nevada, New Mexico, Utah or Wyoming, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information, valid in the state of diagnosis, that authorizes the Radiation Exposure Compensation Program to contact the appropriate state cancer or tumor registry, the Program will, where appropriate, request the relevant information from that registry and will review records that it obtains from the registry. (In cases where the claimant is deceased, the Program will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary renal cancer.)

(d) If medical records regarding the claimant were gathered during the course of any federally supported, health-related study of uranium workers, and the claimant or eligible surviving beneficiary submits with the claim an Authorization To Release Medical or Other Information that authorizes the Program to contact the custodian of the records of the study to determine if proof of the claimant's medical condition is contained in the records of the study, the Program will, where appropriate, request such records from that custodian and will review records that it obtains from the custodian. (In cases where the claimant is deceased, the Program will accept as proof of the claimant's medical condition such medical records or abstracts of medical records containing a

verified diagnosis of primary renal cancer.)

(e) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted primary renal cancer. Such documentation will be most useful where it contains an explicit statement of diagnosis or such other information or data from which the appropriate authorities at the National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty:

(1) Pathology report of tissue biopsy or resection;

(2) Autopsy report;

(3) One of the following summary medical reports:

(i) Physician summary report;

(ii) Hospital discharge summary report;

(iii) Operative report;

(iv) Radiotherapy summary report; or

(v) Medical oncology summary or consultation report;

(4) Report of one of the following radiology examinations:

(i) Computerized tomography (CT) scan;

(ii) Magnetic resonance imaging (MRI); or

(5) Death certificate, provided that it is signed by a physician at the time of death.

§ 79.67 Proof of chronic renal disease.

(a) In determining whether a claimant developed chronic renal disease following pertinent employment as an ore transporter, the Assistant Director shall resolve all reasonable doubt in favor of the claimant. A conclusion that a claimant developed chronic renal disease must be supported by medical documentation.

(b) A claimant or beneficiary may submit any of the following forms of medical documentation in support of a claim that the claimant contracted chronic renal disease.

(1) Pathology report of tissue biopsy;

(2) If laboratory or radiographic tests exist:

(i) Abnormal plasma creatinine values;

(ii) Abnormal glomerular filtration rate (by either measured creatinine or iothalamate clearance or calculated by MDRD equation); and

(iii) Renal tubular dysfunction as evidenced by:

(A) Glycosuria in the absence of diabetes mellitus;

(B) Proteinuria less than one gram daily without other known etiology; or

(C) Hyperphosphaturia, aminoaciduria, B–2 microglobinuria or alkaline phosphaturia or other marker of proximal tubular injury; or

(iv) Radiographic evidence of chronic renal disease;

(3) Autopsy report;

(4) Physician summary report;

(5) Hospital discharge summary report;

(6) Hospital admitting report; or

(7) Death certificate, provided that it is signed by a physician at the time of death.

Subpart H—Procedures

§ 79.70 Attorney General's delegation of authority.

(a) An Assistant Director within the Constitutional and Specialized Torts Staff, Torts Branch, Civil Division, shall be assigned to manage the Radiation Exposure Compensation Program and issue a decision on each claim filed under the Act, and otherwise act on behalf of the Attorney General in all other matters relating to the administration of the Program, except for rulemaking authority. The Assistant Director may delegate any of his or her responsibilities under the regulations in this part to an attorney working under the supervision of the Assistant Director.

(b) The Assistant Attorney General, Civil Division, shall designate an Appeals Officer to act on appeals from the Assistant Director's decisions.

§ 79.71 Filing of claims.

(a) All claims for compensation under the Act must be in writing and submitted on a standard claim form designated by the Assistant Director for the filing of compensation claims. Except as specifically provided in this part, the claimant or eligible surviving beneficiary must furnish the medical documentation required by this part with his or her standard form. Except

as specifically provided in this part, the claimant or eligible surviving beneficiary must also provide with the standard form any records establishing the claimant's physical presence in an affected area, onsite participation, employment in a uranium mine or mill, or employment as an ore transporter, in accordance with this part. The standard claim form must be completed, signed under oath either by a person eligible to file a claim under the Act or by that person's legal guardian, and mailed with supporting documentation to the following address: Radiation Exposure Compensation Program, U.S. Department of Justice, P.O. Box 146, Ben Franklin Station, Washington, DC 20044–0146. Copies of the standard form, as well as the regulations, guidelines, and other information, may be obtained by requesting the document or publications from the Assistant Director at that address or by accessing the Program's Web site at *http://www.usdoj.gov/civil/reca*.

(b) The Assistant Director will file a claim after receipt of the standard form with supporting documentation and examination for substantial compliance with this part. The date of filing shall be recorded by a stamp on the face of the standard form. The Assistant Director shall file only claims that substantially comply with paragraph (a) of this section. If a claim substantially fails to comply with paragraph (a), the Assistant Director shall promptly return the claim unfiled to the sender with a statement identifying the reason(s) why the claim does not comply with this part. The sender may return the claim to the Assistant Director after correcting the deficiencies. For those cases that are filed, the Assistant Director shall promptly acknowledge receipt of the claim with a letter identifying the number assigned to the claim, the date the claim was filed, and the period within which the Assistant Director must act on the claim.

(c) The following persons or their legal guardians are eligible to file claims for compensation under the Act in the following order:

(1) The claimant;

(2) If the claimant is deceased, the spouse of the claimant, provided that he or she was married to the claimant for at least one year immediately prior to the claimant's death;

(3) If there is no surviving spouse or if the spouse is ineligible because he or she was not married to the claimant for at least one year immediately prior to the claimant's death, a child of the claimant;

(4) If there is no eligible surviving spouse and no child, a parent of the claimant;

(5) If there is no eligible surviving spouse and no child or parent, a grandchild of the claimant; or

(6) If there is no eligible surviving spouse and no child, parent or grandchild, a grandparent of the claimant.

(7) Only the beneficiaries listed in this paragraph (c) are eligible to file a claim on behalf of the claimant.

(d) The identity of the claimant must be established by submitting a birth certificate or one of the other documents identified in § 79.14(a) when the person has no birth certificate. Additionally, documentation demonstrating any and all name changes must be provided.

(e)(1) The spouse of a claimant must establish his or her eligibility to file a claim by furnishing:

(i) His or her birth certificate and, if applicable, documentation demonstrating any and all name changes;

(ii) The birth and death certificates of the claimant;

(iii) One of the following documents to establish a marriage to the claimant:

(A) The public record of marriage;

(B) A certificate of marriage;

(C) The religious record of marriage; or

(D) A judicial or other governmental determination that a valid marriage existed, such as the final opinion or order of a probate court or a determination of the Social Security Administration that the person filing the claim is the spouse of the decedent;

(iv) A death certificate or divorce decree for each spouse of the claimant (if applicable); and

(v) An affidavit (or declaration under oath on the standard claim form) stating that the spouse was married to the claimant for at least one year immediately prior to the claimant's death.

(2) If the spouse is a member of an Indian Tribe, he or she need not provide any of the documents listed in paragraph (e)(1) of this section at the time the claim is filed (although these records may later be required), but should instead furnish a signed release of private information that the Assistant Director will use to obtain a statement of verification of all of the information listed in paragraph (e)(1) directly from the tribal records custodian. In identifying those individuals eligible to receive compensation by virtue of marriage, relationship, or survivorship, the Assistant Director shall, to the maximum extent practicable, take into consideration and give effect to established law, tradition, and custom of the particular affected Indian Tribe.

(f)(1) A child of a claimant must establish his or her eligibility to file a claim by furnishing:

(i) His or her birth certificate and, if applicable, documentation demonstrating any and all name changes;

(ii) The birth and death certificates of the claimant;

(iii) One of the documents listed in paragraph (e)(1)(iii) of this section to establish each marriage of the claimant (if applicable);

(iv) A death certificate or divorce decree for each spouse of the claimant (if applicable);

(v) A death certificate for each of the other children of the claimant (if applicable);

(vi) An affidavit (or declaration under oath on the standard claim form) stating the following:

(A) That the claimant was never married, or, if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or death of the last spouse of the claimant; and

(B) That the claimant had no other children, or, if the claimant did have other children, the name of each child, the date and place of birth of each child, and the date and place of death or current address of each child; and

(vii) One of the following:

(A) In the case of a natural child, a birth certificate showing that the claimant was the child's parent, or a judicial decree identifying the claimant as the child's parent;

(B) In the case of an adopted child, the judicial decree of adoption; or

(C) In the case of a stepchild, evidence of birth to the spouse of the claimant as outlined in paragraph (f)(1)(vii) of this section, and records reflecting that the stepchild lived with the claimant in a regular parent-child relationship.

(2) If the child is a member of an Indian Tribe, he or she need not provide any of the documents listed in paragraph (f)(1) of this section at the time the claim is filed (although these records may later be required), but should instead furnish a signed release of private information that the Assistant Director will use to obtain a statement of verification of all of the information listed in paragraph (f)(1) directly from the tribal records custodian. In identifying those individuals eligible to receive compensation by virtue of survivorship, the Assistant Director shall, to the maximum extent practicable, take into consideration and give effect to established law, tradition, and custom of the particular affected Indian Tribe.

(g)(1) A parent of a claimant must establish his or her eligibility to file a claim by furnishing:

(i) His or her birth certificate and, if applicable, documentation demonstrating any and all name changes;

(ii) The birth and death certificates of the claimant;

(iii) One of the documents listed in paragraph (e)(1)(iii) of this section to establish each marriage of the claimant (if applicable);

(iv) A death certificate or divorce decree for each spouse of the claimant (if applicable);

(v) A death certificate for each child of the claimant (if applicable);

(vi) A death certificate for the other parent(s) (if applicable);

(vii) An affidavit (or declaration under oath on the standard claim form) stating the following:

(A) That the claimant was never married, or, if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or

death of the last spouse of the claimant;

(B) That the claimant had no children, or, if the claimant did have children, the name of each child, the date and place of birth of each child, and the date and place of death of each child; and

(C) The name and address, or date and place of death, of the other parent(s) of the claimant; and

(viii) One of the following:

(A) In the case of a natural parent, a birth certificate showing that the claimant was the parent's child, or a judicial decree identifying the claimant as the parent's child; or

(B) In the case of an adoptive parent, the judicial decree of adoption.

(2) If the parent is a member of an Indian Tribe, he or she need not provide any of the documents listed in paragraph (g)(1) of this section at the time the claim is filed (although these records may later be required), but should instead furnish a signed release of private information that the Assistant Director will use to obtain a statement of verification of all of the information listed in paragraph (g)(1) directly from the tribal records custodian. In identifying those individuals eligible to receive compensation by virtue of survivorship, the Assistant Director shall, to the maximum extent practicable, take into consideration and give effect to established law, tradition, and custom of the particular affected Indian Tribe.

(h)(1) A grandchild of a claimant must establish his or her eligibility to file a claim by furnishing:

(i) His or her birth certificate and, if applicable, documentation demonstrating any and all name changes;

(ii) The birth and death certificates of the claimant;

(iii) One of the documents listed in paragraph (e)(1)(iii) of this section to establish each marriage of the claimant (if applicable);

(iv) A death certificate or divorce decree for each spouse of the claimant (if applicable);

(v) A death certificate for each child of the claimant;

(vi) A death certificate for each parent of the claimant;

(vii) A death certificate for each of the other grandchildren of the claimant (if applicable);

(viii) An affidavit (or declaration under oath on the standard claim form) stating the following:

(A) That the claimant was never married, or, if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or death of the last spouse of the claimant;

(B) The name of each child, the date and place of birth of each child, and the date and place of death of each child;

(C) The names of each parent of the claimant together with the dates and places of death of each parent; and

(D) That the claimant had no other grandchildren, or, if the claimant did have other grandchildren, the name of each grandchild, the date and place of birth of each grandchild, and the date and place of death or current address of each grandchild; and

(ix) One of the following:

(A) In the case of a natural grandchild, a combination of birth certificates showing that the claimant was the grandchild's grandparent;

(B) In the case of an adopted grandchild, a combination of judicial records and birth certificates showing that the claimant was the grandchild's grandparent; or

(C) In the case of a stepgrandchild, evidence of birth to the spouse of the child of the claimant, as outlined in this paragraph (h)(1), and records reflecting that the stepchild lived with a child of the claimant in a regular parent-child relationship; or evidence of birth to the spouse of the stepchild of the claimant or the stepchild of the claimant, as outlined in this paragraph (h)(1), and records reflecting that the stepchild of the claimant lived with the claimant in a regular parent-child relationship.

(2) If the grandchild is a member of an Indian Tribe, he or she need not provide any of the documents listed in paragraph (h)(1) of this section at the time the claim is filed (although these records may later be required), but should instead furnish a signed release

of private information that the Assistant Director will use to obtain a statement of verification of all of the information listed in paragraph (h)(1) directly from the tribal records custodian. In identifying those individuals eligible to receive compensation by virtue of survivorship, the Assistant Director shall, to the maximum extent practicable, take into consideration and give effect to established law, tradition, and custom of the particular affected Indian Tribe.

(i)(1) A grandparent of the claimant must establish his or her eligibility to file a claim by furnishing:

(i) His or her birth certificate and, if applicable, documentation demonstrating any and all name changes;

(ii) The birth and death certificates of the claimant;

(iii) One of the documents listed in paragraph (e)(1)(iii) of this section to establish each marriage of the claimant (if applicable);

(iv) A death certificate or divorce decree for each spouse of the claimant (if applicable);

(v) A death certificate for each child of the claimant (if applicable);

(vi) A death certificate for each parent of the claimant;

(vii) A death certificate for each grandchild of the claimant (if applicable);

(viii) A death certificate for each of the other grandparents of the claimant (if applicable);

(ix) An affidavit stating the following:

(A) That the claimant was never married, or if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or death of the last spouse of the claimant;

(B) That the claimant had no children, or, if the claimant did have children, the name of each child, the date and place of birth of each child, and the date and place of death of each child;

(C) The names of each parent of the claimant together with the dates and places of death of each parent;

(D) That the claimant had no grandchildren, or, if the claimant did have grandchildren, the name of each grandchild, the date and place of birth of each grandchild, and the date and place of death of each grandchild; and

(E) The names of all other grandparents of the claimant together with the dates and places of birth of each grandparent, and the dates and places of death of each other grandparent or the current address of each other grandparent; and

(x) One of the following:

(A) In the case of a natural grandparent, a combination of birth certificates showing that the claimant was the grandparent's grandchild;

(B) In the case of an adoptive grandparent, a combination of judicial records and birth certificates showing that the claimant was the grandparent's grandchild.

(2) If the grandparent is a member of an Indian Tribe, he or she need not provide any of the documents listed in paragraph (i)(1) of this section at the time the claim is filed (although these records may later be required), but should instead furnish a signed release of private information that the Assistant Director will use to obtain a statement of verification of all of the information listed in paragraph (i)(1) directly from the tribal records custodian. In identifying those individuals eligible to receive compensation by virtue of survivorship, the Assistant Director shall, to the maximum extent practicable, take into consideration and give effect to established law, tradition, and custom of the particular affected Indian Tribe.

(j) A claim that was filed and denied may be filed again in those cases where the claimant or eligible surviving beneficiary obtains documentation that he or she did not possess when the claim was filed previously and that redresses the deficiency for which the claim was denied, including, where applicable, documentation addressing:

(1) An injury specified in the Act;

(2) Residency in the affected area;

(3) Onsite participation in a nuclear test;

(4) Exposure to 40 WLMs of radiation while employed in a uranium mine or mines during the designated time period;

(5) Employment for one year (12 consecutive or cumulative months) as a miner, miller or ore transporter; or

(6) The identity of the claimant and/or the eligible surviving beneficiary.

(k) A claimant or eligible surviving beneficiary may not refile a claim more than three times. Claims filed prior to July 10, 2000, will not be included in determining the number of claims filed.

§ 79.72 Review and resolution of claims.

(a) *Initial review*. The Assistant Director shall conduct an initial review of each claim that has been filed to determine whether:

(1) The person submitting the claim represents that he or she is an eligible surviving beneficiary in those cases where the claimant is deceased;

(2) The medical condition identified in the claim is a disease specified in the Act for which the claimant or eligible surviving beneficiary could recover compensation;

(3) For claims submitted under subparts B and C of this part, as relevant, the period and place of physical presence set forth in the claim falls within the designated time period and affected areas identified in § 79.11;

(4) For claims submitted under subparts B and D of this part, as relevant, the place and period of onsite participation set forth in the claim falls within the places and times set forth in § 79.11 and § 79.31; and

(5) For claims submitted under subparts E, F, and G of this part, the period and place of uranium mining, mill working or ore transporting set forth in the claim falls within the designated time period and specified states identified in §§ 79.41, 79.51, and 79.61. If the Assistant Director determines from the initial review that any one of the applicable criteria is not met, or that any other criterion of this part is not met, the Assistant Director shall so advise the claimant or eligible surviving beneficiary in writing, setting forth the reasons for the determination, and allow the claimant or eligible surviving beneficiary 60-days from the date of such notification to correct any deficiency in the claim. If the claimant or eligible surviving beneficiary fails adequately to correct the deficiencies within the 60-day period, the Assistant Director shall, without further review, issue a Decision denying the claim.

(b) *Review of medical documentation*. The Assistant Director will examine the medical documentation submitted in support of the claim and determine whether it satisfies the criteria for eligibility established by the Act and this part. The Assistant Director may, for the purpose of verifying eligibility, require the claimant or eligible surviving beneficiary to provide an authorization to release any medical record identified in this part. If the Assistant Director determines that the documentation does not satisfy the criteria for eligibility established by the Act and this part, the Assistant Director shall so advise the claimant or eligible surviving beneficiary in writing, setting forth the reason(s) for the determination, and shall allow the claimant or eligible beneficiary 60 days from the date of notification, or such greater period as the Assistant Director permits, to furnish additional medical documentation that meets the requirements of the Act and this part. Where appropriate, the Assistant Director may require the claimant or eligible surviving beneficiary to provide an authorization to release additional records. If the claimant or eligible beneficiary fails, within 60 days or the greater period approved by the Assistant Director, to provide sufficient medical documentation or a valid release when requested by the Assistant Director, then the Assistant Director shall, without further review, issue a Decision denying the claim.

(c) *Review of the records*. The Assistant Director will examine the other records submitted in support of the claim to prove those matters set forth in all other sections of the Act and this part, and will determine whether such records satisfy all other criteria for eligibility. For the purposes of verifying such eligibility, the Assistant Director may require the claimant or eligible surviving beneficiary to provide an authorization to release any record identified in this part. If the Assistant Director determines that the records do not satisfy the criteria for eligibility established by the Act and this part, the Assistant Director shall so advise

the claimant or eligible surviving beneficiary in writing, setting forth the reasons for the determination, and shall provide the claimant or eligible surviving beneficiary 60 days from the date of notification, or such greater period as the Assistant Director permits, to furnish additional records to satisfy the requirements of the Act and this part. Where appropriate, the Assistant Director may require the claimant or eligible surviving beneficiary to provide an authorization to release additional records as an alternative to, or in addition to, the claimant or eligible beneficiary furnishing such additional records. If the claimant or eligible beneficiary fails within 60 days or the greater period approved by the Assistant Director, to provide sufficient records or a valid release when requested by the Assistant Director, then the Assistant Director shall, without further review, issue a Decision denying the claim.

(d) *Decision*. The Assistant Director shall review each claim and issue a written Decision on each claim within 12 months of the date the claim was filed. The Assistant Director may request from any claimant, or from any individual or entity on behalf of the claimant, any relevant additional information or documentation necessary to complete the determination of eligibility under paragraphs (a), (b), or (c) of this section. The period beginning on the date on which the Assistant Director makes a request for such additional information or documentation and ending on the date on which the claimant or individual or entity acting on behalf of the claimant submits that information or documentation (or informs the Assistant Director that it is not possible to provide that information or that the claimant or individual or entity will not provide that information) shall not apply to the 12-month period. Any Decision denying a claim shall set forth reason(s) for the denial, shall indicate that the Decision of the Assistant Director may be appealed to the Assistant Attorney General, Civil Division, in writing within 60 days of the date of the Decision, or such greater period as may be permitted by the Assistant Attorney General, Civil Division, and shall identify the address to which the appeal should be sent.

§ 79.73 Appeals procedures.

(a) An appeal must be in writing and must be received by the Radiation Exposure Compensation Program within 60 days of the date of the Decision denying the claim, unless a greater period has been permitted. Appeals must be sent to the following address: Radiation Exposure Compensation Program, Appeal of Decision, U.S. Department of Justice, P.O. Box 146, Ben Franklin Station, Washington, DC 20044–0146.

(b) The claimant or eligible surviving beneficiary must set forth in the appeal the reason(s) why he or she believes that the Decision of the Assistant Director is incorrect.

(c) Upon receipt of an appeal, the Radiation Exposure Compensation Program shall forward the appeal, the Decision, the claim, and all supporting documentation to the Appeals Officer for action on the appeal. If the appeal is not received within the 60-day period, or such greater period as may be permitted, the appeal may be denied without further review.

(d) The Appeals Officer shall review any appeal and other information forwarded by the Program. Within 90 days after the receipt of an appeal, the Appeals Officer shall issue a Memorandum either affirming or reversing the Assistant Director's Decision or, when appropriate, remanding the claim to the Assistant Director for further action. The Memorandum shall include a statement of the reason(s) for such reversal, affirmance, or remand. The Memorandum and all papers relating to the claim shall be returned to the Radiation Exposure Compensation Program, which shall promptly inform the claimant or eligible surviving beneficiary of the action of the Appeals Officer. A Memorandum affirming or reversing the Assistant Director's Decision shall be deemed to be the final action of the Department of Justice on the claim.

(e) Before seeking judicial review of a decision denying a claim under the Act, an individual must first seek review by the designated Appeals Officer.

Once the appeals procedures are completed, an individual whose claim for compensation under the Act is affirmed on appeal may seek judicial review in a district court of the United States.

§ 79.74 Representatives and attorney's fees.

(a) *Representation*. In submitting and presenting a claim to the Program, a claimant or beneficiary may, but need not, be represented by an attorney or by a representative of an Indian Tribe or tribal organization. Non-attorneys (other than representatives of an Indian Tribe or tribal organization) are not permitted to represent claimants or beneficiaries before the Program. To the extent that resources are available, the Assistant Director will provide assistance to all persons who file claims for compensation. Only qualified attorneys, as described in paragraph (c) of this section, may receive from a claimant or beneficiary any fee in connection with a successful claim.

(b) *Fees*. (1) Notwithstanding any contract, the attorney of a claimant or beneficiary, along with any assistants or experts retained by the attorney on behalf of the claimant or beneficiary, may not receive from a claimant or beneficiary any fee for services rendered in connection with an unsuccessful claim. The attorney of a claimant or beneficiary may recover costs incurred in connection with an unsuccessful claim.

(2) Notwithstanding any contract and except as provided in paragraph (b)(3) of this section, the attorney of a claimant or beneficiary, along with any assistants or experts retained by the attorney on behalf of the claimant or beneficiary, may receive from a claimant or beneficiary no more than 2% of the total award for all services rendered in connection with a successful claim, exclusive of costs.

(3)(i) If an attorney entered into a contract with the claimant or beneficiary for services before July 10, 2000, with respect to a particular claim, then that attorney may receive up to 10% of the total award for services rendered in connection with a successful claim, exclusive of costs.

(ii) If an attorney resubmits a previously denied claim, then that attorney may receive up to 10% of the total award to the claimant or beneficiary for services rendered in connection with that subsequently successful claim, exclusive of costs. Resubmission of a previously denied claim includes only those claims that were previously denied and refiled under the Act.

(4) Any violation of paragraph (b) of this section shall result in a fine of not more than $5,000.

(c) *Attorney qualifications*. An attorney may not represent a claimant or beneficiary unless the attorney is engaged in the private practice of law and an active member in good standing of the bar of the highest court of a state. Attorneys who are members of multiple state bars, and who are suspended, sanctioned, disbarred, or disqualified from the practice of law for professional misconduct in one state may not represent a claimant or beneficiary even though the attorney continues to remain in good standing of the bar of another state. If a claimant or beneficiary is represented by an attorney, then the attorney must submit the following documents to the Program along with the claim:

(1) A statement of the attorney's active membership in good standing of the bar of the highest court of a state; and

(2) A signed representation agreement, retainer agreement, fee agreement, or contract, documenting the attorney's authorization to represent the claimant or beneficiary. The document must acknowledge that the Act's fee limitations are satisfied.

[Order No. 2711–2004, 69 FR 13634, Mar. 23, 2004, as amended by Order 3185–2010, 75 FR 48275, Aug. 10, 2010]

§ 79.75 Procedures for payment of claims.

(a) All awards for compensation are made in the form of one time lump sum payments and shall be made to the claimant or to the legal guardian of the claimant, unless the claimant is deceased at the time of the payment. In cases involving a claimant who is deceased, payment shall be made to each eligible surviving beneficiary or to the legal guardian acting on his or her behalf, in accordance with the terms and conditions specified in the

Act. Once the Program has received the claimant's or eligible surviving beneficiary's election to accept the payment, the Assistant Director shall ensure that the claim is paid within six weeks. All time frames for processing claims under the Act are suspended during periods when the Radiation Trust Fund is not funded.

(b) In cases involving the approval of a claim, the Assistant Director shall take all necessary and appropriate steps to determine the correct amount of any offset to be made to the amount awarded under the Act and to verify the identity of the claimant or, in the case of a deceased claimant, the existence of eligible surviving beneficiaries who are entitled by the Act to receive the payment the claimant would have received. The Assistant Director may conduct any investigation, and may require any claimant or eligible surviving beneficiary to provide or execute any affidavit, record, or document or authorize the release of any information the Assistant Director deems necessary to ensure that the compensation payment is made in the correct amount and to the correct person(s). If the claimant or eligible surviving beneficiary fails or refuses to execute an affidavit or release of information, or to provide a record or document requested, or fails to provide access to information, such failure or refusal may be deemed to be a rejection of the payment, unless the claimant or eligible surviving beneficiary does not have and cannot obtain the legal authority to provide, release or authorize access to the required information, records or documents.

(c) Prior to authorizing payment, the Assistant Director shall require the claimant or each eligible surviving beneficiary to execute and provide an affidavit (or declaration under oath on the standard claim form) setting forth the amount of any payment made pursuant to a final award or settlement on a claim (other than a claim for worker's compensation), against any person, that is based on injuries incurred by the claimant on account of:

(1) Exposure to radiation from an atmospheric detonation of a nuclear device while present in an affected area (as defined in § 79.11(a)) at any time during the periods described in § 79.11(c) or § 79.11(h);

(2) Exposure to radiation while participating onsite in an atmospheric detonation of a nuclear device (as defined in § 79.11(b)) at any time during the periods described in § 79.11(h) (This paragraph (c) only applies to claims filed under section 4(a)(1)(A)(i)(III) of the Act); or

(3) Exposure to radiation during employment in a uranium mine at any time during the period described in section 5 of the Act. For purposes of this paragraph, a ''claim'' includes, but is not limited to, any request or demand for money made or sought in a civil action or made or sought in anticipation of the filing of a civil action, but shall not include requests or demands made pursuant to a life insurance or health insurance contract. If any such award or settlement payment was made, the Assistant Director shall subtract the sum of such award or settlement payments from the payment to be made under the Act.

(d) In the case of a claim filed under section 4(a)(2)(C) of the Act, the Assistant Director shall require the claimant or each eligible surviving beneficiary to execute and provide an affidavit (or declaration under oath on the standard claim form) setting forth the amount of any payment made pursuant to a final award or settlement on a claim (other than a claim for worker's compensation) against any person or any payment made by the Department of Veterans Affairs, that is based on injuries incurred by the claimant on account of exposure to radiation as a result of onsite participation in a test involving the atmospheric detonation of a nuclear device. For purposes of this paragraph, a ''claim'' includes, but is not limited to, any request or demand for money made or sought in a civil action or made or sought in anticipation of a civil action, but shall not include requests or demands made pursuant to a life-or health-insurance contract.

(1) Payments by the Department of Veterans Affairs shall include:

(i) Any disability payments or compensation benefits paid to the claimant and his or her dependents while the claimant is alive; and

(ii) Any Dependency and Indemnity Compensation payments made to survivors due to death related to the illness for which the claim under the Act is submitted.

(2) Payments by the Department of Veterans Affairs shall not include:

(i) Active duty pay, retired pay, retainer pay, or payments under the Survivor Benefits Plan;

(ii) Death gratuities;

(iii) SGLI, VGLI, or mortgage, life, or health insurance payments;

(iv) Burial benefits or reimbursement for burial expenses;

(v) Loans or loan guarantees;

(vi) Education benefits and payments;

(vii) Vocational rehabilitation benefits and payments;

(viii) Medical, hospital, and dental benefits; or

(ix) Commissary and PX privileges.

(e) If any such award, settlement, or payment was made as described in paragraphs (c) or (d) of this section, the Assistant Director shall calculate the actuarial present value of such payment(s), and subtract the actuarial present value from the payment to be made under the Act. The actuarial present value shall be calculated using the worksheet in appendix C to this part in the following manner:

(1) Step 1. The sums of the past payments received in each year are entered in the appropriate rows in column (2). Additional rows will be added as needed to calculate the present value of payments received in the years prior to 1960 and after 1990.

(2) Step 2. The present CPI-U (to be obtained monthly from the Bureau of Labor Statistics, Department of Labor) is entered in column (3).

(3) Step 3. The CPI (Major Expenditure Classes—All Items) for each year in which payments were received is entered in the appropriate row in column (4). (This measure is provided for 1960 through 1990. The measure for subsequent years will be obtained from the Bureau of Labor Statistics.)

(4) Step 4. For each row, the amount in column (2) is multiplied by the corresponding inflator (column (3) divided by column (4)) and the product is entered in column (5).

(5) Step 5. The products in column (5) are added together and the sum is entered on the line labeled ''Total of column (5) equals actuarial present value of past payments.''

(6) Step 6. The sum in Step 5 is subtracted from the statutory payment of $75,000 and the remainder is entered on the line labeled ''Net Claim Owed to Claimant.''

(f) When the Assistant Director has verified the identity of the claimant or each eligible surviving beneficiary who is entitled to the compensation payment or to a share of the compensation payment, and has determined the correct amount of the payment or the share of the payment, he or she shall notify the claimant or each eligible surviving beneficiary, or his or her legal guardian, and require such person(s) to sign an Acceptance of Payment Form. Such form shall be signed and returned within 60 days of the date of the form or such greater period as may be allowed by the Assistant Director. Failure to return the signed form within the required time may be deemed to be a rejection of the payment. Signing and returning the form within the required time shall constitute acceptance of the payment, unless the individual who has signed the form dies prior to receiving the actual payment, in which case the person who possesses the payment shall return it to the Assistant Director for redetermination of the correct disbursement of the payment.

(g) Rejected compensation payments or shares of compensation payments shall not be distributed to other eligible surviving beneficiaries, but shall be returned to the Trust Fund for use in paying other claims.

(h) Upon receipt of the Acceptance of Payment Form, the Assistant Director or the Constitutional and Specialized Torts Staff Director or Deputy Director, or their designee, shall authorize the appropriate authorities to issue a check to the claimant or to each eligible surviving beneficiary who has accepted payment out of the funds appropriated for this purpose.

(i) *Multiple payments.* (1) No claimant may receive payment under more than one subpart of this part for illnesses that he or she contracted. In addition

to one payment for his or her illnesses, he or she may also receive one payment for each claimant for whom he or she qualifies as an eligible surviving beneficiary.

(2) An eligible surviving beneficiary who is not also a claimant may receive one payment for each claimant for whom he or she qualifies as an eligible surviving beneficiary.

Appendix A to Part 79—FVC and FEV–1 Lower Limits of Normal Values

Table 1—Caucasian Males FVC Lower Limit of Normal Values, Hankinson, et al. (1999)

[Reference value equation: $-0.1933 + (0.00064)(\text{age}) + (-0.000269)(\text{age}^2) + (0.00015695)(\text{height}^2)$]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.96	2.91	2.85	2.79	2.74	2.67	2.61	2.55	2.48	2.41	2.34	2.26	2.19	2.11	2.03	1.94	1.86
61.5	156.2	3.02	2.97	2.91	2.86	2.80	2.74	2.67	2.61	2.54	2.47	2.40	2.33	2.25	2.17	2.09	2.01	1.92
62.0	157.5	3.09	3.03	2.98	2.92	2.86	2.80	2.74	2.67	2.61	2.54	2.46	2.39	2.31	2.23	2.15	2.07	1.99
62.5	158.8	3.15	3.10	3.04	2.99	2.93	2.87	2.80	2.74	2.67	2.60	2.53	2.45	2.38	2.30	2.22	2.14	2.05
63.0	160.0	3.21	3.16	3.10	3.05	2.99	2.93	2.86	2.80	2.73	2.66	2.59	2.51	2.44	2.36	2.28	2.20	2.11
63.5	161.3	3.28	3.22	3.17	3.11	3.05	2.99	2.93	2.86	2.80	2.73	2.65	2.58	2.50	2.43	2.34	2.26	2.18
64.0	162.6	3.34	3.29	3.23	3.18	3.12	3.06	2.99	2.93	2.86	2.79	2.72	2.65	2.57	2.49	2.41	2.33	2.24
64.5	163.8	3.40	3.35	3.30	3.24	3.18	3.12	3.06	2.99	2.92	2.85	2.78	2.71	2.63	2.55	2.47	2.39	2.30
65.0	165.1	3.47	3.42	3.36	3.31	3.25	3.19	3.12	3.06	2.99	2.92	2.85	2.77	2.70	2.62	2.54	2.46	2.37
65.5	166.4	3.54	3.48	3.43	3.37	3.31	3.25	3.19	3.12	3.06	2.99	2.91	2.84	2.76	2.69	2.61	2.52	2.44
66.0	167.6	3.60	3.55	3.50	3.44	3.38	3.32	3.26	3.19	3.12	3.05	2.98	2.91	2.83	2.75	2.67	2.59	2.50
66.5	168.9	3.67	3.62	3.56	3.51	3.45	3.39	3.32	3.26	3.19	3.12	3.05	2.97	2.90	2.82	2.74	2.66	2.57
67.0	170.2	3.74	3.69	3.63	3.57	3.52	3.45	3.39	3.33	3.26	3.19	3.12	3.04	2.97	2.89	2.81	2.72	2.64
67.5	171.5	3.81	3.76	3.70	3.64	3.59	3.52	3.46	3.40	3.33	3.26	3.19	3.11	3.04	2.96	2.88	2.79	2.71
68.0	172.7	3.87	3.82	3.77	3.71	3.65	3.59	3.53	3.46	3.39	3.32	3.25	3.18	3.10	3.02	2.94	2.86	2.77
68.5	174.0	3.94	3.89	3.84	3.78	3.72	3.66	3.60	3.53	3.46	3.39	3.32	3.25	3.17	3.09	3.01	2.93	2.85
69.0	175.3	4.02	3.96	3.91	3.85	3.79	3.73	3.67	3.60	3.53	3.47	3.39	3.32	3.24	3.16	3.08	3.00	2.92
69.5	176.5	4.08	4.03	3.97	3.92	3.86	3.80	3.73	3.67	3.60	3.53	3.46	3.39	3.31	3.23	3.15	3.07	2.98
70.0	177.8	4.15	4.10	4.05	3.99	3.93	3.87	3.81	3.74	3.67	3.60	3.53	3.46	3.38	3.30	3.22	3.14	3.06
70.5	179.1	4.23	4.17	4.12	4.06	4.00	3.94	3.88	3.81	3.75	3.68	3.60	3.53	3.45	3.38	3.30	3.21	3.13
71.0	180.3	4.29	4.24	4.19	4.13	4.07	4.01	3.95	3.88	3.81	3.74	3.67	3.60	3.52	3.44	3.36	3.28	3.20
71.5	181.6	4.37	4.32	4.26	4.20	4.15	4.08	4.02	3.96	3.89	3.82	3.75	3.67	3.60	3.52	3.44	3.35	3.27
72.0	182.9	4.44	4.39	4.34	4.28	4.22	4.16	4.10	4.03	3.96	3.89	3.82	3.75	3.67	3.59	3.51	3.43	3.34
72.5	184.2	4.52	4.46	4.41	4.35	4.29	4.23	4.17	4.10	4.04	3.97	3.90	3.82	3.75	3.67	3.59	3.50	3.42
73.0	185.4	4.59	4.53	4.48	4.42	4.36	4.30	4.24	4.17	4.11	4.04	3.97	3.89	3.81	3.74	3.66	3.57	3.49
73.5	186.7	4.66	4.61	4.56	4.50	4.44	4.38	4.32	4.25	4.18	4.11	4.04	3.97	3.89	3.81	3.73	3.65	3.56
74.0	188.0	4.74	4.69	4.63	4.58	4.52	4.46	4.39	4.33	4.26	4.19	4.12	4.04	3.97	3.89	3.81	3.73	3.64
74.5	189.2	4.81	4.76	4.70	4.65	4.59	4.53	4.46	4.40	4.33	4.26	4.19	4.11	4.04	3.96	3.88	3.80	3.71
75.0	190.5	4.89	4.84	4.78	4.72	4.66	4.60	4.54	4.48	4.41	4.34	4.27	4.19	4.12	4.04	3.96	3.87	3.79
75.5	191.8	4.97	4.91	4.86	4.80	4.74	4.68	4.62	4.55	4.49	4.42	4.34	4.27	4.19	4.12	4.03	3.95	3.87
76.0	193.0	5.04	4.99	4.93	4.87	4.82	4.75	4.69	4.63	4.56	4.49	4.42	4.34	4.27	4.19	4.11	4.02	3.94
76.5	194.3	5.12	5.06	5.01	4.95	4.89	4.83	4.77	4.70	4.64	4.57	4.50	4.42	4.35	4.27	4.19	4.10	4.02
77.0	195.6	5.20	5.14	5.09	5.03	4.97	4.91	4.85	4.78	4.72	4.65	4.57	4.50	4.42	4.35	4.27	4.18	4.10
77.5	196.9	5.28	5.22	5.17	5.11	5.05	4.99	4.93	4.86	4.80	4.73	4.66	4.58	4.50	4.43	4.35	4.26	4.18
78.0	198.1	5.35	5.30	5.24	5.19	5.13	5.07	5.00	4.94	4.87	4.80	4.73	4.66	4.58	4.50	4.42	4.34	4.25
78.5	199.4	5.43	5.38	5.33	5.27	5.21	5.15	5.09	5.02	4.95	4.88	4.81	4.74	4.66	4.58	4.50	4.42	4.33
79.0	200.7	5.51	5.46	5.41	5.35	5.29	5.23	5.17	5.10	5.03	4.96	4.89	4.82	4.74	4.66	4.58	4.50	4.42
79.5	201.9	5.59	5.54	5.48	5.43	5.37	5.31	5.24	5.18	5.11	5.04	4.97	4.89	4.82	4.74	4.66	4.58	4.49
80.0	203.2	5.67	5.62	5.57	5.51	5.45	5.39	5.33	5.26	5.19	5.12	5.05	4.98	4.90	4.82	4.74	4.66	4.57
80.5	204.5	5.76	5.70	5.65	5.59	5.53	5.47	5.41	5.34	5.28	5.21	5.13	5.06	4.98	4.91	4.82	4.74	4.66
81.0	205.7	5.83	5.78	5.73	5.67	5.61	5.55	5.49	5.42	5.35	5.28	5.21	5.14	5.06	4.98	4.90	4.82	4.73

81.5	207.0	5.92	5.86	5.81	5.75	5.69	5.63	5.57	5.50	5.44	5.37	5.30	5.22	5.15	5.07	4.99	4.90	4.82
82.0	208.3	6.00	5.95	5.89	5.84	5.78	5.72	5.65	5.59	5.52	5.45	5.38	5.31	5.23	5.15	5.07	4.99	4.90
82.5	209.6	6.09	6.03	5.98	5.92	5.86	5.80	5.74	5.67	5.61	5.54	5.47	5.39	5.32	5.24	5.16	5.07	4.99

TABLE 1A—CAUCASIAN MALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: 0.5536 + (−0.01303)(age) + (−0.000172)(age^2) + (0.00011607)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.29	2.23	2.16	2.10	2.04	1.97	1.90	1.84	1.76	1.69	1.62	1.55	1.47	1.39	1.32	1.24	1.15
61.5	156.2	2.33	2.27	2.21	2.15	2.08	2.02	1.95	1.88	1.81	1.74	1.67	1.59	1.52	1.44	1.36	1.28	1.20
62.0	157.5	2.38	2.32	2.26	2.20	2.13	2.07	2.00	1.93	1.86	1.79	1.71	1.64	1.57	1.49	1.41	1.33	1.25
62.5	158.8	2.43	2.37	2.31	2.24	2.18	2.11	2.05	1.98	1.91	1.84	1.76	1.69	1.61	1.54	1.46	1.38	1.30
63.0	160.0	2.47	2.41	2.35	2.29	2.22	2.16	2.09	2.02	1.95	1.88	1.81	1.73	1.66	1.58	1.50	1.42	1.34
63.5	161.3	2.52	2.46	2.40	2.34	2.27	2.21	2.14	2.07	2.00	1.93	1.86	1.78	1.71	1.63	1.55	1.47	1.39
64.0	162.6	2.57	2.51	2.45	2.39	2.32	2.25	2.19	2.12	2.05	1.98	1.90	1.83	1.75	1.68	1.60	1.52	1.44
64.5	163.8	2.62	2.56	2.49	2.43	2.37	2.30	2.23	2.16	2.09	2.02	1.95	1.88	1.80	1.72	1.64	1.56	1.48
65.0	165.1	2.67	2.61	2.54	2.48	2.42	2.35	2.28	2.21	2.14	2.07	2.00	1.93	1.85	1.77	1.69	1.61	1.53
65.5	166.4	2.71	2.65	2.59	2.53	2.46	2.40	2.33	2.26	2.19	2.12	2.05	1.97	1.90	1.82	1.74	1.66	1.58
66.0	167.6	2.76	2.70	2.64	2.58	2.51	2.45	2.38	2.31	2.24	2.17	2.10	2.02	1.95	1.87	1.79	1.71	1.63
66.5	168.9	2.81	2.75	2.69	2.63	2.56	2.50	2.43	2.36	2.29	2.22	2.15	2.07	2.00	1.92	1.84	1.76	1.68
67.0	170.2	2.86	2.80	2.74	2.68	2.61	2.55	2.48	2.41	2.34	2.27	2.20	2.12	2.05	1.97	1.89	1.81	1.73
67.5	171.5	2.92	2.86	2.79	2.73	2.67	2.60	2.53	2.46	2.39	2.32	2.25	2.18	2.10	2.02	1.94	1.86	1.78
68.0	172.7	2.96	2.90	2.84	2.78	2.71	2.65	2.58	2.51	2.44	2.37	2.30	2.22	2.15	2.07	1.99	1.91	1.83
68.5	174.0	3.02	2.96	2.89	2.83	2.77	2.70	2.63	2.56	2.49	2.42	2.35	2.28	2.20	2.12	2.04	1.96	1.88
69.0	175.3	3.07	3.01	2.95	2.88	2.82	2.75	2.69	2.62	2.55	2.48	2.40	2.33	2.25	2.18	2.10	2.02	1.94
69.5	176.5	3.12	3.06	3.00	2.93	2.87	2.80	2.73	2.67	2.60	2.52	2.45	2.38	2.30	2.22	2.15	2.07	1.99
70.0	177.8	3.17	3.11	3.05	2.99	2.92	2.86	2.79	2.72	2.65	2.58	2.50	2.43	2.36	2.28	2.20	2.12	2.04
70.5	179.1	3.23	3.16	3.10	3.04	2.98	2.91	2.84	2.77	2.70	2.63	2.56	2.48	2.41	2.33	2.25	2.17	2.09
71.0	180.3	3.28	3.21	3.15	3.09	3.03	2.96	2.89	2.82	2.75	2.68	2.61	2.53	2.46	2.38	2.30	2.22	2.14
71.5	181.6	3.33	3.27	3.21	3.14	3.08	3.01	2.95	2.88	2.81	2.74	2.66	2.59	2.51	2.44	2.36	2.28	2.20
72.0	182.9	3.38	3.32	3.26	3.20	3.13	3.07	3.00	2.93	2.86	2.79	2.72	2.64	2.57	2.49	2.41	2.33	2.25
72.5	184.2	3.44	3.38	3.32	3.25	3.19	3.12	3.06	2.99	2.92	2.85	2.77	2.70	2.62	2.55	2.47	2.39	2.31
73.0	185.4	3.49	3.43	3.37	3.31	3.24	3.18	3.11	3.04	2.97	2.90	2.83	2.75	2.68	2.60	2.52	2.44	2.36
73.5	186.7	3.55	3.49	3.43	3.36	3.30	3.23	3.16	3.10	3.03	2.95	2.88	2.81	2.73	2.65	2.58	2.50	2.42
74.0	188.0	3.60	3.54	3.48	3.42	3.35	3.29	3.22	3.15	3.08	3.01	2.94	2.86	2.79	2.71	2.63	2.55	2.47
74.5	189.2	3.66	3.60	3.53	3.47	3.41	3.34	3.27	3.20	3.13	3.06	2.99	2.92	2.84	2.76	2.69	2.61	2.52
75.0	190.5	3.71	3.65	3.59	3.53	3.46	3.40	3.33	3.26	3.19	3.12	3.05	2.97	2.90	2.82	2.74	2.66	2.58
75.5	191.8	3.77	3.71	3.65	3.59	3.52	3.46	3.39	3.32	3.25	3.18	3.11	3.03	2.96	2.88	2.80	2.72	2.64
76.0	193.0	3.83	3.77	3.70	3.64	3.58	3.51	3.44	3.37	3.30	3.23	3.16	3.08	3.01	2.93	2.85	2.77	2.69
76.5	194.3	3.88	3.82	3.76	3.70	3.63	3.57	3.50	3.43	3.36	3.29	3.22	3.14	3.07	2.99	2.91	2.83	2.75
77.0	195.6	3.94	3.88	3.82	3.76	3.69	3.63	3.56	3.49	3.42	3.35	3.28	3.20	3.13	3.05	2.97	2.89	2.81
77.5	196.9	4.00	3.94	3.88	3.82	3.75	3.69	3.62	3.55	3.48	3.41	3.34	3.26	3.19	3.11	3.03	2.95	2.87
78.0	198.1	4.06	4.00	3.93	3.87	3.81	3.74	3.67	3.61	3.53	3.46	3.39	3.32	3.24	3.16	3.09	3.01	2.92
78.5	199.4	4.12	4.06	3.99	3.93	3.87	3.80	3.73	3.67	3.59	3.52	3.45	3.38	3.30	3.22	3.15	3.07	2.98
79.0	200.7	4.18	4.12	4.06	3.99	3.93	3.86	3.79	3.73	3.66	3.58	3.51	3.44	3.36	3.28	3.21	3.13	3.05
79.5	201.9	4.23	4.17	4.11	4.05	3.98	3.92	3.85	3.78	3.71	3.64	3.57	3.49	3.42	3.34	3.26	3.18	3.10

TABLE 1A—CAUCASIAN MALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)—Continued

[Reference value equation: 0.5536 + (−0.01303)(age) + (−0.000172)(age^2) + (0.00011607)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
80.0	203.2	4.29	4.23	4.17	4.11	4.04	3.98	3.91	3.84	3.77	3.70	3.63	3.55	3.48	3.40	3.32	3.24	3.16
80.5	204.5	4.36	4.30	4.23	4.17	4.11	4.04	3.97	3.90	3.83	3.76	3.69	3.62	3.54	3.46	3.38	3.30	3.22
81.0	205.7	4.41	4.35	4.29	4.23	4.16	4.10	4.03	3.96	3.89	3.82	3.75	3.67	3.60	3.52	3.44	3.36	3.28
81.5	207.0	4.48	4.42	4.35	4.29	4.23	4.16	4.09	4.02	3.95	3.88	3.81	3.73	3.66	3.58	3.50	3.42	3.34
82.0	208.3	4.54	4.48	4.42	4.35	4.29	4.22	4.15	4.09	4.02	3.94	3.87	3.80	3.72	3.64	3.57	3.49	3.41
82.5	209.6	4.60	4.54	4.48	4.42	4.35	4.29	4.22	4.15	4.08	4.01	3.93	3.86	3.79	3.71	3.63	3.55	3.47

TABLE 2—CAUCASIAN FEMALES FVC LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: −0.356 + (0.0187)(age) + (−0.000382)(age^2) + (0.00012198)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.57	2.53	2.49	2.44	2.40	2.34	2.29	2.23	2.17	2.11	2.04	1.97	1.90	1.82	1.75	1.66	1.58
61.5	156.2	2.62	2.58	2.54	2.49	2.44	2.39	2.34	2.28	2.22	2.16	2.09	2.02	1.95	1.87	1.80	1.71	1.63
62.0	157.5	2.67	2.63	2.59	2.54	2.49	2.44	2.39	2.33	2.27	2.21	2.14	2.07	2.00	1.92	1.84	1.76	1.68
62.5	158.8	2.72	2.68	2.64	2.59	2.54	2.49	2.44	2.38	2.32	2.26	2.19	2.12	2.05	1.97	1.90	1.81	1.73
63.0	160.0	2.77	2.73	2.68	2.64	2.59	2.54	2.49	2.43	2.37	2.30	2.24	2.17	2.10	2.02	1.94	1.86	1.78
63.5	161.3	2.82	2.78	2.74	2.69	2.64	2.59	2.54	2.48	2.42	2.36	2.29	2.22	2.15	2.07	1.99	1.91	1.83
64.0	162.6	2.87	2.83	2.79	2.74	2.69	2.64	2.59	2.53	2.47	2.41	2.34	2.27	2.20	2.12	2.04	1.96	1.88
64.5	163.8	2.92	2.88	2.83	2.79	2.74	2.69	2.64	2.58	2.52	2.45	2.39	2.32	2.25	2.17	2.09	2.01	1.93
65.0	165.1	2.97	2.93	2.89	2.84	2.79	2.74	2.69	2.63	2.57	2.51	2.44	2.37	2.30	2.22	2.14	2.06	1.98
65.5	166.4	3.02	2.98	2.94	2.89	2.85	2.79	2.74	2.68	2.62	2.56	2.49	2.42	2.35	2.27	2.20	2.11	2.03
66.0	167.6	3.07	3.03	2.99	2.94	2.90	2.85	2.79	2.73	2.67	2.61	2.54	2.47	2.40	2.33	2.25	2.17	2.08
66.5	168.9	3.12	3.08	3.04	3.00	2.95	2.90	2.84	2.79	2.73	2.66	2.60	2.53	2.45	2.38	2.30	2.22	2.13
67.0	170.2	3.18	3.14	3.10	3.05	3.00	2.95	2.90	2.84	2.78	2.72	2.65	2.58	2.51	2.43	2.35	2.27	2.19
67.5	171.5	3.23	3.19	3.15	3.10	3.06	3.01	2.95	2.89	2.83	2.77	2.70	2.63	2.56	2.49	2.41	2.32	2.24
68.0	172.7	3.28	3.24	3.20	3.16	3.11	3.06	3.00	2.94	2.88	2.82	2.75	2.68	2.61	2.54	2.46	2.38	2.29
68.5	174.0	3.34	3.30	3.26	3.21	3.16	3.11	3.06	3.00	2.94	2.88	2.81	2.74	2.67	2.59	2.51	2.43	2.35
69.0	175.3	3.39	3.35	3.31	3.27	3.22	3.17	3.11	3.05	2.99	2.93	2.86	2.79	2.72	2.65	2.57	2.49	2.40
69.5	176.5	3.44	3.40	3.36	3.32	3.27	3.22	3.16	3.11	3.05	2.98	2.92	2.85	2.77	2.70	2.62	2.54	2.45
70.0	177.8	3.50	3.46	3.42	3.37	3.32	3.27	3.22	3.16	3.10	3.04	2.97	2.90	2.83	2.75	2.68	2.59	2.51
70.5	179.1	3.56	3.52	3.47	3.43	3.38	3.33	3.28	3.22	3.16	3.09	3.03	2.96	2.89	2.81	2.73	2.65	2.57
71.0	180.3	3.61	3.57	3.53	3.48	3.43	3.38	3.33	3.27	3.21	3.15	3.08	3.01	2.94	2.86	2.78	2.70	2.62
71.5	181.6	3.67	3.63	3.58	3.54	3.49	3.44	3.39	3.33	3.27	3.20	3.14	3.07	3.00	2.92	2.84	2.76	2.68
72.0	182.9	3.72	3.68	3.64	3.60	3.55	3.50	3.44	3.39	3.33	3.26	3.20	3.13	3.05	2.98	2.90	2.82	2.73
72.5	184.2	3.78	3.74	3.70	3.66	3.61	3.56	3.50	3.44	3.38	3.32	3.25	3.18	3.11	3.04	2.96	2.88	2.79
73.0	185.4	3.84	3.80	3.75	3.71	3.66	3.61	3.56	3.50	3.44	3.37	3.31	3.24	3.17	3.09	3.01	2.93	2.85
73.5	186.7	3.89	3.86	3.81	3.77	3.72	3.67	3.62	3.56	3.50	3.43	3.37	3.30	3.23	3.15	3.07	2.99	2.90
74.0	188.0	3.95	3.92	3.87	3.83	3.78	3.73	3.67	3.62	3.56	3.49	3.43	3.36	3.28	3.21	3.13	3.05	2.96
74.5	189.2	4.01	3.97	3.93	3.88	3.84	3.78	3.73	3.67	3.61	3.55	3.48	3.41	3.34	3.26	3.19	3.10	3.02

75.0	190.5	4.07	4.03	3.99	3.94	3.90	3.84	3.79	3.73	3.67	3.61	3.54	3.47	3.40	3.32	3.25	3.16	3.08
75.5	191.8	4.13	4.09	4.05	4.00	3.96	3.90	3.85	3.79	3.73	3.67	3.60	3.53	3.46	3.39	3.31	3.22	3.14
76.0	193.0	4.19	4.15	4.11	4.06	4.01	3.96	3.91	3.85	3.79	3.73	3.66	3.59	3.52	3.44	3.36	3.28	3.20
76.5	194.3	4.25	4.21	4.17	4.12	4.07	4.02	3.97	3.91	3.85	3.79	3.72	3.65	3.58	3.50	3.42	3.34	3.26
77.0	195.6	4.31	4.27	4.23	4.18	4.14	4.08	4.03	3.97	3.91	3.85	3.78	3.71	3.64	3.56	3.49	3.40	3.32
77.5	196.9	4.37	4.33	4.29	4.25	4.20	4.15	4.09	4.04	3.97	3.91	3.84	3.78	3.70	3.63	3.55	3.47	3.38
78.0	198.1	4.43	4.39	4.35	4.30	4.26	4.20	4.15	4.09	4.03	3.97	3.90	3.83	3.76	3.68	3.61	3.52	3.44
78.5	199.4	4.49	4.45	4.41	4.37	4.32	4.27	4.21	4.16	4.10	4.03	3.97	3.90	3.82	3.75	3.67	3.59	3.50
79.0	200.7	4.56	4.52	4.48	4.43	4.38	4.33	4.28	4.22	4.16	4.10	4.03	3.96	3.89	3.81	3.73	3.65	3.57
79.5	201.9	4.62	4.58	4.53	4.49	4.44	4.39	4.34	4.28	4.22	4.15	4.09	4.02	3.95	3.87	3.79	3.71	3.62
80.0	203.2	4.68	4.64	4.60	4.55	4.51	4.45	4.40	4.34	4.28	4.22	4.15	4.08	4.01	3.93	3.86	3.77	3.69
80.5	204.5	4.74	4.71	4.66	4.62	4.57	4.52	4.46	4.41	4.35	4.28	4.22	4.15	4.07	4.00	3.92	3.84	3.75
81.0	205.7	4.80	4.77	4.72	4.68	4.63	4.58	4.52	4.47	4.41	4.34	4.28	4.21	4.13	4.06	3.98	3.90	3.81
81.5	207.0	4.87	4.83	4.79	4.74	4.70	4.64	4.59	4.53	4.47	4.41	4.34	4.27	4.20	4.12	4.05	3.96	3.88
82.0	208.3	4.94	4.90	4.85	4.81	4.76	4.71	4.66	4.60	4.54	4.47	4.41	4.34	4.27	4.19	4.11	4.03	3.94
82.5	209.6	5.00	4.96	4.92	4.88	4.83	4.78	4.72	4.66	4.60	4.54	4.47	4.40	4.33	4.26	4.18	4.10	4.01

TABLE 2A—CAUCASIAN FEMALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: $0.4333 + (-0.00361)(\text{age}) + (-0.000194)(\text{age}^2) + (0.00009283)(\text{height}^2)$]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.02	1.97	1.92	1.88	1.82	1.77	1.72	1.66	1.61	1.55	1.49	1.43	1.36	1.30	1.23	1.16	1.10
61.5	156.2	2.06	2.01	1.96	1.91	1.86	1.81	1.76	1.70	1.64	1.59	1.53	1.46	1.40	1.34	1.27	1.20	1.13
62.0	157.5	2.09	2.05	2.00	1.95	1.90	1.85	1.79	1.74	1.68	1.62	1.56	1.50	1.44	1.37	1.31	1.24	1.17
62.5	158.8	2.13	2.09	2.04	1.99	1.94	1.89	1.83	1.78	1.72	1.66	1.60	1.54	1.48	1.41	1.35	1.28	1.21
63.0	160.0	2.17	2.12	2.07	2.02	1.97	1.92	1.87	1.81	1.76	1.70	1.64	1.58	1.51	1.45	1.38	1.31	1.24
63.5	161.3	2.21	2.16	2.11	2.06	2.01	1.96	1.91	1.85	1.79	1.74	1.68	1.61	1.55	1.49	1.42	1.35	1.28
64.0	162.6	2.24	2.20	2.15	2.10	2.05	2.00	1.95	1.89	1.83	1.77	1.71	1.65	1.59	1.53	1.46	1.39	1.32
64.5	163.8	2.28	2.24	2.19	2.14	2.09	2.04	1.98	1.93	1.87	1.81	1.75	1.69	1.63	1.56	1.50	1.43	1.36
65.0	165.1	2.32	2.27	2.23	2.18	2.13	2.08	2.02	1.97	1.91	1.85	1.79	1.73	1.67	1.60	1.54	1.47	1.40
65.5	166.4	2.36	2.31	2.27	2.22	2.17	2.11	2.06	2.01	1.95	1.89	1.83	1.77	1.71	1.64	1.57	1.51	1.44
66.0	167.6	2.40	2.35	2.31	2.26	2.21	2.15	2.10	2.04	1.99	1.93	1.87	1.81	1.74	1.68	1.61	1.55	1.48
66.5	168.9	2.44	2.39	2.35	2.30	2.25	2.19	2.14	2.08	2.03	1.97	1.91	1.85	1.78	1.72	1.65	1.59	1.52
67.0	170.2	2.48	2.43	2.39	2.34	2.29	2.23	2.18	2.12	2.07	2.01	1.95	1.89	1.83	1.76	1.69	1.63	1.56
67.5	171.5	2.52	2.47	2.43	2.38	2.33	2.28	2.22	2.17	2.11	2.05	1.99	1.93	1.87	1.80	1.74	1.67	1.60
68.0	172.7	2.56	2.51	2.47	2.42	2.37	2.31	2.26	2.20	2.15	2.09	2.03	1.97	1.90	1.84	1.77	1.71	1.64
68.5	174.0	2.60	2.56	2.51	2.46	2.41	2.36	2.30	2.25	2.19	2.13	2.07	2.01	1.95	1.88	1.82	1.75	1.68
69.0	175.3	2.64	2.60	2.55	2.50	2.45	2.40	2.34	2.29	2.23	2.17	2.11	2.05	1.99	1.92	1.86	1.79	1.72
69.5	176.5	2.68	2.64	2.59	2.54	2.49	2.44	2.38	2.33	2.27	2.21	2.15	2.09	2.03	1.96	1.90	1.83	1.76
70.0	177.8	2.73	2.68	2.63	2.58	2.53	2.48	2.43	2.37	2.31	2.26	2.20	2.13	2.07	2.01	1.94	1.87	1.80
70.5	179.1	2.77	2.72	2.67	2.63	2.57	2.52	2.47	2.41	2.36	2.30	2.24	2.18	2.11	2.05	1.98	1.92	1.85
71.0	180.3	2.81	2.76	2.71	2.67	2.61	2.56	2.51	2.45	2.40	2.34	2.28	2.22	2.15	2.09	2.02	1.96	1.89
71.5	181.6	2.85	2.81	2.76	2.71	2.66	2.61	2.55	2.50	2.44	2.38	2.32	2.26	2.20	2.13	2.07	2.00	1.93
72.0	182.9	2.90	2.85	2.80	2.75	2.70	2.65	2.60	2.54	2.48	2.43	2.37	2.30	2.24	2.18	2.11	2.04	1.97
72.5	184.2	2.94	2.89	2.85	2.80	2.75	2.69	2.64	2.59	2.53	2.47	2.41	2.35	2.29	2.22	2.15	2.09	2.02
73.0	185.4	2.98	2.94	2.89	2.84	2.79	2.74	2.68	2.63	2.57	2.51	2.45	2.39	2.33	2.26	2.20	2.13	2.06

TABLE 2A—CAUCASIAN FEMALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)—Continued

[Reference value equation: 0.4333 + (−0.00361)(age) + (−0.000194)(age^2) + (0.00009283)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
73.5	186.7	3.03	2.98	2.93	2.88	2.83	2.78	2.73	2.67	2.61	2.56	2.50	2.43	2.37	2.31	2.24	2.17	2.10
74.0	188.0	3.07	3.03	2.98	2.93	2.88	2.83	2.77	2.72	2.66	2.60	2.54	2.48	2.42	2.35	2.29	2.22	2.15
74.5	189.2	3.11	3.07	3.02	2.97	2.92	2.87	2.81	2.76	2.70	2.64	2.58	2.52	2.46	2.39	2.33	2.26	2.19
75.0	190.5	3.16	3.11	3.07	3.02	2.97	2.91	2.86	2.80	2.75	2.69	2.63	2.57	2.50	2.44	2.37	2.31	2.24
75.5	191.8	3.21	3.16	3.11	3.06	3.01	2.96	2.91	2.85	2.79	2.74	2.68	2.61	2.55	2.49	2.42	2.35	2.28
76.0	193.0	3.25	3.20	3.15	3.11	3.06	3.00	2.95	2.89	2.84	2.78	2.72	2.66	2.59	2.53	2.46	2.40	2.33
76.5	194.3	3.30	3.25	3.20	3.15	3.10	3.05	3.00	2.94	2.88	2.83	2.77	2.70	2.64	2.58	2.51	2.44	2.37
77.0	195.6	3.34	3.30	3.25	3.20	3.15	3.10	3.04	2.99	2.93	2.87	2.81	2.75	2.69	2.62	2.56	2.49	2.42
77.5	196.9	3.39	3.34	3.30	3.25	3.20	3.14	3.09	3.03	2.98	2.92	2.86	2.80	2.73	2.67	2.60	2.54	2.47
78.0	198.1	3.43	3.39	3.34	3.29	3.24	3.19	3.13	3.08	3.02	2.96	2.90	2.84	2.78	2.71	2.65	2.58	2.51
78.5	199.4	3.48	3.44	3.39	3.34	3.29	3.24	3.18	3.13	3.07	3.01	2.95	2.89	2.83	2.76	2.70	2.63	2.56
79.0	200.7	3.53	3.48	3.44	3.39	3.34	3.28	3.23	3.18	3.12	3.06	3.00	2.94	2.88	2.81	2.74	2.68	2.61
79.5	201.9	3.57	3.53	3.48	3.43	3.38	3.33	3.28	3.22	3.16	3.10	3.04	2.98	2.92	2.86	2.79	2.72	2.65
80.0	203.2	3.62	3.58	3.53	3.48	3.43	3.38	3.32	3.27	3.21	3.15	3.09	3.03	2.97	2.90	2.84	2.77	2.70
80.5	204.5	3.67	3.63	3.58	3.53	3.48	3.43	3.37	3.32	3.26	3.20	3.14	3.08	3.02	2.95	2.89	2.82	2.75
81.0	205.7	3.72	3.67	3.62	3.58	3.53	3.47	3.42	3.36	3.31	3.25	3.19	3.13	3.06	3.00	2.93	2.87	2.80
81.5	207.0	3.77	3.72	3.67	3.63	3.57	3.52	3.47	3.41	3.36	3.30	3.24	3.18	3.11	3.05	2.98	2.92	2.85
82.0	208.3	3.82	3.77	3.72	3.68	3.63	3.57	3.52	3.46	3.41	3.35	3.29	3.23	3.16	3.10	3.03	2.97	2.90
82.5	209.6	3.87	3.82	3.78	3.73	3.68	3.62	3.57	3.51	3.46	3.40	3.34	3.28	3.21	3.15	3.08	3.02	2.95

TABLE 3—AFRICAN AMERICAN MALES FVC LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: −0.1517 + (−0.01821)(age) + (0.0001367)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.24	2.20	2.16	2.13	2.09	2.05	2.02	1.98	1.94	1.91	1.87	1.84	1.80	1.76	1.73	1.69	1.65
61.5	156.2	2.29	2.25	2.22	2.18	2.15	2.11	2.07	2.04	2.00	1.96	1.93	1.89	1.85	1.82	1.78	1.74	1.71
62.0	157.5	2.35	2.31	2.27	2.24	2.20	2.16	2.13	2.09	2.06	2.02	1.98	1.95	1.91	1.87	1.84	1.80	1.76
62.5	158.8	2.40	2.37	2.33	2.29	2.26	2.22	2.18	2.15	2.11	2.08	2.04	2.00	1.97	1.93	1.89	1.86	1.82
63.0	160.0	2.46	2.42	2.38	2.35	2.31	2.27	2.24	2.20	2.16	2.13	2.09	2.05	2.02	1.98	1.95	1.91	1.87
63.5	161.3	2.51	2.48	2.44	2.40	2.37	2.33	2.29	2.26	2.22	2.18	2.15	2.11	2.08	2.04	2.00	1.97	1.93
64.0	162.6	2.57	2.53	2.50	2.46	2.42	2.39	2.35	2.32	2.28	2.24	2.21	2.17	2.13	2.10	2.06	2.02	1.99
64.5	163.8	2.62	2.59	2.55	2.51	2.48	2.44	2.41	2.37	2.33	2.30	2.26	2.22	2.19	2.15	2.11	2.08	2.04
65.0	165.1	2.68	2.65	2.61	2.57	2.54	2.50	2.46	2.43	2.39	2.35	2.32	2.28	2.25	2.21	2.17	2.14	2.10
65.5	166.4	2.74	2.70	2.67	2.63	2.59	2.56	2.52	2.48	2.45	2.41	2.38	2.34	2.30	2.27	2.23	2.19	2.16
66.0	167.6	2.80	2.76	2.72	2.69	2.65	2.62	2.58	2.54	2.51	2.47	2.43	2.40	2.36	2.32	2.29	2.25	2.21
66.5	168.9	2.86	2.82	2.78	2.75	2.71	2.67	2.64	2.60	2.56	2.53	2.49	2.46	2.42	2.38	2.35	2.31	2.27
67.0	170.2	2.92	2.88	2.84	2.81	2.77	2.73	2.70	2.66	2.62	2.59	2.55	2.52	2.48	2.44	2.41	2.37	2.33
67.5	171.5	2.98	2.94	2.90	2.87	2.83	2.79	2.76	2.72	2.69	2.65	2.61	2.58	2.54	2.50	2.47	2.43	2.39
68.0	172.7	3.03	3.00	2.96	2.92	2.89	2.85	2.81	2.78	2.74	2.71	2.67	2.63	2.60	2.56	2.52	2.49	2.45

68.5	174.0	3.09	3.06	3.02	2.99	2.95	2.91	2.88	2.84	2.80	2.77	2.73	2.69	2.66	2.62	2.58	2.55	2.51
69.0	175.3	3.16	3.12	3.08	3.05	3.01	2.97	2.94	2.90	2.87	2.83	2.79	2.76	2.72	2.68	2.65	2.61	2.57
69.5	176.5	3.21	3.18	3.14	3.11	3.07	3.03	3.00	2.96	2.92	2.89	2.85	2.81	2.78	2.74	2.70	2.67	2.63
70.0	177.8	3.28	3.24	3.20	3.17	3.13	3.10	3.06	3.02	2.99	2.95	2.91	2.88	2.84	2.80	2.77	2.73	2.69
70.5	179.1	3.34	3.30	3.27	3.23	3.20	3.16	3.12	3.09	3.05	3.01	2.98	2.94	2.90	2.87	2.83	2.79	2.76
71.0	180.3	3.40	3.36	3.33	3.29	3.25	3.22	3.18	3.14	3.11	3.07	3.04	3.00	2.96	2.93	2.89	2.85	2.82
71.5	181.6	3.46	3.43	3.39	3.35	3.32	3.28	3.25	3.21	3.17	3.14	3.10	3.06	3.03	2.99	2.95	2.92	2.88
72.0	182.9	3.53	3.49	3.46	3.42	3.38	3.35	3.31	3.27	3.24	3.20	3.16	3.13	3.09	3.06	3.02	2.98	2.95
72.5	184.2	3.59	3.56	3.52	3.48	3.45	3.41	3.38	3.34	3.30	3.27	3.23	3.19	3.16	3.12	3.08	3.05	3.01
73.0	185.4	3.65	3.62	3.58	3.55	3.51	3.47	3.44	3.40	3.36	3.33	3.29	3.25	3.22	3.18	3.14	3.11	3.07
73.5	186.7	3.72	3.68	3.65	3.61	3.58	3.54	3.50	3.47	3.43	3.39	3.36	3.32	3.28	3.25	3.21	3.17	3.14
74.0	188.0	3.79	3.75	3.71	3.68	3.64	3.61	3.57	3.53	3.50	3.46	3.42	3.39	3.35	3.31	3.28	3.24	3.20
74.5	189.2	3.85	3.81	3.78	3.74	3.70	3.67	3.63	3.59	3.56	3.52	3.49	3.45	3.41	3.38	3.34	3.30	3.27
75.0	190.5	3.92	3.88	3.84	3.81	3.77	3.73	3.70	3.66	3.63	3.59	3.55	3.52	3.48	3.44	3.41	3.37	3.33
75.5	191.8	3.98	3.95	3.91	3.88	3.84	3.80	3.77	3.73	3.69	3.66	3.62	3.58	3.55	3.51	3.47	3.44	3.40
76.0	193.0	4.05	4.01	3.98	3.94	3.90	3.87	3.83	3.79	3.76	3.72	3.68	3.65	3.61	3.57	3.54	3.50	3.47
76.5	194.3	4.12	4.08	4.04	4.01	3.97	3.93	3.90	3.86	3.83	3.79	3.75	3.72	3.68	3.64	3.61	3.57	3.53
77.0	195.6	4.19	4.15	4.11	4.08	4.04	4.00	3.97	3.93	3.89	3.86	3.82	3.79	3.75	3.71	3.68	3.64	3.60
77.5	196.9	4.26	4.22	4.18	4.15	4.11	4.07	4.04	4.00	3.96	3.93	3.89	3.86	3.82	3.78	3.75	3.71	3.67
78.0	198.1	4.32	4.28	4.25	4.21	4.17	4.14	4.10	4.07	4.03	3.99	3.96	3.92	3.88	3.85	3.81	3.77	3.74
78.5	199.4	4.39	4.35	4.32	4.28	4.25	4.21	4.17	4.14	4.10	4.06	4.03	3.99	3.95	3.92	3.88	3.84	3.81
79.0	200.7	4.46	4.43	4.39	4.35	4.32	4.28	4.24	4.21	4.17	4.13	4.10	4.06	4.03	3.99	3.95	3.92	3.88
79.5	201.9	4.53	4.49	4.46	4.42	4.38	4.35	4.31	4.27	4.24	4.20	4.16	4.13	4.09	4.05	4.02	3.98	3.95
80.0	203.2	4.60	4.56	4.53	4.49	4.45	4.42	4.38	4.35	4.31	4.27	4.24	4.20	4.16	4.13	4.09	4.05	4.02
80.5	204.5	4.67	4.64	4.60	4.56	4.53	4.49	4.45	4.42	4.38	4.35	4.31	4.27	4.24	4.20	4.16	4.13	4.09
81.0	205.7	4.74	4.70	4.67	4.63	4.59	4.56	4.52	4.49	4.45	4.41	4.38	4.34	4.30	4.27	4.23	4.19	4.16
81.5	207.0	4.81	4.78	4.74	4.70	4.67	4.63	4.59	4.56	4.52	4.49	4.45	4.41	4.38	4.34	4.30	4.27	4.23
82.0	208.3	4.89	4.85	4.81	4.78	4.74	4.71	4.67	4.63	4.60	4.56	4.52	4.49	4.45	4.41	4.38	4.34	4.30
82.5	209.6	4.96	4.93	4.89	4.85	4.82	4.78	4.74	4.71	4.67	4.63	4.60	4.56	4.52	4.49	4.45	4.42	4.38

TABLE 3A—AFRICAN AMERICAN MALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: 0.3411 + (−0.02309)(age) + (0.00010561)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	1.74	1.70	1.65	1.61	1.56	1.51	1.47	1.42	1.37	1.33	1.28	1.24	1.19	1.14	1.10	1.05	1.00
61.5	156.2	1.79	1.74	1.69	1.65	1.60	1.56	1.51	1.46	1.42	1.37	1.32	1.28	1.23	1.19	1.14	1.09	1.05
62.0	157.5	1.83	1.78	1.74	1.69	1.64	1.60	1.55	1.51	1.46	1.41	1.37	1.32	1.28	1.23	1.18	1.14	1.09
62.5	158.8	1.87	1.83	1.78	1.73	1.69	1.64	1.60	1.55	1.50	1.46	1.41	1.36	1.32	1.27	1.23	1.18	1.13
63.0	160.0	1.91	1.87	1.82	1.77	1.73	1.68	1.64	1.59	1.54	1.50	1.45	1.41	1.36	1.31	1.27	1.22	1.17
63.5	161.3	1.96	1.91	1.87	1.82	1.77	1.73	1.68	1.63	1.59	1.54	1.50	1.45	1.40	1.36	1.31	1.26	1.22
64.0	162.6	2.00	1.96	1.91	1.86	1.82	1.77	1.72	1.68	1.63	1.59	1.54	1.49	1.45	1.40	1.36	1.31	1.26
64.5	163.8	2.04	2.00	1.95	1.90	1.86	1.81	1.77	1.72	1.67	1.63	1.58	1.54	1.49	1.44	1.40	1.35	1.30
65.0	165.1	2.09	2.04	2.00	1.95	1.90	1.86	1.81	1.77	1.72	1.67	1.63	1.58	1.53	1.49	1.44	1.40	1.35
65.5	166.4	2.13	2.09	2.04	1.99	1.95	1.90	1.86	1.81	1.76	1.72	1.67	1.62	1.58	1.53	1.49	1.44	1.39
66.0	167.6	2.18	2.13	2.09	2.04	1.99	1.95	1.90	1.85	1.81	1.76	1.72	1.67	1.62	1.58	1.53	1.48	1.44
66.5	168.9	2.22	2.18	2.13	2.08	2.04	1.99	1.95	1.90	1.85	1.81	1.76	1.71	1.67	1.62	1.58	1.53	1.48

TABLE 3A—AFRICAN AMERICAN MALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)—Continued

[Reference value equation: 0.3411 + (−0.02309)(age) + (0.00010561)(height²)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
67.0	170.2	2.27	2.22	2.18	2.13	2.08	2.04	1.99	1.95	1.90	1.85	1.81	1.76	1.71	1.67	1.62	1.58	1.53
67.5	171.5	2.32	2.27	2.22	2.18	2.13	2.09	2.04	1.99	1.95	1.90	1.85	1.81	1.76	1.72	1.67	1.62	1.58
68.0	172.7	2.36	2.31	2.27	2.22	2.17	2.13	2.08	2.04	1.99	1.94	1.90	1.85	1.81	1.76	1.71	1.67	1.62
68.5	174.0	2.41	2.36	2.31	2.27	2.22	2.18	2.13	2.08	2.04	1.99	1.95	1.90	1.85	1.81	1.76	1.71	1.67
69.0	175.3	2.46	2.41	2.36	2.32	2.27	2.22	2.18	2.13	2.09	2.04	1.99	1.95	1.90	1.85	1.81	1.76	1.72
69.5	176.5	2.50	2.45	2.41	2.36	2.31	2.27	2.22	2.18	2.13	2.08	2.04	1.99	1.95	1.90	1.85	1.81	1.76
70.0	177.8	2.55	2.50	2.46	2.41	2.36	2.32	2.27	2.23	2.18	2.13	2.09	2.04	1.99	1.95	1.90	1.86	1.81
70.5	179.1	2.60	2.55	2.50	2.46	2.41	2.37	2.32	2.27	2.23	2.18	2.14	2.09	2.04	2.00	1.95	1.90	1.86
71.0	180.3	2.64	2.60	2.55	2.50	2.46	2.41	2.37	2.32	2.27	2.23	2.18	2.13	2.09	2.04	2.00	1.95	1.90
71.5	181.6	2.69	2.65	2.60	2.55	2.51	2.46	2.42	2.37	2.32	2.28	2.23	2.18	2.14	2.09	2.05	2.00	1.95
72.0	182.9	2.74	2.70	2.65	2.60	2.56	2.51	2.47	2.42	2.37	2.33	2.28	2.23	2.19	2.14	2.10	2.05	2.00
72.5	184.2	2.79	2.75	2.70	2.65	2.61	2.56	2.52	2.47	2.42	2.38	2.33	2.29	2.24	2.19	2.15	2.10	2.05
73.0	185.4	2.84	2.79	2.75	2.70	2.66	2.61	2.56	2.52	2.47	2.42	2.38	2.33	2.29	2.24	2.19	2.15	2.10
73.5	186.7	2.89	2.84	2.80	2.75	2.71	2.66	2.61	2.57	2.52	2.48	2.43	2.38	2.34	2.29	2.24	2.20	2.15
74.0	188.0	2.94	2.90	2.85	2.80	2.76	2.71	2.67	2.62	2.57	2.53	2.48	2.43	2.39	2.34	2.30	2.25	2.20
74.5	189.2	2.99	2.94	2.90	2.85	2.81	2.76	2.71	2.67	2.62	2.57	2.53	2.48	2.44	2.39	2.34	2.30	2.25
75.0	190.5	3.04	3.00	2.95	2.90	2.86	2.81	2.77	2.72	2.67	2.63	2.58	2.53	2.49	2.44	2.40	2.35	2.30
75.5	191.8	3.09	3.05	3.00	2.96	2.91	2.86	2.82	2.77	2.73	2.68	2.63	2.59	2.54	2.49	2.45	2.40	2.36
76.0	193.0	3.14	3.10	3.05	3.01	2.96	2.91	2.87	2.82	2.77	2.73	2.68	2.64	2.59	2.54	2.50	2.45	2.40
76.5	194.3	3.20	3.15	3.10	3.06	3.01	2.97	2.92	2.87	2.83	2.78	2.73	2.69	2.64	2.60	2.55	2.50	2.46
77.0	195.6	3.25	3.20	3.16	3.11	3.07	3.02	2.97	2.93	2.88	2.83	2.79	2.74	2.70	2.65	2.60	2.56	2.51
77.5	196.9	3.30	3.26	3.21	3.17	3.12	3.07	3.03	2.98	2.93	2.89	2.84	2.80	2.75	2.70	2.66	2.61	2.57
78.0	198.1	3.35	3.31	3.26	3.22	3.17	3.12	3.08	3.03	2.98	2.94	2.89	2.85	2.80	2.75	2.71	2.66	2.62
78.5	199.4	3.41	3.36	3.32	3.27	3.22	3.18	3.13	3.09	3.04	2.99	2.95	2.90	2.85	2.81	2.76	2.72	2.67
79.0	200.7	3.46	3.42	3.37	3.33	3.28	3.23	3.19	3.14	3.09	3.05	3.00	2.96	2.91	2.86	2.82	2.77	2.72
79.5	201.9	3.51	3.47	3.42	3.38	3.33	3.28	3.24	3.19	3.15	3.10	3.05	3.01	2.96	2.91	2.87	2.82	2.78
80.0	203.2	3.57	3.52	3.48	3.43	3.39	3.34	3.29	3.25	3.20	3.15	3.11	3.06	3.02	2.97	2.92	2.88	2.83
80.5	204.5	3.63	3.58	3.53	3.49	3.44	3.40	3.35	3.30	3.26	3.21	3.16	3.12	3.07	3.03	2.98	2.93	2.89
81.0	205.7	3.68	3.63	3.59	3.54	3.49	3.45	3.40	3.36	3.31	3.26	3.22	3.17	3.12	3.08	3.03	2.99	2.94
81.5	207.0	3.73	3.69	3.64	3.60	3.55	3.50	3.46	3.41	3.37	3.32	3.27	3.23	3.18	3.13	3.09	3.04	3.00
82.0	208.3	3.79	3.75	3.70	3.65	3.61	3.56	3.51	3.47	3.42	3.38	3.33	3.28	3.24	3.19	3.15	3.10	3.05
82.5	209.6	3.85	3.80	3.76	3.71	3.66	3.62	3.57	3.53	3.48	3.43	3.39	3.34	3.30	3.25	3.20	3.16	3.11

TABLE 4—AFRICAN AMERICAN FEMALES FVC LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: −0.3039 + (0.00536)(age) + (−0.000265)(age²) + (0.00010916)(height²)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	1.94	1.90	1.85	1.81	1.76	1.71	1.66	1.60	1.54	1.48	1.42	1.36	1.29	1.23	1.16	1.08	1.01
61.5	156.2	1.99	1.94	1.90	1.85	1.80	1.75	1.70	1.65	1.59	1.53	1.47	1.40	1.34	1.27	1.20	1.13	1.05

62.0	157.5	2.03	1.99	1.94	1.90	1.85	1.80	1.74	1.69	1.63	1.57	1.51	1.45	1.38	1.32	1.25	1.17	1.10
62.5	158.8	2.08	2.03	1.99	1.94	1.89	1.84	1.79	1.73	1.68	1.62	1.56	1.49	1.43	1.36	1.29	1.22	1.14
63.0	160.0	2.12	2.07	2.03	1.98	1.94	1.88	1.83	1.78	1.72	1.66	1.60	1.54	1.47	1.40	1.33	1.26	1.19
63.5	161.3	2.16	2.12	2.08	2.03	1.98	1.93	1.88	1.82	1.76	1.71	1.64	1.58	1.52	1.45	1.38	1.31	1.23
64.0	162.6	2.21	2.17	2.12	2.08	2.03	1.98	1.92	1.87	1.81	1.75	1.69	1.63	1.56	1.49	1.42	1.35	1.28
64.5	163.8	2.25	2.21	2.16	2.12	2.07	2.02	1.97	1.91	1.85	1.79	1.73	1.67	1.60	1.54	1.47	1.39	1.32
65.0	165.1	2.30	2.26	2.21	2.16	2.12	2.07	2.01	1.96	1.90	1.84	1.78	1.72	1.65	1.58	1.51	1.44	1.37
65.5	166.4	2.34	2.30	2.26	2.21	2.16	2.11	2.06	2.00	1.95	1.89	1.83	1.76	1.70	1.63	1.56	1.49	1.41
66.0	167.6	2.39	2.35	2.30	2.26	2.21	2.16	2.10	2.05	1.99	1.93	1.87	1.81	1.74	1.68	1.61	1.53	1.46
66.5	168.9	2.44	2.39	2.35	2.30	2.26	2.20	2.15	2.10	2.04	1.98	1.92	1.86	1.79	1.72	1.65	1.58	1.51
67.0	170.2	2.48	2.44	2.40	2.35	2.30	2.25	2.20	2.14	2.09	2.03	1.97	1.90	1.84	1.77	1.70	1.63	1.55
67.5	171.5	2.53	2.49	2.45	2.40	2.35	2.30	2.25	2.19	2.14	2.08	2.01	1.95	1.89	1.82	1.75	1.68	1.60
68.0	172.7	2.58	2.54	2.49	2.45	2.40	2.35	2.29	2.24	2.18	2.12	2.06	2.00	1.93	1.86	1.79	1.72	1.65
68.5	174.0	2.63	2.59	2.54	2.49	2.45	2.39	2.34	2.29	2.23	2.17	2.11	2.05	1.98	1.91	1.84	1.77	1.70
69.0	175.3	2.68	2.63	2.59	2.54	2.50	2.44	2.39	2.34	2.28	2.22	2.16	2.10	2.03	1.96	1.89	1.82	1.75
69.5	176.5	2.72	2.68	2.64	2.59	2.54	2.49	2.44	2.38	2.33	2.27	2.20	2.14	2.08	2.01	1.94	1.87	1.79
70.0	177.8	2.77	2.73	2.69	2.64	2.59	2.54	2.49	2.43	2.38	2.32	2.26	2.19	2.13	2.06	1.99	1.92	1.84
70.5	179.1	2.82	2.78	2.74	2.69	2.64	2.59	2.54	2.48	2.43	2.37	2.31	2.24	2.18	2.11	2.04	1.97	1.89
71.0	180.3	2.87	2.83	2.78	2.74	2.69	2.64	2.59	2.53	2.47	2.41	2.35	2.29	2.22	2.16	2.09	2.01	1.94
71.5	181.6	2.92	2.88	2.84	2.79	2.74	2.69	2.64	2.58	2.52	2.47	2.40	2.34	2.28	2.21	2.14	2.07	1.99
72.0	182.9	2.97	2.93	2.89	2.84	2.79	2.74	2.69	2.63	2.58	2.52	2.46	2.39	2.33	2.26	2.19	2.12	2.04
72.5	184.2	3.03	2.98	2.94	2.89	2.84	2.79	2.74	2.69	2.63	2.57	2.51	2.44	2.38	2.31	2.24	2.17	2.10
73.0	185.4	3.07	3.03	2.99	2.94	2.89	2.84	2.79	2.73	2.68	2.62	2.56	2.49	2.43	2.36	2.29	2.22	2.14
73.5	186.7	3.13	3.09	3.04	2.99	2.95	2.89	2.84	2.79	2.73	2.67	2.61	2.55	2.48	2.41	2.34	2.27	2.20
74.0	188.0	3.18	3.14	3.09	3.05	3.00	2.95	2.90	2.84	2.78	2.72	2.66	2.60	2.53	2.47	2.40	2.32	2.25
74.5	189.2	3.23	3.19	3.14	3.10	3.05	3.00	2.94	2.89	2.83	2.77	2.71	2.65	2.58	2.52	2.45	2.37	2.30
75.0	190.5	3.28	3.24	3.20	3.15	3.10	3.05	3.00	2.94	2.89	2.83	2.77	2.70	2.64	2.57	2.50	2.43	2.35
75.5	191.8	3.34	3.30	3.25	3.20	3.16	3.11	3.05	3.00	2.94	2.88	2.82	2.76	2.69	2.62	2.55	2.48	2.41
76.0	193.0	3.39	3.35	3.30	3.26	3.21	3.16	3.10	3.05	2.99	2.93	2.87	2.81	2.74	2.67	2.60	2.53	2.46
76.5	194.3	3.44	3.40	3.36	3.31	3.26	3.21	3.16	3.10	3.05	2.99	2.93	2.86	2.80	2.73	2.66	2.59	2.51
77.0	195.6	3.50	3.46	3.41	3.37	3.32	3.27	3.21	3.16	3.10	3.04	2.98	2.92	2.85	2.78	2.71	2.64	2.57
77.5	196.9	3.55	3.51	3.47	3.42	3.37	3.32	3.27	3.21	3.16	3.10	3.04	2.97	2.91	2.84	2.77	2.70	2.62
78.0	198.1	3.61	3.56	3.52	3.47	3.42	3.37	3.32	3.27	3.21	3.15	3.09	3.02	2.96	2.89	2.82	2.75	2.68
78.5	199.4	3.66	3.62	3.58	3.53	3.48	3.43	3.38	3.32	3.27	3.21	3.14	3.08	3.02	2.95	2.88	2.81	2.73
79.0	200.7	3.72	3.68	3.63	3.59	3.54	3.49	3.43	3.38	3.32	3.26	3.20	3.14	3.07	3.00	2.93	2.86	2.79
79.5	201.9	3.77	3.73	3.69	3.64	3.59	3.54	3.49	3.43	3.37	3.32	3.25	3.19	3.12	3.06	2.99	2.92	2.84
80.0	203.2	3.83	3.79	3.74	3.70	3.65	3.60	3.54	3.49	3.43	3.37	3.31	3.25	3.18	3.11	3.04	2.97	2.90
80.5	204.5	3.89	3.85	3.80	3.75	3.71	3.65	3.60	3.55	3.49	3.43	3.37	3.31	3.24	3.17	3.10	3.03	2.96
81.0	205.7	3.94	3.90	3.85	3.81	3.76	3.71	3.66	3.60	3.54	3.48	3.42	3.36	3.29	3.23	3.16	3.08	3.01
81.5	207.0	4.00	3.96	3.91	3.87	3.82	3.77	3.71	3.66	3.60	3.54	3.48	3.42	3.35	3.28	3.22	3.14	3.07
82.0	208.3	4.06	4.02	3.97	3.93	3.88	3.83	3.77	3.72	3.66	3.60	3.54	3.48	3.41	3.34	3.27	3.20	3.13
82.5	209.6	4.12	4.08	4.03	3.98	3.94	3.89	3.83	3.78	3.72	3.66	3.60	3.54	3.47	3.40	3.33	3.26	3.19

TABLE 4A—AFRICAN AMERICAN FEMALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: 0.3433 + (−0.01283)(age) + (−0.000097)(age^2) + (0.00008546)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	1.53	1.49	1.44	1.39	1.35	1.30	1.25	1.20	1.15	1.10	1.05	0.99	0.94	0.89	0.83	0.77	0.72
61.5	156.2	1.57	1.52	1.48	1.43	1.38	1.33	1.28	1.24	1.18	1.13	1.08	1.03	0.97	0.92	0.87	0.81	0.75
62.0	157.5	1.60	1.56	1.51	1.46	1.42	1.37	1.32	1.27	1.22	1.17	1.12	1.06	1.01	0.96	0.90	0.84	0.79
62.5	158.8	1.64	1.59	1.55	1.50	1.45	1.40	1.35	1.31	1.25	1.20	1.15	1.10	1.04	0.99	0.94	0.88	0.82
63.0	160.0	1.67	1.62	1.58	1.53	1.48	1.44	1.39	1.34	1.29	1.24	1.18	1.13	1.08	1.02	0.97	0.91	0.86
63.5	161.3	1.71	1.66	1.61	1.57	1.52	1.47	1.42	1.37	1.32	1.27	1.22	1.17	1.11	1.06	1.00	0.95	0.89
64.0	162.6	1.74	1.70	1.65	1.60	1.56	1.51	1.46	1.41	1.36	1.31	1.26	1.20	1.15	1.09	1.04	0.98	0.93
64.5	163.8	1.77	1.73	1.68	1.64	1.59	1.54	1.49	1.44	1.39	1.34	1.29	1.24	1.18	1.13	1.07	1.02	0.96
65.0	165.1	1.81	1.77	1.72	1.67	1.63	1.58	1.53	1.48	1.43	1.38	1.33	1.27	1.22	1.16	1.11	1.05	1.00
65.5	166.4	1.85	1.80	1.76	1.71	1.66	1.61	1.57	1.52	1.46	1.41	1.36	1.31	1.26	1.20	1.15	1.09	1.03
66.0	167.6	1.88	1.84	1.79	1.75	1.70	1.65	1.60	1.55	1.50	1.45	1.40	1.35	1.29	1.24	1.18	1.13	1.07
66.5	168.9	1.92	1.87	1.83	1.78	1.74	1.69	1.64	1.59	1.54	1.49	1.43	1.38	1.33	1.27	1.22	1.16	1.11
67.0	170.2	1.96	1.91	1.87	1.82	1.77	1.72	1.68	1.63	1.58	1.52	1.47	1.42	1.37	1.31	1.26	1.20	1.14
67.5	171.5	2.00	1.95	1.90	1.86	1.81	1.76	1.71	1.66	1.61	1.56	1.51	1.46	1.40	1.35	1.29	1.24	1.18
68.0	172.7	2.03	1.99	1.94	1.89	1.85	1.80	1.75	1.70	1.65	1.60	1.55	1.49	1.44	1.38	1.33	1.27	1.22
68.5	174.0	2.07	2.02	1.98	1.93	1.88	1.84	1.79	1.74	1.69	1.64	1.58	1.53	1.48	1.42	1.37	1.31	1.26
69.0	175.3	2.11	2.06	2.02	1.97	1.92	1.87	1.83	1.78	1.73	1.67	1.62	1.57	1.52	1.46	1.41	1.35	1.29
69.5	176.5	2.14	2.10	2.05	2.01	1.96	1.91	1.86	1.81	1.76	1.71	1.66	1.61	1.55	1.50	1.44	1.39	1.33
70.0	177.8	2.18	2.14	2.09	2.05	2.00	1.95	1.90	1.85	1.80	1.75	1.70	1.65	1.59	1.54	1.48	1.43	1.37
70.5	179.1	2.22	2.18	2.13	2.09	2.04	1.99	1.94	1.89	1.84	1.79	1.74	1.68	1.63	1.58	1.52	1.47	1.41
71.0	180.3	2.26	2.21	2.17	2.12	2.07	2.03	1.98	1.93	1.88	1.83	1.77	1.72	1.67	1.61	1.56	1.50	1.45
71.5	181.6	2.30	2.26	2.21	2.16	2.12	2.07	2.02	1.97	1.92	1.87	1.81	1.76	1.71	1.65	1.60	1.54	1.49
72.0	182.9	2.34	2.30	2.25	2.20	2.16	2.11	2.06	2.01	1.96	1.91	1.86	1.80	1.75	1.69	1.64	1.58	1.53
72.5	184.2	2.38	2.34	2.29	2.24	2.20	2.15	2.10	2.05	2.00	1.95	1.90	1.84	1.79	1.74	1.68	1.62	1.57
73.0	185.4	2.42	2.37	2.33	2.28	2.23	2.19	2.14	2.09	2.04	1.99	1.93	1.88	1.83	1.77	1.72	1.66	1.61
73.5	186.7	2.46	2.42	2.37	2.32	2.28	2.23	2.18	2.13	2.08	2.03	1.98	1.92	1.87	1.81	1.76	1.70	1.65
74.0	188.0	2.50	2.46	2.41	2.36	2.32	2.27	2.22	2.17	2.12	2.07	2.02	1.96	1.91	1.86	1.80	1.74	1.69
74.5	189.2	2.54	2.50	2.45	2.40	2.36	2.31	2.26	2.21	2.16	2.11	2.06	2.00	1.95	1.89	1.84	1.78	1.73
75.0	190.5	2.58	2.54	2.49	2.45	2.40	2.35	2.30	2.25	2.20	2.15	2.10	2.04	1.99	1.94	1.88	1.83	1.77
75.5	191.8	2.63	2.58	2.53	2.49	2.44	2.39	2.34	2.29	2.24	2.19	2.14	2.09	2.03	1.98	1.92	1.87	1.81
76.0	193.0	2.67	2.62	2.57	2.53	2.48	2.43	2.38	2.33	2.28	2.23	2.18	2.13	2.07	2.02	1.96	1.91	1.85
76.5	194.3	2.71	2.66	2.62	2.57	2.52	2.48	2.43	2.38	2.33	2.27	2.22	2.17	2.12	2.06	2.01	1.95	1.89
77.0	195.6	2.75	2.71	2.66	2.61	2.57	2.52	2.47	2.42	2.37	2.32	2.27	2.21	2.16	2.11	2.05	1.99	1.94
77.5	196.9	2.79	2.75	2.70	2.66	2.61	2.56	2.51	2.46	2.41	2.36	2.31	2.26	2.20	2.15	2.09	2.04	1.98
78.0	198.1	2.84	2.79	2.74	2.70	2.65	2.60	2.55	2.50	2.45	2.40	2.35	2.30	2.24	2.19	2.13	2.08	2.02
78.5	199.4	2.88	2.83	2.79	2.74	2.69	2.65	2.60	2.55	2.50	2.45	2.39	2.34	2.29	2.23	2.18	2.12	2.07
79.0	200.7	2.92	2.88	2.83	2.79	2.74	2.69	2.64	2.59	2.54	2.49	2.44	2.39	2.33	2.28	2.22	2.17	2.11
79.5	201.9	2.97	2.92	2.87	2.83	2.78	2.73	2.68	2.63	2.58	2.53	2.48	2.43	2.37	2.32	2.26	2.21	2.15
80.0	203.2	3.01	2.97	2.92	2.87	2.83	2.78	2.73	2.68	2.63	2.58	2.52	2.47	2.42	2.36	2.31	2.25	2.20
80.5	204.5	3.06	3.01	2.96	2.92	2.87	2.82	2.77	2.72	2.67	2.62	2.57	2.52	2.46	2.41	2.35	2.30	2.24
81.0	205.7	3.10	3.05	3.01	2.96	2.91	2.86	2.82	2.77	2.72	2.66	2.61	2.56	2.51	2.45	2.40	2.34	2.28
81.5	207.0	3.14	3.10	3.05	3.01	2.96	2.91	2.86	2.81	2.76	2.71	2.66	2.61	2.55	2.50	2.44	2.39	2.33
82.0	208.3	3.19	3.14	3.10	3.05	3.00	2.96	2.91	2.86	2.81	2.76	2.70	2.65	2.60	2.54	2.49	2.43	2.38

82.5	209.6	3.24	3.19	3.15	3.10	3.05	3.00	2.95	2.90	2.85	2.80	2.75	2.70	2.64	2.59	2.53	2.48	2.42

TABLE 5—MEXICAN AMERICAN MALES FVC LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: 0.2376 + (−0.00891)(age) + (−0.00182)(age^2) + (0.0014947)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.95	2.90	2.84	2.78	2.72	2.66	2.60	2.54	2.48	2.41	2.34	2.27	2.20	2.13	2.06	1.98	1.91
61.5	156.2	3.01	2.96	2.90	2.84	2.79	2.73	2.66	2.60	2.54	2.47	2.40	2.33	2.26	2.19	2.12	2.04	1.97
62.0	157.5	3.07	3.02	2.96	2.90	2.85	2.79	2.72	2.66	2.60	2.53	2.46	2.40	2.33	2.25	2.18	2.11	2.03
62.5	158.8	3.13	3.08	3.02	2.97	2.91	2.85	2.79	2.72	2.66	2.59	2.53	2.46	2.39	2.31	2.24	2.17	2.09
63.0	160.0	3.19	3.14	3.08	3.02	2.96	2.90	2.84	2.78	2.72	2.65	2.58	2.51	2.44	2.37	2.30	2.22	2.15
63.5	161.3	3.25	3.20	3.14	3.09	3.03	2.97	2.91	2.84	2.78	2.71	2.65	2.58	2.51	2.43	2.36	2.29	2.21
64.0	162.6	3.32	3.26	3.21	3.15	3.09	3.03	2.97	2.91	2.84	2.78	2.71	2.64	2.57	2.50	2.42	2.35	2.27
64.5	163.8	3.37	3.32	3.26	3.21	3.15	3.09	3.03	2.96	2.90	2.83	2.77	2.70	2.63	2.56	2.48	2.41	2.33
65.0	165.1	3.44	3.38	3.33	3.27	3.21	3.15	3.09	3.03	2.96	2.90	2.83	2.76	2.69	2.62	2.55	2.47	2.40
65.5	166.4	3.50	3.45	3.39	3.33	3.28	3.22	3.15	3.09	3.03	2.96	2.89	2.82	2.75	2.68	2.61	2.54	2.46
66.0	167.6	3.56	3.51	3.45	3.40	3.34	3.28	3.22	3.15	3.09	3.02	2.96	2.89	2.82	2.75	2.67	2.60	2.52
66.5	168.9	3.63	3.57	3.52	3.46	3.40	3.34	3.28	3.22	3.15	3.09	3.02	2.95	2.88	2.81	2.74	2.66	2.59
67.0	170.2	3.69	3.64	3.58	3.53	3.47	3.41	3.35	3.28	3.22	3.15	3.09	3.02	2.95	2.88	2.80	2.73	2.65
67.5	171.5	3.76	3.71	3.65	3.59	3.53	3.47	3.41	3.35	3.29	3.22	3.15	3.08	3.01	2.94	2.87	2.79	2.72
68.0	172.7	3.82	3.77	3.71	3.65	3.60	3.54	3.47	3.41	3.35	3.28	3.21	3.15	3.08	3.00	2.93	2.86	2.78
68.5	174.0	3.89	3.84	3.78	3.72	3.66	3.60	3.54	3.48	3.41	3.35	3.28	3.21	3.14	3.07	3.00	2.92	2.85
69.0	175.3	3.96	3.90	3.85	3.79	3.73	3.67	3.61	3.55	3.48	3.42	3.35	3.28	3.21	3.14	3.07	2.99	2.92
69.5	176.5	4.02	3.97	3.91	3.85	3.79	3.73	3.67	3.61	3.55	3.48	3.41	3.34	3.27	3.20	3.13	3.05	2.98
70.0	177.8	4.09	4.03	3.98	3.92	3.86	3.80	3.74	3.68	3.61	3.55	3.48	3.41	3.34	3.27	3.20	3.12	3.05
70.5	179.1	4.16	4.10	4.05	3.99	3.93	3.87	3.81	3.75	3.68	3.62	3.55	3.48	3.41	3.34	3.27	3.19	3.12
71.0	180.3	4.22	4.17	4.11	4.06	4.00	3.94	3.88	3.81	3.75	3.68	3.62	3.55	3.48	3.40	3.33	3.26	3.18
71.5	181.6	4.29	4.24	4.18	4.13	4.07	4.01	3.95	3.88	3.82	3.75	3.69	3.62	3.55	3.47	3.40	3.33	3.25
72.0	182.9	4.36	4.31	4.25	4.20	4.14	4.08	4.02	3.95	3.89	3.82	3.76	3.69	3.62	3.55	3.47	3.40	3.32
72.5	184.2	4.44	4.38	4.33	4.27	4.21	4.15	4.09	4.03	3.96	3.90	3.83	3.76	3.69	3.62	3.54	3.47	3.39
73.0	185.4	4.50	4.45	4.39	4.33	4.28	4.22	4.15	4.09	4.03	3.96	3.89	3.83	3.76	3.68	3.61	3.54	3.46
73.5	186.7	4.57	4.52	4.46	4.41	4.35	4.29	4.23	4.16	4.10	4.03	3.97	3.90	3.83	3.76	3.68	3.61	3.53
74.0	188.0	4.65	4.59	4.54	4.48	4.42	4.36	4.30	4.24	4.17	4.11	4.04	3.97	3.90	3.83	3.76	3.68	3.60
74.5	189.2	4.71	4.66	4.60	4.55	4.49	4.43	4.37	4.30	4.24	4.17	4.11	4.04	3.97	3.90	3.82	3.75	3.67
75.0	190.5	4.79	4.73	4.68	4.62	4.56	4.50	4.44	4.38	4.31	4.25	4.18	4.11	4.04	3.97	3.90	3.82	3.75
75.5	191.8	4.86	4.81	4.75	4.70	4.64	4.58	4.52	4.45	4.39	4.32	4.25	4.19	4.12	4.04	3.97	3.90	3.82
76.0	193.0	4.93	4.88	4.82	4.76	4.71	4.65	4.58	4.52	4.46	4.39	4.32	4.26	4.18	4.11	4.04	3.97	3.89
76.5	194.3	5.01	4.95	4.90	4.84	4.78	4.72	4.66	4.60	4.53	4.47	4.40	4.33	4.26	4.19	4.12	4.04	3.96
77.0	195.6	5.08	5.03	4.97	4.92	4.86	4.80	4.74	4.67	4.61	4.54	4.47	4.41	4.34	4.26	4.19	4.12	4.04
77.5	196.9	5.16	5.10	5.05	4.99	4.93	4.87	4.81	4.75	4.68	4.62	4.55	4.48	4.41	4.34	4.27	4.19	4.12
78.0	198.1	5.23	5.18	5.12	5.06	5.00	4.94	4.88	4.82	4.76	4.69	4.62	4.55	4.48	4.41	4.34	4.26	4.19
78.5	199.4	5.31	5.25	5.20	5.14	5.08	5.02	4.96	4.90	4.83	4.77	4.70	4.63	4.56	4.49	4.42	4.34	4.26
79.0	200.7	5.38	5.33	5.27	5.22	5.16	5.10	5.04	4.97	4.91	4.84	4.78	4.71	4.64	4.57	4.49	4.42	4.34
79.5	201.9	5.46	5.40	5.35	5.29	5.23	5.17	5.11	5.05	4.98	4.92	4.85	4.78	4.71	4.64	4.57	4.49	4.41
80.0	203.2	5.54	5.48	5.43	5.37	5.31	5.25	5.19	5.13	5.06	5.00	4.93	4.86	4.79	4.72	4.64	4.57	4.49
80.5	204.5	5.61	5.56	5.51	5.45	5.39	5.33	5.27	5.20	5.14	5.07	5.01	4.94	4.87	4.80	4.72	4.65	4.57

TABLE 5—MEXICAN AMERICAN MALES FVC LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)—Continued

[Reference value equation: 0.2376 + (−0.00891)(age) + (−0.00182)(age²) + (0.0014947)(height²)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
81.0	205.7	5.69	5.63	5.58	5.52	5.46	5.40	5.34	5.28	5.21	5.15	5.08	5.01	4.94	4.87	4.80	4.72	4.65
81.5	207.0	5.77	5.71	5.66	5.60	5.54	5.48	5.42	5.36	5.29	5.23	5.16	5.09	5.02	4.95	4.88	4.80	4.73
82.0	208.3	5.85	5.80	5.74	5.68	5.62	5.56	5.50	5.44	5.37	5.31	5.24	5.17	5.10	5.03	4.96	4.88	4.81
82.5	209.6	5.93	5.88	5.82	5.76	5.70	5.64	5.58	5.52	5.46	5.39	5.32	5.25	5.18	5.11	5.04	4.96	4.89

TABLE 5A—MEXICAN AMERICAN MALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: 0.6306 + (−0.02928)(age) + (0.0001267)(height²)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.24	2.18	2.12	2.06	2.00	1.94	1.88	1.83	1.77	1.71	1.65	1.59	1.53	1.47	1.42	1.36	1.30
61.5	156.2	2.29	2.23	2.17	2.11	2.05	1.99	1.94	1.88	1.82	1.76	1.70	1.64	1.58	1.53	1.47	1.41	1.35
62.0	157.5	2.34	2.28	2.22	2.16	2.10	2.05	1.99	1.93	1.87	1.81	1.75	1.69	1.64	1.58	1.52	1.46	1.40
62.5	158.8	2.39	2.33	2.27	2.22	2.16	2.10	2.04	1.98	1.92	1.86	1.81	1.75	1.69	1.63	1.57	1.51	1.45
63.0	160.0	2.44	2.38	2.32	2.26	2.21	2.15	2.09	2.03	1.97	1.91	1.85	1.80	1.74	1.68	1.62	1.56	1.50
63.5	161.3	2.49	2.43	2.38	2.32	2.26	2.20	2.14	2.08	2.02	1.97	1.91	1.85	1.79	1.73	1.67	1.61	1.56
64.0	162.6	2.55	2.49	2.43	2.37	2.31	2.25	2.19	2.14	2.08	2.02	1.96	1.90	1.84	1.78	1.73	1.67	1.61
64.5	163.8	2.60	2.54	2.48	2.42	2.36	2.30	2.24	2.19	2.13	2.07	2.01	1.95	1.89	1.83	1.78	1.72	1.66
65.0	165.1	2.65	2.59	2.53	2.47	2.42	2.36	2.30	2.24	2.18	2.12	2.06	2.01	1.95	1.89	1.83	1.77	1.71
65.5	166.4	2.70	2.64	2.59	2.53	2.47	2.41	2.35	2.29	2.23	2.18	2.12	2.06	2.00	1.94	1.88	1.82	1.77
66.0	167.6	2.76	2.70	2.64	2.58	2.52	2.46	2.41	2.35	2.29	2.23	2.17	2.11	2.05	2.00	1.94	1.88	1.82
66.5	168.9	2.81	2.75	2.69	2.64	2.58	2.52	2.46	2.40	2.34	2.28	2.23	2.17	2.11	2.05	1.99	1.93	1.87
67.0	170.2	2.87	2.81	2.75	2.69	2.63	2.57	2.51	2.46	2.40	2.34	2.28	2.22	2.16	2.10	2.05	1.99	1.93
67.5	171.5	2.92	2.86	2.81	2.75	2.69	2.63	2.57	2.51	2.45	2.40	2.34	2.28	2.22	2.16	2.10	2.04	1.99
68.0	172.7	2.97	2.92	2.86	2.80	2.74	2.68	2.62	2.56	2.51	2.45	2.39	2.33	2.27	2.21	2.15	2.10	2.04
68.5	174.0	3.03	2.97	2.91	2.86	2.80	2.74	2.68	2.62	2.56	2.50	2.45	2.39	2.33	2.27	2.21	2.15	2.09
69.0	175.3	3.09	3.03	2.97	2.91	2.86	2.80	2.74	2.68	2.62	2.56	2.50	2.45	2.39	2.33	2.27	2.21	2.15
69.5	176.5	3.14	3.08	3.03	2.97	2.91	2.85	2.79	2.73	2.67	2.62	2.56	2.50	2.44	2.38	2.32	2.26	2.21
70.0	177.8	3.20	3.14	3.08	3.03	2.97	2.91	2.85	2.79	2.73	2.67	2.62	2.56	2.50	2.44	2.38	2.32	2.26
70.5	179.1	3.26	3.20	3.14	3.08	3.03	2.97	2.91	2.85	2.79	2.73	2.67	2.62	2.56	2.50	2.44	2.38	2.32
71.0	180.3	3.31	3.26	3.20	3.14	3.08	3.02	2.96	2.90	2.85	2.79	2.73	2.67	2.61	2.55	2.49	2.44	2.38
71.5	181.6	3.37	3.32	3.26	3.20	3.14	3.08	3.02	2.96	2.91	2.85	2.79	2.73	2.67	2.61	2.55	2.50	2.44
72.0	182.9	3.43	3.38	3.32	3.26	3.20	3.14	3.08	3.02	2.97	2.91	2.85	2.79	2.73	2.67	2.61	2.56	2.50
72.5	184.2	3.49	3.44	3.38	3.32	3.26	3.20	3.14	3.08	3.03	2.97	2.91	2.85	2.79	2.73	2.67	2.62	2.56
73.0	185.4	3.55	3.49	3.43	3.38	3.32	3.26	3.20	3.14	3.08	3.02	2.97	2.91	2.85	2.79	2.73	2.67	2.61
73.5	186.7	3.61	3.55	3.50	3.44	3.38	3.32	3.26	3.20	3.14	3.09	3.03	2.97	2.91	2.85	2.79	2.73	2.68
74.0	188.0	3.67	3.62	3.56	3.50	3.44	3.38	3.32	3.26	3.21	3.15	3.09	3.03	2.97	2.91	2.85	2.80	2.74
74.5	189.2	3.73	3.67	3.61	3.56	3.50	3.44	3.38	3.32	3.26	3.20	3.15	3.09	3.03	2.97	2.91	2.85	2.79
75.0	190.5	3.79	3.74	3.68	3.62	3.56	3.50	3.44	3.38	3.33	3.27	3.21	3.15	3.09	3.03	2.97	2.92	2.86
75.5	191.8	3.86	3.80	3.74	3.68	3.62	3.56	3.51	3.45	3.39	3.33	3.27	3.21	3.15	3.10	3.04	2.98	2.92

76.0	193.0	3.92	3.86	3.80	3.74	3.68	3.62	3.56	3.51	3.45	3.39	3.33	3.27	3.21	3.15	3.10	3.04	2.98
76.5	194.3	3.98	3.92	3.86	3.80	3.74	3.69	3.63	3.57	3.51	3.45	3.39	3.33	3.28	3.22	3.16	3.10	3.04
77.0	195.6	4.04	3.98	3.93	3.87	3.81	3.75	3.69	3.63	3.57	3.52	3.46	3.40	3.34	3.28	3.22	3.16	3.11
77.5	196.9	4.11	4.05	3.99	3.93	3.87	3.82	3.76	3.70	3.64	3.58	3.52	3.46	3.41	3.35	3.29	3.23	3.17
78.0	198.1	4.17	4.11	4.05	3.99	3.93	3.88	3.82	3.76	3.70	3.64	3.58	3.52	3.47	3.41	3.35	3.29	3.23
78.5	199.4	4.23	4.17	4.12	4.06	4.00	3.94	3.88	3.82	3.77	3.71	3.65	3.59	3.53	3.47	3.41	3.36	3.30
79.0	200.7	4.30	4.24	4.18	4.12	4.07	4.01	3.95	3.89	3.83	3.77	3.71	3.66	3.60	3.54	3.48	3.42	3.36
79.5	201.9	4.36	4.30	4.24	4.18	4.13	4.07	4.01	3.95	3.89	3.83	3.78	3.72	3.66	3.60	3.54	3.48	3.42
80.0	203.2	4.43	4.37	4.31	4.25	4.19	4.13	4.08	4.02	3.96	3.90	3.84	3.78	3.72	3.67	3.61	3.55	3.49
80.5	204.5	4.49	4.44	4.38	4.32	4.26	4.20	4.14	4.08	4.03	3.97	3.91	3.85	3.79	3.73	3.67	3.62	3.56
81.0	205.7	4.56	4.50	4.44	4.38	4.32	4.26	4.21	4.15	4.09	4.03	3.97	3.91	3.85	3.80	3.74	3.68	3.62
81.5	207.0	4.62	4.57	4.51	4.45	4.39	4.33	4.27	4.21	4.16	4.10	4.04	3.98	3.92	3.86	3.81	3.75	3.69
82.0	208.3	4.69	4.63	4.58	4.52	4.46	4.40	4.34	4.28	4.22	4.17	4.11	4.05	3.99	3.93	3.87	3.81	3.76
82.5	209.6	4.76	4.70	4.64	4.59	4.53	4.47	4.41	4.35	4.29	4.24	4.18	4.12	4.06	4.00	3.94	3.88	3.83

TABLE 6—MEXICAN AMERICAN FEMALES FVC LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: 0.121 + (0.00307)(age) + (−0.000237)(age^2) + (0.00011570)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.48	2.44	2.39	2.35	2.30	2.25	2.20	2.15	2.10	2.04	1.98	1.92	1.86	1.79	1.73	1.66	1.59
61.5	156.2	2.53	2.48	2.44	2.40	2.35	2.30	2.25	2.20	2.14	2.09	2.03	1.97	1.91	1.84	1.78	1.71	1.64
62.0	157.5	2.57	2.53	2.49	2.44	2.40	2.35	2.30	2.24	2.19	2.13	2.07	2.01	1.95	1.89	1.82	1.75	1.68
62.5	158.8	2.62	2.58	2.54	2.49	2.44	2.39	2.34	2.29	2.24	2.18	2.12	2.06	2.00	1.94	1.87	1.80	1.73
63.0	160.0	2.66	2.62	2.58	2.53	2.49	2.44	2.39	2.34	2.28	2.22	2.17	2.11	2.04	1.98	1.91	1.85	1.78
63.5	161.3	2.71	2.67	2.63	2.58	2.54	2.49	2.44	2.38	2.33	2.27	2.21	2.15	2.09	2.03	1.96	1.89	1.82
64.0	162.6	2.76	2.72	2.68	2.63	2.58	2.54	2.49	2.43	2.38	2.32	2.26	2.20	2.14	2.08	2.01	1.94	1.87
64.5	163.8	2.81	2.77	2.72	2.68	2.63	2.58	2.53	2.48	2.42	2.37	2.31	2.25	2.19	2.12	2.06	1.99	1.92
65.0	165.1	2.86	2.81	2.77	2.73	2.68	2.63	2.58	2.53	2.47	2.42	2.36	2.30	2.24	2.17	2.11	2.04	1.97
65.5	166.4	2.90	2.86	2.82	2.78	2.73	2.68	2.63	2.58	2.52	2.47	2.41	2.35	2.28	2.22	2.15	2.09	2.02
66.0	167.6	2.95	2.91	2.87	2.82	2.78	2.73	2.68	2.63	2.57	2.51	2.46	2.40	2.33	2.27	2.20	2.14	2.07
66.5	168.9	3.00	2.96	2.92	2.87	2.83	2.78	2.73	2.67	2.62	2.56	2.51	2.45	2.38	2.32	2.25	2.19	2.12
67.0	170.2	3.05	3.01	2.97	2.92	2.88	2.83	2.78	2.73	2.67	2.61	2.56	2.50	2.43	2.37	2.30	2.24	2.17
67.5	171.5	3.11	3.06	3.02	2.98	2.93	2.88	2.83	2.78	2.72	2.67	2.61	2.55	2.49	2.42	2.36	2.29	2.22
68.0	172.7	3.15	3.11	3.07	3.02	2.98	2.93	2.88	2.82	2.77	2.71	2.66	2.60	2.53	2.47	2.40	2.34	2.27
68.5	174.0	3.21	3.16	3.12	3.08	3.03	2.98	2.93	2.88	2.82	2.77	2.71	2.65	2.59	2.52	2.46	2.39	2.32
69.0	175.3	3.26	3.22	3.17	3.13	3.08	3.03	2.98	2.93	2.87	2.82	2.76	2.70	2.64	2.57	2.51	2.44	2.37
69.5	176.5	3.31	3.27	3.22	3.18	3.13	3.08	3.03	2.98	2.92	2.87	2.81	2.75	2.69	2.62	2.56	2.49	2.42
70.0	177.8	3.36	3.32	3.28	3.23	3.18	3.13	3.08	3.03	2.98	2.92	2.86	2.80	2.74	2.68	2.61	2.54	2.47
70.5	179.1	3.41	3.37	3.33	3.28	3.24	3.19	3.14	3.09	3.03	2.97	2.92	2.86	2.79	2.73	2.66	2.60	2.53
71.0	180.3	3.46	3.42	3.38	3.33	3.29	3.24	3.19	3.13	3.08	3.02	2.97	2.91	2.84	2.78	2.71	2.65	2.58
71.5	181.6	3.52	3.48	3.43	3.39	3.34	3.29	3.24	3.19	3.13	3.08	3.02	2.96	2.90	2.83	2.77	2.70	2.63
72.0	182.9	3.57	3.53	3.49	3.44	3.40	3.35	3.30	3.24	3.19	3.13	3.07	3.01	2.95	2.89	2.82	2.75	2.69
72.5	184.2	3.63	3.59	3.54	3.50	3.45	3.40	3.35	3.30	3.24	3.19	3.13	3.07	3.01	2.94	2.88	2.81	2.74
73.0	185.4	3.68	3.64	3.59	3.55	3.50	3.45	3.40	3.35	3.30	3.24	3.18	3.12	3.06	3.00	2.93	2.86	2.79
73.5	186.7	3.74	3.69	3.65	3.61	3.56	3.51	3.46	3.41	3.35	3.30	3.24	3.18	3.12	3.05	2.99	2.92	2.85
74.0	188.0	3.79	3.75	3.71	3.66	3.62	3.57	3.52	3.46	3.41	3.35	3.29	3.23	3.17	3.11	3.04	2.97	2.90

TABLE 6—MEXICAN AMERICAN FEMALES FVC LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)—Continued

[Reference value equation: 0.121 + (0.00307)(age) + (−0.000237)(age^2) + (0.00011570)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
74.5	189.2	3.84	3.80	3.76	3.71	3.67	3.62	3.57	3.52	3.46	3.40	3.35	3.29	3.22	3.16	3.09	3.03	2.96
75.0	190.5	3.90	3.86	3.82	3.77	3.72	3.68	3.63	3.57	3.52	3.46	3.40	3.34	3.28	3.22	3.15	3.08	3.01
75.5	191.8	3.96	3.92	3.87	3.83	3.78	3.73	3.68	3.63	3.58	3.52	3.46	3.40	3.34	3.27	3.21	3.14	3.07
76.0	193.0	4.01	3.97	3.93	3.88	3.84	3.79	3.74	3.68	3.63	3.57	3.51	3.45	3.39	3.33	3.26	3.19	3.12
76.5	194.3	4.07	4.03	3.99	3.94	3.89	3.85	3.79	3.74	3.69	3.63	3.57	3.51	3.45	3.39	3.32	3.25	3.18
77.0	195.6	4.13	4.09	4.04	4.00	3.95	3.90	3.85	3.80	3.75	3.69	3.63	3.57	3.51	3.44	3.38	3.31	3.24
77.5	196.9	4.19	4.15	4.10	4.06	4.01	3.96	3.91	3.86	3.80	3.75	3.69	3.63	3.57	3.50	3.44	3.37	3.30
78.0	198.1	4.24	4.20	4.16	4.11	4.07	4.02	3.97	3.91	3.86	3.80	3.74	3.68	3.62	3.56	3.49	3.42	3.36
78.5	199.4	4.30	4.26	4.22	4.17	4.13	4.08	4.03	3.97	3.92	3.86	3.80	3.74	3.68	3.62	3.55	3.48	3.41
79.0	200.7	4.36	4.32	4.28	4.23	4.19	4.14	4.09	4.03	3.98	3.92	3.86	3.80	3.74	3.68	3.61	3.54	3.48
79.5	201.9	4.42	4.38	4.33	4.29	4.24	4.19	4.14	4.09	4.04	3.98	3.92	3.86	3.80	3.73	3.67	3.60	3.53
80.0	203.2	4.48	4.44	4.40	4.35	4.30	4.25	4.20	4.15	4.10	4.04	3.98	3.92	3.86	3.80	3.73	3.66	3.59
80.5	204.5	4.54	4.50	4.46	4.41	4.36	4.32	4.26	4.21	4.16	4.10	4.04	3.98	3.92	3.86	3.79	3.72	3.65
81.0	205.7	4.60	4.56	4.51	4.47	4.42	4.37	4.32	4.27	4.21	4.16	4.10	4.04	3.98	3.91	3.85	3.78	3.71
81.5	207.0	4.66	4.62	4.58	4.53	4.48	4.43	4.38	4.33	4.28	4.22	4.16	4.10	4.04	3.98	3.91	3.84	3.77
82.0	208.3	4.72	4.68	4.64	4.59	4.55	4.50	4.45	4.39	4.34	4.28	4.22	4.16	4.10	4.04	3.97	3.90	3.83
82.5	209.6	4.79	4.74	4.70	4.66	4.61	4.56	4.51	4.46	4.40	4.35	4.29	4.23	4.17	4.10	4.04	3.97	3.90

TABLE 6A—MEXICAN AMERICAN FEMALES FEV–1 LOWER LIMIT OF NORMAL VALUES, HANKINSON, ET AL. (1999)

[Reference value equation: 0.4529 + (−0.01178)(age) + (−0.000113)(age^2) + (0.00009890)(height^2)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	1.98	1.93	1.88	1.84	1.79	1.74	1.69	1.64	1.58	1.53	1.48	1.42	1.36	1.31	1.25	1.19	1.13
61.5	156.2	2.02	1.97	1.92	1.88	1.83	1.78	1.73	1.68	1.62	1.57	1.52	1.46	1.40	1.35	1.29	1.23	1.17
62.0	157.5	2.06	2.01	1.96	1.92	1.87	1.82	1.77	1.72	1.66	1.61	1.56	1.50	1.44	1.39	1.33	1.27	1.21
62.5	158.8	2.10	2.05	2.01	1.96	1.91	1.86	1.81	1.76	1.70	1.65	1.60	1.54	1.48	1.43	1.37	1.31	1.25
63.0	160.0	2.14	2.09	2.04	2.00	1.95	1.90	1.85	1.79	1.74	1.69	1.63	1.58	1.52	1.47	1.41	1.35	1.29
63.5	161.3	2.18	2.13	2.08	2.04	1.99	1.94	1.89	1.84	1.78	1.73	1.68	1.62	1.56	1.51	1.45	1.39	1.33
64.0	162.6	2.22	2.17	2.13	2.08	2.03	1.98	1.93	1.88	1.82	1.77	1.72	1.66	1.61	1.55	1.49	1.43	1.37
64.5	163.8	2.26	2.21	2.16	2.12	2.07	2.02	1.97	1.92	1.86	1.81	1.76	1.70	1.64	1.59	1.53	1.47	1.41
65.0	165.1	2.30	2.25	2.21	2.16	2.11	2.06	2.01	1.96	1.91	1.85	1.80	1.74	1.69	1.63	1.57	1.51	1.45
65.5	166.4	2.34	2.30	2.25	2.20	2.15	2.10	2.05	2.00	1.95	1.89	1.84	1.78	1.73	1.67	1.61	1.55	1.49
66.0	167.6	2.38	2.34	2.29	2.24	2.19	2.14	2.09	2.04	1.99	1.94	1.88	1.83	1.77	1.71	1.66	1.60	1.54
66.5	168.9	2.43	2.38	2.33	2.28	2.24	2.19	2.14	2.08	2.03	1.98	1.92	1.87	1.81	1.76	1.70	1.64	1.58
67.0	170.2	2.47	2.42	2.38	2.33	2.28	2.23	2.18	2.13	2.07	2.02	1.97	1.91	1.86	1.80	1.74	1.68	1.62
67.5	171.5	2.51	2.47	2.42	2.37	2.32	2.27	2.22	2.17	2.12	2.07	2.01	1.96	1.90	1.84	1.78	1.73	1.67
68.0	172.7	2.55	2.51	2.46	2.41	2.36	2.31	2.26	2.21	2.16	2.11	2.05	2.00	1.94	1.88	1.83	1.77	1.71
68.5	174.0	2.60	2.55	2.51	2.46	2.41	2.36	2.31	2.26	2.20	2.15	2.10	2.04	1.99	1.93	1.87	1.81	1.75
69.0	175.3	2.64	2.60	2.55	2.50	2.45	2.40	2.35	2.30	2.25	2.20	2.14	2.09	2.03	1.97	1.92	1.86	1.80

69.5	176.5	2.69	2.64	2.59	2.54	2.50	2.45	2.39	2.34	2.29	2.24	2.18	2.13	2.07	2.01	1.96	1.90	1.84
70.0	177.8	2.73	2.68	2.64	2.59	2.54	2.49	2.44	2.39	2.34	2.28	2.23	2.17	2.12	2.06	2.00	1.94	1.88
70.5	179.1	2.78	2.73	2.68	2.64	2.59	2.54	2.49	2.43	2.38	2.33	2.27	2.22	2.16	2.11	2.05	1.99	1.93
71.0	180.3	2.82	2.77	2.73	2.68	2.63	2.58	2.53	2.48	2.42	2.37	2.32	2.26	2.21	2.15	2.09	2.03	1.97
71.5	181.6	2.87	2.82	2.77	2.72	2.68	2.63	2.58	2.52	2.47	2.42	2.36	2.31	2.25	2.20	2.14	2.08	2.02
72.0	182.9	2.91	2.87	2.82	2.77	2.72	2.67	2.62	2.57	2.52	2.46	2.41	2.36	2.30	2.24	2.18	2.13	2.07
72.5	184.2	2.96	2.91	2.87	2.82	2.77	2.72	2.67	2.62	2.57	2.51	2.46	2.40	2.35	2.29	2.23	2.17	2.11
73.0	185.4	3.00	2.96	2.91	2.86	2.81	2.76	2.71	2.66	2.61	2.56	2.50	2.45	2.39	2.33	2.28	2.22	2.16
73.5	186.7	3.05	3.01	2.96	2.91	2.86	2.81	2.76	2.71	2.66	2.60	2.55	2.49	2.44	2.38	2.32	2.26	2.20
74.0	188.0	3.10	3.05	3.01	2.96	2.91	2.86	2.81	2.76	2.71	2.65	2.60	2.54	2.49	2.43	2.37	2.31	2.25
74.5	189.2	3.14	3.10	3.05	3.00	2.95	2.90	2.85	2.80	2.75	2.70	2.64	2.59	2.53	2.47	2.42	2.36	2.30
75.0	190.5	3.19	3.15	3.10	3.05	3.00	2.95	2.90	2.85	2.80	2.75	2.69	2.64	2.58	2.52	2.46	2.41	2.35
75.5	191.8	3.24	3.20	3.15	3.10	3.05	3.00	2.95	2.90	2.85	2.79	2.74	2.69	2.63	2.57	2.51	2.46	2.40
76.0	193.0	3.29	3.24	3.20	3.15	3.10	3.05	3.00	2.95	2.89	2.84	2.79	2.73	2.67	2.62	2.56	2.50	2.44
76.5	194.3	3.34	3.29	3.24	3.20	3.15	3.10	3.05	3.00	2.94	2.89	2.84	2.78	2.72	2.67	2.61	2.55	2.49
77.0	195.6	3.39	3.34	3.29	3.25	3.20	3.15	3.10	3.05	2.99	2.94	2.89	2.83	2.77	2.72	2.66	2.60	2.54
77.5	196.9	3.44	3.39	3.35	3.30	3.25	3.20	3.15	3.10	3.04	2.99	2.94	2.88	2.83	2.77	2.71	2.65	2.59
78.0	198.1	3.49	3.44	3.39	3.34	3.30	3.25	3.20	3.14	3.09	3.04	2.98	2.93	2.87	2.81	2.76	2.70	2.64
78.5	199.4	3.54	3.49	3.44	3.40	3.35	3.30	3.25	3.19	3.14	3.09	3.03	2.98	2.92	2.87	2.81	2.75	2.69
79.0	200.7	3.59	3.54	3.49	3.45	3.40	3.35	3.30	3.25	3.19	3.14	3.09	3.03	2.97	2.92	2.86	2.80	2.74
79.5	201.9	3.64	3.59	3.54	3.49	3.45	3.40	3.35	3.29	3.24	3.19	3.13	3.08	3.02	2.97	2.91	2.85	2.79
80.0	203.2	3.69	3.64	3.59	3.55	3.50	3.45	3.40	3.35	3.29	3.24	3.19	3.13	3.07	3.02	2.96	2.90	2.84
80.5	204.5	3.74	3.69	3.65	3.60	3.55	3.50	3.45	3.40	3.35	3.29	3.24	3.18	3.13	3.07	3.01	2.95	2.89
81.0	205.7	3.79	3.74	3.70	3.65	3.60	3.55	3.50	3.45	3.39	3.34	3.29	3.23	3.18	3.12	3.06	3.00	2.94
81.5	207.0	3.84	3.80	3.75	3.70	3.65	3.60	3.55	3.50	3.45	3.39	3.34	3.28	3.23	3.17	3.11	3.05	3.00
82.0	208.3	3.90	3.85	3.80	3.75	3.71	3.66	3.61	3.55	3.50	3.45	3.39	3.34	3.28	3.22	3.17	3.11	3.05
82.5	209.6	3.95	3.90	3.86	3.81	3.76	3.71	3.66	3.61	3.55	3.50	3.45	3.39	3.34	3.28	3.22	3.16	3.10

TABLE 7—NAVAJO MALES FVC LOWER LIMIT OF NORMAL VALUES, CRAPO, ET AL. (1988)

[Reference value equation: [− 6.2404 + (− 0.0264)(age) + (0.0686)(height)] × (.817)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.53	2.48	2.44	2.40	2.35	2.31	2.27	2.22	2.18	2.14	2.09	2.05	2.01	1.97	1.92	1.88	1.84
61.5	156.2	2.60	2.56	2.51	2.47	2.43	2.38	2.34	2.30	2.25	2.21	2.17	2.12	2.08	2.04	2.00	1.95	1.91
62.0	157.5	2.67	2.63	2.59	2.54	2.50	2.46	2.41	2.37	2.33	2.28	2.24	2.20	2.15	2.11	2.07	2.02	1.98
62.5	158.8	2.74	2.70	2.66	2.62	2.57	2.53	2.49	2.44	2.40	2.36	2.31	2.27	2.23	2.18	2.14	2.10	2.05
63.0	160.0	2.81	2.77	2.73	2.68	2.64	2.60	2.55	2.51	2.47	2.42	2.38	2.34	2.29	2.25	2.21	2.17	2.12
63.5	161.3	2.88	2.84	2.80	2.76	2.71	2.67	2.63	2.58	2.54	2.50	2.45	2.41	2.37	2.32	2.28	2.24	2.19
64.0	162.6	2.96	2.91	2.87	2.83	2.79	2.74	2.70	2.66	2.61	2.57	2.53	2.48	2.44	2.40	2.35	2.31	2.27
64.5	163.8	3.03	2.98	2.94	2.90	2.85	2.81	2.77	2.72	2.68	2.64	2.59	2.55	2.51	2.46	2.42	2.38	2.33
65.0	165.1	3.10	3.05	3.01	2.97	2.93	2.88	2.84	2.80	2.75	2.71	2.67	2.62	2.58	2.54	2.49	2.45	2.41
65.5	166.4	3.17	3.13	3.08	3.04	3.00	2.95	2.91	2.87	2.82	2.78	2.74	2.69	2.65	2.61	2.57	2.52	2.48
66.0	167.6	3.24	3.20	3.15	3.11	3.07	3.02	2.98	2.94	2.90	2.85	2.81	2.77	2.72	2.68	2.64	2.59	2.55
66.5	168.9	3.31	3.27	3.23	3.18	3.14	3.10	3.05	3.01	2.97	2.92	2.88	2.84	2.79	2.75	2.71	2.66	2.62
67.0	170.2	3.38	3.34	3.30	3.25	3.21	3.17	3.12	3.08	3.04	3.00	2.95	2.91	2.87	2.82	2.78	2.74	2.69
67.5	171.5	3.46	3.41	3.37	3.33	3.28	3.24	3.20	3.15	3.11	3.07	3.03	2.98	2.94	2.90	2.85	2.81	2.77

TABLE 7—NAVAJO MALES FVC LOWER LIMIT OF NORMAL VALUES, CRAPO, ET AL. (1988)—Continued

[Reference value equation: [−6.2404 + (−0.0264)(age) + (0.0686)(height)] × (.817)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
68.0	172.7	3.52	3.48	3.44	3.39	3.35	3.31	3.27	3.22	3.18	3.14	3.09	3.05	3.01	2.96	2.92	2.88	2.83
68.5	174.0	3.60	3.55	3.51	3.47	3.42	3.38	3.34	3.29	3.25	3.21	3.17	3.12	3.08	3.04	2.99	2.95	2.91
69.0	175.3	3.67	3.63	3.58	3.54	3.50	3.45	3.41	3.37	3.32	3.28	3.24	3.20	3.15	3.11	3.07	3.02	2.98
69.5	176.5	3.74	3.69	3.65	3.61	3.56	3.52	3.48	3.43	3.39	3.35	3.31	3.26	3.22	3.18	3.13	3.09	3.05
70.0	177.8	3.81	3.77	3.72	3.68	3.64	3.59	3.55	3.51	3.46	3.42	3.38	3.34	3.29	3.25	3.21	3.16	3.12
70.5	179.1	3.88	3.84	3.80	3.75	3.71	3.67	3.62	3.58	3.54	3.49	3.45	3.41	3.36	3.32	3.28	3.24	3.19
71.0	180.3	3.95	3.91	3.86	3.82	3.78	3.73	3.69	3.65	3.60	3.56	3.52	3.48	3.43	3.39	3.35	3.30	3.26
71.5	181.6	4.02	3.98	3.94	3.89	3.85	3.81	3.76	3.72	3.68	3.63	3.59	3.55	3.51	3.46	3.42	3.38	3.33
72.0	182.9	4.10	4.05	4.01	3.97	3.92	3.88	3.84	3.79	3.75	3.71	3.66	3.62	3.58	3.53	3.49	3.45	3.41
72.5	184.2	4.17	4.13	4.08	4.04	4.00	3.95	3.91	3.87	3.82	3.78	3.74	3.69	3.65	3.61	3.56	3.52	3.48
73.0	185.4	4.24	4.19	4.15	4.11	4.06	4.02	3.98	3.93	3.89	3.85	3.80	3.76	3.72	3.67	3.63	3.59	3.55
73.5	186.7	4.31	4.27	4.22	4.18	4.14	4.09	4.05	4.01	3.96	3.92	3.88	3.83	3.79	3.75	3.70	3.66	3.62
74.0	188.0	4.38	4.34	4.30	4.25	4.21	4.17	4.12	4.08	4.04	3.99	3.95	3.91	3.86	3.82	3.78	3.73	3.69
74.5	189.2	4.45	4.41	4.36	4.32	4.28	4.23	4.19	4.15	4.10	4.06	4.02	3.97	3.93	3.89	3.84	3.80	3.76
75.0	190.5	4.52	4.48	4.44	4.39	4.35	4.31	4.26	4.22	4.18	4.13	4.09	4.05	4.00	3.96	3.92	3.87	3.83
75.5	191.8	4.59	4.55	4.51	4.46	4.42	4.38	4.34	4.29	4.25	4.21	4.16	4.12	4.08	4.03	3.99	3.95	3.90
76.0	193.0	4.66	4.62	4.58	4.53	4.49	4.45	4.40	4.36	4.32	4.27	4.23	4.19	4.14	4.10	4.06	4.01	3.97
76.5	194.3	4.73	4.69	4.65	4.61	4.56	4.52	4.48	4.43	4.39	4.35	4.30	4.26	4.22	4.17	4.13	4.09	4.04
77.0	195.6	4.81	4.76	4.72	4.68	4.63	4.59	4.55	4.51	4.46	4.42	4.38	4.33	4.29	4.25	4.20	4.16	4.12
77.5	196.9	4.88	4.84	4.79	4.75	4.71	4.66	4.62	4.58	4.54	4.49	4.45	4.41	4.36	4.32	4.28	4.23	4.19
78.0	198.1	4.95	4.90	4.86	4.82	4.77	4.73	4.69	4.65	4.60	4.56	4.52	4.47	4.43	4.39	4.34	4.30	4.26
78.5	199.4	5.02	4.98	4.93	4.89	4.85	4.80	4.76	4.72	4.68	4.63	4.59	4.55	4.50	4.46	4.42	4.37	4.33
79.0	200.7	5.09	5.05	5.01	4.96	4.92	4.88	4.83	4.79	4.75	4.70	4.66	4.62	4.58	4.53	4.49	4.45	4.40
79.5	201.9	5.16	5.12	5.07	5.03	4.99	4.94	4.90	4.86	4.82	4.77	4.73	4.69	4.64	4.60	4.56	4.51	4.47
80.0	203.2	5.23	5.19	5.15	5.10	5.06	5.02	4.97	4.93	4.89	4.85	4.80	4.76	4.72	4.67	4.63	4.59	4.54
80.5	204.5	5.31	5.26	5.22	5.18	5.13	5.09	5.05	5.00	4.96	4.92	4.87	4.83	4.79	4.75	4.70	4.66	4.62
81.0	205.7	5.37	5.33	5.29	5.24	5.20	5.16	5.11	5.07	5.03	4.99	4.94	4.90	4.86	4.81	4.77	4.73	4.68
81.5	207.0	5.45	5.40	5.36	5.32	5.27	5.23	5.19	5.14	5.10	5.06	5.01	4.97	4.93	4.89	4.84	4.80	4.76
82.0	208.3	5.52	5.48	5.43	5.39	5.35	5.30	5.26	5.22	5.17	5.13	5.09	5.04	5.00	4.96	4.92	4.87	4.83
82.5	209.6	5.59	5.55	5.51	5.46	5.42	5.38	5.33	5.29	5.25	5.20	5.16	5.12	5.07	5.03	4.99	4.94	4.90

TABLE 7A—NAVAJO MALES FEV–1 LOWER LIMIT OF NORMAL VALUES, CRAPO, ET AL. (1988)

[Reference value equation: [−4.7504 + (−0.0283)(age) + (0.0558)(height)] × (0.812)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.04	1.99	1.94	1.90	1.85	1.81	1.76	1.71	1.67	1.62	1.58	1.53	1.48	1.44	1.39	1.35	1.30
61.5	156.2	2.09	2.05	2.00	1.96	1.91	1.86	1.82	1.77	1.73	1.68	1.63	1.59	1.54	1.50	1.45	1.40	1.36
62.0	157.5	2.15	2.11	2.06	2.02	1.97	1.92	1.88	1.83	1.79	1.74	1.69	1.65	1.60	1.56	1.51	1.46	1.42
62.5	158.8	2.21	2.17	2.12	2.07	2.03	1.98	1.94	1.89	1.84	1.80	1.75	1.71	1.66	1.61	1.57	1.52	1.48

63.0	160.0	2.27	2.22	2.17	2.13	2.08	2.04	1.99	1.94	1.90	1.85	1.81	1.76	1.71	1.67	1.62	1.58	1.53
63.5	161.3	2.33	2.28	2.23	2.19	2.14	2.10	2.05	2.00	1.96	1.91	1.87	1.82	1.77	1.73	1.68	1.64	1.59
64.0	162.6	2.38	2.34	2.29	2.25	2.20	2.15	2.11	2.06	2.02	1.97	1.92	1.88	1.83	1.79	1.74	1.69	1.65
64.5	163.8	2.44	2.39	2.35	2.30	2.25	2.21	2.16	2.12	2.07	2.02	1.98	1.93	1.89	1.84	1.79	1.75	1.70
65.0	165.1	2.50	2.45	2.41	2.36	2.31	2.27	2.22	2.18	2.13	2.08	2.04	1.99	1.95	1.90	1.85	1.81	1.76
65.5	166.4	2.55	2.51	2.46	2.42	2.37	2.33	2.28	2.23	2.19	2.14	2.10	2.05	2.00	1.96	1.91	1.87	1.82
66.0	167.6	2.61	2.57	2.52	2.47	2.43	2.38	2.34	2.29	2.24	2.20	2.15	2.11	2.06	2.01	1.97	1.92	1.88
66.5	168.9	2.67	2.62	2.58	2.53	2.49	2.44	2.39	2.35	2.30	2.26	2.21	2.16	2.12	2.07	2.03	1.98	1.93
67.0	170.2	2.73	2.68	2.64	2.59	2.54	2.50	2.45	2.41	2.36	2.31	2.27	2.22	2.18	2.13	2.08	2.04	1.99
67.5	171.5	2.79	2.74	2.70	2.65	2.60	2.56	2.51	2.47	2.42	2.37	2.33	2.28	2.24	2.19	2.14	2.10	2.05
68.0	172.7	2.84	2.80	2.75	2.70	2.66	2.61	2.57	2.52	2.47	2.43	2.38	2.34	2.29	2.24	2.20	2.15	2.11
68.5	174.0	2.90	2.85	2.81	2.76	2.72	2.67	2.62	2.58	2.53	2.49	2.44	2.39	2.35	2.30	2.26	2.21	2.17
69.0	175.3	2.96	2.91	2.87	2.82	2.78	2.73	2.68	2.64	2.59	2.55	2.50	2.45	2.41	2.36	2.32	2.27	2.22
69.5	176.5	3.01	2.97	2.92	2.88	2.83	2.78	2.74	2.69	2.65	2.60	2.55	2.51	2.46	2.42	2.37	2.32	2.28
70.0	177.8	3.07	3.03	2.98	2.93	2.89	2.84	2.80	2.75	2.71	2.66	2.61	2.57	2.52	2.48	2.43	2.38	2.34
70.5	179.1	3.13	3.09	3.04	2.99	2.95	2.90	2.86	2.81	2.76	2.72	2.67	2.63	2.58	2.53	2.49	2.44	2.40
71.0	180.3	3.19	3.14	3.09	3.05	3.00	2.96	2.91	2.86	2.82	2.77	2.73	2.68	2.63	2.59	2.54	2.50	2.45
71.5	181.6	3.24	3.20	3.15	3.11	3.06	3.02	2.97	2.92	2.88	2.83	2.79	2.74	2.69	2.65	2.60	2.56	2.51
72.0	182.9	3.30	3.26	3.21	3.17	3.12	3.07	3.03	2.98	2.94	2.89	2.84	2.80	2.75	2.71	2.66	2.61	2.57
72.5	184.2	3.36	3.32	3.27	3.22	3.18	3.13	3.09	3.04	3.00	2.95	2.90	2.86	2.81	2.77	2.72	2.67	2.63
73.0	185.4	3.42	3.37	3.33	3.28	3.23	3.19	3.14	3.10	3.05	3.00	2.96	2.91	2.87	2.82	2.77	2.73	2.68
73.5	186.7	3.48	3.43	3.38	3.34	3.29	3.25	3.20	3.15	3.11	3.06	3.02	2.97	2.92	2.88	2.83	2.79	2.74
74.0	188.0	3.53	3.49	3.44	3.40	3.35	3.31	3.26	3.21	3.17	3.12	3.08	3.03	2.98	2.94	2.89	2.85	2.80
74.5	189.2	3.59	3.54	3.50	3.45	3.41	3.36	3.31	3.27	3.22	3.18	3.13	3.08	3.04	2.99	2.95	2.90	2.85
75.0	190.5	3.65	3.60	3.56	3.51	3.46	3.42	3.37	3.33	3.28	3.23	3.19	3.14	3.10	3.05	3.00	2.96	2.91
75.5	191.8	3.71	3.66	3.62	3.57	3.52	3.48	3.43	3.39	3.34	3.29	3.25	3.20	3.16	3.11	3.06	3.02	2.97
76.0	193.0	3.76	3.72	3.67	3.62	3.58	3.53	3.49	3.44	3.39	3.35	3.30	3.26	3.21	3.16	3.12	3.07	3.03
76.5	194.3	3.82	3.77	3.73	3.68	3.64	3.59	3.54	3.50	3.45	3.41	3.36	3.31	3.27	3.22	3.18	3.13	3.08
77.0	195.6	3.88	3.83	3.79	3.74	3.70	3.65	3.60	3.56	3.51	3.47	3.42	3.37	3.33	3.28	3.24	3.19	3.14
77.5	196.9	3.94	3.89	3.85	3.80	3.75	3.71	3.66	3.62	3.57	3.52	3.48	3.43	3.39	3.34	3.29	3.25	3.20
78.0	198.1	3.99	3.95	3.90	3.85	3.81	3.76	3.72	3.67	3.62	3.58	3.53	3.49	3.44	3.40	3.35	3.30	3.26
78.5	199.4	4.05	4.01	3.96	3.91	3.87	3.82	3.78	3.73	3.68	3.64	3.59	3.55	3.50	3.45	3.41	3.36	3.32
79.0	200.7	4.11	4.06	4.02	3.97	3.93	3.88	3.83	3.79	3.74	3.70	3.65	3.60	3.56	3.51	3.47	3.42	3.37
79.5	201.9	4.16	4.12	4.07	4.03	3.98	3.93	3.89	3.84	3.80	3.75	3.71	3.66	3.61	3.57	3.52	3.48	3.43
80.0	203.2	4.22	4.18	4.13	4.09	4.04	3.99	3.95	3.90	3.86	3.81	3.76	3.72	3.67	3.63	3.58	3.53	3.49
80.5	204.5	4.28	4.24	4.19	4.14	4.10	4.05	4.01	3.96	3.91	3.87	3.82	3.78	3.73	3.69	3.64	3.59	3.55
81.0	205.7	4.34	4.29	4.24	4.20	4.15	4.11	4.06	4.02	3.97	3.92	3.88	3.83	3.79	3.74	3.69	3.65	3.60
81.5	207.0	4.40	4.35	4.30	4.26	4.21	4.17	4.12	4.07	4.03	3.98	3.94	3.89	3.84	3.80	3.75	3.71	3.66
82.0	208.3	4.45	4.41	4.36	4.32	4.27	4.22	4.18	4.13	4.09	4.04	4.00	3.95	3.90	3.86	3.81	3.77	3.72
82.5	209.6	4.51	4.47	4.42	4.38	4.33	4.28	4.24	4.19	4.15	4.10	4.05	4.01	3.96	3.92	3.87	3.82	3.78

TABLE 8—NAVAJO FEMALES FVC LOWER LIMIT OF NORMAL VALUES, CRAPO, ET AL. (1988)

[Reference value equation: [−2.9769 + (−0.0207)(age) + (0.0448)(height)] × (0.815)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	2.40	2.37	2.34	2.30	2.27	2.23	2.20	2.17	2.13	2.10	2.07	2.03	2.00	1.96	1.93	1.90	1.86

TABLE 8—NAVAJO FEMALES FVC LOWER LIMIT OF NORMAL VALUES, CRAPO, ET AL. (1988)—Continued

[Reference value equation: [−2.9769 + (−0.0207)(age) + (0.0448)(height)] × (0.815)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.5	156.2	2.45	2.42	2.38	2.35	2.32	2.28	2.25	2.21	2.18	2.15	2.11	2.08	2.05	2.01	1.98	1.94	1.91
62.0	157.5	2.50	2.46	2.43	2.40	2.36	2.33	2.30	2.26	2.23	2.19	2.16	2.13	2.09	2.06	2.03	1.99	1.96
62.5	158.8	2.55	2.51	2.48	2.44	2.41	2.38	2.34	2.31	2.28	2.24	2.21	2.17	2.14	2.11	2.07	2.04	2.01
63.0	160.0	2.59	2.56	2.52	2.49	2.45	2.42	2.39	2.35	2.32	2.29	2.25	2.22	2.18	2.15	2.12	2.08	2.05
63.5	161.3	2.64	2.60	2.57	2.54	2.50	2.47	2.43	2.40	2.37	2.33	2.30	2.27	2.23	2.20	2.16	2.13	2.10
64.0	162.6	2.68	2.65	2.62	2.58	2.55	2.52	2.48	2.45	2.41	2.38	2.35	2.31	2.28	2.25	2.21	2.18	2.14
64.5	163.8	2.73	2.69	2.66	2.63	2.59	2.56	2.53	2.49	2.46	2.42	2.39	2.36	2.32	2.29	2.26	2.22	2.19
65.0	165.1	2.78	2.74	2.71	2.67	2.64	2.61	2.57	2.54	2.51	2.47	2.44	2.40	2.37	2.34	2.30	2.27	2.24
65.5	166.4	2.82	2.79	2.75	2.72	2.69	2.65	2.62	2.59	2.55	2.52	2.48	2.45	2.42	2.38	2.35	2.32	2.28
66.0	167.6	2.87	2.83	2.80	2.77	2.73	2.70	2.67	2.63	2.60	2.56	2.53	2.50	2.46	2.43	2.40	2.36	2.33
66.5	168.9	2.91	2.88	2.85	2.81	2.78	2.75	2.71	2.68	2.64	2.61	2.58	2.54	2.51	2.48	2.44	2.41	2.37
67.0	170.2	2.96	2.93	2.89	2.86	2.83	2.79	2.76	2.73	2.69	2.66	2.62	2.59	2.56	2.52	2.49	2.46	2.42
67.5	171.5	3.01	2.98	2.94	2.91	2.87	2.84	2.81	2.77	2.74	2.71	2.67	2.64	2.60	2.57	2.54	2.50	2.47
68.0	172.7	3.05	3.02	2.99	2.95	2.92	2.88	2.85	2.82	2.78	2.75	2.72	2.68	2.65	2.61	2.58	2.55	2.51
68.5	174.0	3.10	3.07	3.03	3.00	2.97	2.93	2.90	2.86	2.83	2.80	2.76	2.73	2.70	2.66	2.63	2.59	2.56
69.0	175.3	3.15	3.11	3.08	3.05	3.01	2.98	2.95	2.91	2.88	2.84	2.81	2.78	2.74	2.71	2.68	2.64	2.61
69.5	176.5	3.19	3.16	3.12	3.09	3.06	3.02	2.99	2.96	2.92	2.89	2.85	2.82	2.79	2.75	2.72	2.69	2.65
70.0	177.8	3.24	3.21	3.17	3.14	3.10	3.07	3.04	3.00	2.97	2.94	2.90	2.87	2.83	2.80	2.77	2.73	2.70
70.5	179.1	3.29	3.25	3.22	3.19	3.15	3.12	3.08	3.05	3.02	2.98	2.95	2.92	2.88	2.85	2.81	2.78	2.75
71.0	180.3	3.33	3.30	3.26	3.23	3.20	3.16	3.13	3.09	3.06	3.03	2.99	2.96	2.93	2.89	2.86	2.82	2.79
71.5	181.6	3.38	3.34	3.31	3.28	3.24	3.21	3.18	3.14	3.11	3.07	3.04	3.01	2.97	2.94	2.91	2.87	2.84
72.0	182.9	3.43	3.39	3.36	3.32	3.29	3.26	3.22	3.19	3.16	3.12	3.09	3.05	3.02	2.99	2.95	2.92	2.89
72.5	184.2	3.47	3.44	3.41	3.37	3.34	3.30	3.27	3.24	3.20	3.17	3.14	3.10	3.07	3.03	3.00	2.97	2.93
73.0	185.4	3.52	3.48	3.45	3.42	3.38	3.35	3.31	3.28	3.25	3.21	3.18	3.15	3.11	3.08	3.04	3.01	2.98
73.5	186.7	3.56	3.53	3.50	3.46	3.43	3.40	3.36	3.33	3.29	3.26	3.23	3.19	3.16	3.13	3.09	3.06	3.02
74.0	188.0	3.61	3.58	3.54	3.51	3.48	3.44	3.41	3.38	3.34	3.31	3.27	3.24	3.21	3.17	3.14	3.11	3.07
74.5	189.2	3.66	3.62	3.59	3.55	3.52	3.49	3.45	3.42	3.39	3.35	3.32	3.28	3.25	3.22	3.18	3.15	3.12
75.0	190.5	3.70	3.67	3.64	3.60	3.57	3.53	3.50	3.47	3.43	3.40	3.37	3.33	3.30	3.26	3.23	3.20	3.16
75.5	191.8	3.75	3.72	3.68	3.65	3.62	3.58	3.55	3.51	3.48	3.45	3.41	3.38	3.35	3.31	3.28	3.24	3.21
76.0	193.0	3.79	3.76	3.73	3.69	3.66	3.63	3.59	3.56	3.52	3.49	3.46	3.42	3.39	3.36	3.32	3.29	3.25
76.5	194.3	3.84	3.81	3.77	3.74	3.71	3.67	3.64	3.61	3.57	3.54	3.50	3.47	3.44	3.40	3.37	3.34	3.30
77.0	195.6	3.89	3.86	3.82	3.79	3.75	3.72	3.69	3.65	3.62	3.59	3.55	3.52	3.48	3.45	3.42	3.38	3.35
77.5	196.9	3.94	3.90	3.87	3.84	3.80	3.77	3.73	3.70	3.67	3.63	3.60	3.57	3.53	3.50	3.46	3.43	3.40
78.0	198.1	3.98	3.95	3.91	3.88	3.85	3.81	3.78	3.74	3.71	3.68	3.64	3.61	3.58	3.54	3.51	3.47	3.44
78.5	199.4	4.03	3.99	3.96	3.93	3.89	3.86	3.83	3.79	3.76	3.72	3.69	3.66	3.62	3.59	3.56	3.52	3.49
79.0	200.7	4.08	4.04	4.01	3.97	3.94	3.91	3.87	3.84	3.81	3.77	3.74	3.70	3.67	3.64	3.60	3.57	3.54
79.5	201.9	4.12	4.09	4.05	4.02	3.98	3.95	3.92	3.88	3.85	3.82	3.78	3.75	3.71	3.68	3.65	3.61	3.58
80.0	203.2	4.17	4.13	4.10	4.07	4.03	4.00	3.96	3.93	3.90	3.86	3.83	3.80	3.76	3.73	3.69	3.66	3.63
80.5	204.5	4.21	4.18	4.15	4.11	4.08	4.05	4.01	3.98	3.94	3.91	3.88	3.84	3.81	3.78	3.74	3.71	3.67
81.0	205.7	4.26	4.22	4.19	4.16	4.12	4.09	4.06	4.02	3.99	3.95	3.92	3.89	3.85	3.82	3.79	3.75	3.72
81.5	207.0	4.31	4.27	4.24	4.20	4.17	4.14	4.10	4.07	4.04	4.00	3.97	3.93	3.90	3.87	3.83	3.80	3.77
82.0	208.3	4.35	4.32	4.29	4.25	4.22	4.18	4.15	4.12	4.08	4.05	4.02	3.98	3.95	3.91	3.88	3.85	3.81
82.5	209.6	4.40	4.37	4.33	4.30	4.27	4.23	4.20	4.16	4.13	4.10	4.06	4.03	4.00	3.96	3.93	3.89	3.86

TABLE 8A—NAVAJO FEMALES FEV–1 LOWER LIMIT OF NORMAL VALUES, CRAPO, ET AL. (1988)

[Reference value equation: [−1.8110 + (−0.0233)(age) + (0.0347)(height)] × (0.808)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
61.0	154.9	1.96	1.92	1.88	1.84	1.81	1.77	1.73	1.69	1.66	1.62	1.58	1.54	1.51	1.47	1.43	1.39	1.35
61.5	156.2	1.99	1.96	1.92	1.88	1.84	1.81	1.77	1.73	1.69	1.65	1.62	1.58	1.54	1.50	1.47	1.43	1.39
62.0	157.5	2.03	1.99	1.95	1.92	1.88	1.84	1.80	1.77	1.73	1.69	1.65	1.62	1.58	1.54	1.50	1.47	1.43
62.5	158.8	2.07	2.03	1.99	1.95	1.92	1.88	1.84	1.80	1.77	1.73	1.69	1.65	1.61	1.58	1.54	1.50	1.46
63.0	160.0	2.10	2.06	2.02	1.99	1.95	1.91	1.87	1.84	1.80	1.76	1.72	1.69	1.65	1.61	1.57	1.54	1.50
63.5	161.3	2.14	2.10	2.06	2.02	1.99	1.95	1.91	1.87	1.84	1.80	1.76	1.72	1.68	1.65	1.61	1.57	1.53
64.0	162.6	2.17	2.14	2.10	2.06	2.02	1.98	1.95	1.91	1.87	1.83	1.80	1.76	1.72	1.68	1.65	1.61	1.57
64.5	163.8	2.21	2.17	2.13	2.09	2.06	2.02	1.98	1.94	1.91	1.87	1.83	1.79	1.75	1.72	1.68	1.64	1.60
65.0	165.1	2.24	2.21	2.17	2.13	2.09	2.05	2.02	1.98	1.94	1.90	1.87	1.83	1.79	1.75	1.72	1.68	1.64
65.5	166.4	2.28	2.24	2.20	2.17	2.13	2.09	2.05	2.02	1.98	1.94	1.90	1.86	1.83	1.79	1.75	1.71	1.68
66.0	167.6	2.31	2.28	2.24	2.20	2.16	2.13	2.09	2.05	2.01	1.98	1.94	1.90	1.86	1.82	1.79	1.75	1.71
66.5	168.9	2.35	2.31	2.27	2.24	2.20	2.16	2.12	2.09	2.05	2.01	1.97	1.94	1.90	1.86	1.82	1.79	1.75
67.0	170.2	2.39	2.35	2.31	2.27	2.24	2.20	2.16	2.12	2.08	2.05	2.01	1.97	1.93	1.90	1.86	1.82	1.78
67.5	171.5	2.42	2.39	2.35	2.31	2.27	2.23	2.20	2.16	2.12	2.08	2.05	2.01	1.97	1.93	1.90	1.86	1.82
68.0	172.7	2.46	2.42	2.38	2.34	2.31	2.27	2.23	2.19	2.16	2.12	2.08	2.04	2.00	1.97	1.93	1.89	1.85
68.5	174.0	2.49	2.46	2.42	2.38	2.34	2.30	2.27	2.23	2.19	2.15	2.12	2.08	2.04	2.00	1.97	1.93	1.89
69.0	175.3	2.53	2.49	2.45	2.42	2.38	2.34	2.30	2.27	2.23	2.19	2.15	2.12	2.08	2.04	2.00	1.96	1.93
69.5	176.5	2.56	2.53	2.49	2.45	2.41	2.37	2.34	2.30	2.26	2.22	2.19	2.15	2.11	2.07	2.04	2.00	1.96
70.0	177.8	2.60	2.56	2.52	2.49	2.45	2.41	2.37	2.34	2.30	2.26	2.22	2.19	2.15	2.11	2.07	2.03	2.00
70.5	179.1	2.64	2.60	2.56	2.52	2.49	2.45	2.41	2.37	2.33	2.30	2.26	2.22	2.18	2.15	2.11	2.07	2.03
71.0	180.3	2.67	2.63	2.59	2.56	2.52	2.48	2.44	2.41	2.37	2.33	2.29	2.26	2.22	2.18	2.14	2.10	2.07
71.5	181.6	2.71	2.67	2.63	2.59	2.56	2.52	2.48	2.44	2.40	2.37	2.33	2.29	2.25	2.22	2.18	2.14	2.10
72.0	182.9	2.74	2.70	2.67	2.63	2.59	2.55	2.52	2.48	2.44	2.40	2.37	2.33	2.29	2.25	2.22	2.18	2.14
72.5	184.2	2.78	2.74	2.70	2.67	2.63	2.59	2.55	2.52	2.48	2.44	2.40	2.36	2.33	2.29	2.25	2.21	2.18
73.0	185.4	2.81	2.77	2.74	2.70	2.66	2.62	2.59	2.55	2.51	2.47	2.44	2.40	2.36	2.32	2.29	2.25	2.21
73.5	186.7	2.85	2.81	2.77	2.74	2.70	2.66	2.62	2.59	2.55	2.51	2.47	2.43	2.40	2.36	2.32	2.28	2.25
74.0	188.0	2.89	2.85	2.81	2.77	2.73	2.70	2.66	2.62	2.58	2.55	2.51	2.47	2.43	2.40	2.36	2.32	2.28
74.5	189.2	2.92	2.88	2.84	2.81	2.77	2.73	2.69	2.66	2.62	2.58	2.54	2.50	2.47	2.43	2.39	2.35	2.32
75.0	190.5	2.96	2.92	2.88	2.84	2.80	2.77	2.73	2.69	2.65	2.62	2.58	2.54	2.50	2.47	2.43	2.39	2.35
75.5	191.8	2.99	2.95	2.92	2.88	2.84	2.80	2.77	2.73	2.69	2.65	2.62	2.58	2.54	2.50	2.46	2.43	2.39
76.0	193.0	3.03	2.99	2.95	2.91	2.87	2.84	2.80	2.76	2.72	2.69	2.65	2.61	2.57	2.54	2.50	2.46	2.42
76.5	194.3	3.06	3.02	2.99	2.95	2.91	2.87	2.84	2.80	2.76	2.72	2.69	2.65	2.61	2.57	2.53	2.50	2.46
77.0	195.6	3.10	3.06	3.02	2.99	2.95	2.91	2.87	2.83	2.80	2.76	2.72	2.68	2.65	2.61	2.57	2.53	2.50
77.5	196.9	3.13	3.10	3.06	3.02	2.98	2.95	2.91	2.87	2.83	2.80	2.76	2.72	2.68	2.65	2.61	2.57	2.53
78.0	198.1	3.17	3.13	3.09	3.06	3.02	2.98	2.94	2.90	2.87	2.83	2.79	2.75	2.72	2.68	2.64	2.60	2.57
78.5	199.4	3.20	3.17	3.13	3.09	3.05	3.02	2.98	2.94	2.90	2.87	2.83	2.79	2.75	2.72	2.68	2.64	2.60
79.0	200.7	3.24	3.20	3.17	3.13	3.09	3.05	3.02	2.98	2.94	2.90	2.86	2.83	2.79	2.75	2.71	2.68	2.64
79.5	201.9	3.28	3.24	3.20	3.16	3.12	3.09	3.05	3.01	2.97	2.94	2.90	2.86	2.82	2.79	2.75	2.71	2.67
80.0	203.2	3.31	3.27	3.24	3.20	3.16	3.12	3.09	3.05	3.01	2.97	2.93	2.90	2.86	2.82	2.78	2.75	2.71
80.5	204.5	3.35	3.31	3.27	3.23	3.20	3.16	3.12	3.08	3.05	3.01	2.97	2.93	2.90	2.86	2.82	2.78	2.75
81.0	205.7	3.38	3.34	3.31	3.27	3.23	3.19	3.16	3.12	3.08	3.04	3.01	2.97	2.93	2.89	2.85	2.82	2.78
81.5	207.0	3.42	3.38	3.34	3.31	3.27	3.23	3.19	3.15	3.12	3.08	3.04	3.00	2.97	2.93	2.89	2.85	2.82
82.0	208.3	3.45	3.42	3.38	3.34	3.30	3.27	3.23	3.19	3.15	3.12	3.08	3.04	3.00	2.96	2.93	2.89	2.85

TABLE 8A—NAVAJO FEMALES FEV–1 LOWER LIMIT OF NORMAL VALUES, CRAPO, ET AL. (1988)—Continued

[Reference value equation: [−1.8110 + (−0.0233)(age) + (0.0347)(height)] × (0.808)]

Height in inches	Height in centimeters	Age in years																
		49	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81
82.5	209.6	3.49	3.45	3.42	3.38	3.34	3.30	3.26	3.23	3.19	3.15	3.11	3.08	3.04	3.00	2.96	2.93	2.89

APPENDIX B TO PART 79—BLOOD-GAS STUDY TABLES

For arterial blood-gas studies performed at test locations between sea level and 2,999 feet above sea level:

Arterial pCO_2	and arterial pO_2
25 mmHg or below	80 mmHg or below.
26 mmHg	79 mmHg or below.
27 mmHg	78 mmHg or below.
28 mmHg	77 mmHg or below.
29 mmHg	76 mmHg or below.
30 mmHg	75 mmHg or below.
31 mmHg	74 mmHg or below.
32 mmHg	73 mmHg or below.
33 mmHg	72 mmHg or below.
34 mmHg	71 mmHg or below.
35 mmHg	70 mmHg or below.
36 mmHg	69 mmHg or below.
37 mmHg	68 mmHg or below.
38 mmHg	67 mmHg or below.
39 mmHg	66 mmHg or below.
40–49 mmHg	65 mmHg or below.
Above 50 mmHg	Any value.

For arterial blood-gas studies performed at test locations above 3,000 feet above sea level:

Arterial pCO_2	and arterial pO_2
25 mmHg or below	75 mmHg or below.
26 mmHg	74 mmHg or below.
27 mmHg	73 mmHg or below.
28 mmHg	72 mmHg or below.
29 mmHg	71 mmHg or below.
30 mmHg	70 mmHg or below.
31 mmHg	69 mmHg or below.
32 mmHg	68 mmHg or below.
33 mmHg	67 mmHg or below.
34 mmHg	66 mmHg or below.
35 mmHg	65 mmHg or below.
36 mmHg	64 mmHg or below.
37 mmHg	63 mmHg or below.
38 mmHg	62 mmHg or below.
39 mmHg	61 mmHg or below.
40–49 mmHg	60 mmHg or below.
Above 50 mmHg	Any value.

APPENDIX C TO PART 79—RADIATION EXPOSURE COMPENSATION ACT OFFSET WORKSHEET—ON SITE PARTICIPANTS

RADIATION EXPOSURE COMPENSATION ACT OFFSET WORKSHEET—ON SITE PARTICIPANTS

[Present CPI = 185.20]

VA payments year	Payment	Indicated year CPI	Claim # * inflated PV
1960		29.60	$0.00
1961		29.90	$0.00
1962		30.20	$0.00
1963		30.60	$0.00
1964		31.00	$0.00
1965		31.50	$0.00
1966		32.40	$0.00
1967		33.40	$0.00
1968		34.80	$0.00

RADIATION EXPOSURE COMPENSATION ACT OFFSET WORKSHEET—ON SITE PARTICIPANTS—Continued

[Present CPI = 185.20]

VA payments year	Payment	Indicated year CPI	Claim # * inflated PV
1969		36.70	$0.00
1970		38.80	$0.00
1971		40.50	$0.00
1972		41.80	$0.00
1973		44.40	$0.00
1974		49.30	$0.00
1975		53.80	$0.00
1976		56.90	$0.00
1977		60.60	$0.00
1978		65.20	$0.00
1979		72.60	$0.00
1980		82.40	$0.00
1981		90.90	$0.00
1982		96.50	$0.00
1983		99.60	$0.00
1984		103.90	$0.00
1985		107.60	$0.00
1986		109.60	$0.00
1987		113.60	$0.00
1988		118.30	$0.00
1989		124.00	$0.00
1990		130.70	$0.00
1991		136.20	$0.00
1992		140.30	$0.00
1993		144.50	$0.00
1994		148.20	$0.00
1995		152.40	$0.00
1996		156.90	$0.00
1997		160.50	$0.00
1998		163.00	$0.00
1999		166.60	$0.00
2000		172.20	$0.00
2001		177.10	$0.00
2002		179.90	$0.00
2003		184.00	$0.00

RADIATION EXPOSURE COMPENSATION ACT OFFSET WORKSHEET—ON SITE PARTICIPANTS—Continued

[Present CPI = 185.20]

VA payments year	Payment	Indicated year CPI	Claim # * inflated PV
2004	.....	.....	.....
	Total, Column 4	"Actuarial Present Value" of past payments =	$0.00
	NET AMOUNT OWED CLAIMANT ($75,000 less APV)		$75,000.00
		Past CPI	
xxxx			??

* Inflated PV is computed as {payment X (current CPI÷Year's CPI)}.

PART 80—FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE

Sec.
80.1 Purpose.
80.2 Submission requirements.
80.3 Transaction.
80.4 Issuer or domestic concern.
80.5 Affected parties.
80.6 General requirements.
80.7 Additional information.
80.8 Attorney General opinion.
80.9 No oral opinion.
80.10 Rebuttable presumption.
80.11 Effect of FCPA Opinion.
80.12 Accounting requirements.
80.13 Scope of FCPA Opinion.
80.14 Disclosure.
80.15 Withdrawal.
80.16 Additional requests.

AUTHORITY: 28 U.S.C. 509, 510; 15 U.S.C. 78dd–1, 78dd–2.

SOURCE: Order No. 1620–92, 57 FR 39600, Sept. 1, 1992, unless otherwise noted.

§ 80.1 Purpose.

These procedures enable issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. 78dd–1 and 78dd–2. An opinion issued pursuant to these procedures is a Foreign Corrupt Practices Act opinion (hereinafter FCPA Opinion).

§ 80.2 Submission requirements.

A request for an FCPA Opinion must be submitted in writing. An original and five copies of the request should be addressed to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Opinion Group. The mailing address is P.O. Box 28188, Central Station, Washington, DC 20038. The address for hand delivery is room 2424, Bond Building, 1400 New York Avenue, NW., Washington, DC 20005.

§ 80.3 Transaction.

The entire transaction which is the subject of the request must be an actual—not a hypothetical—transaction but need not involve only prospective conduct. However, a request will not be considered unless that portion of the transaction for which an opinion is sought involves only prospective conduct. An executed contract is not a prerequisite and, in most—if not all—instances, an opinion request should be made prior to the requestor's commitment to proceed with a transaction.

§ 80.4 Issuer or domestic concern.

The request must be submitted by an issuer or domestic concern within the meaning of 15 U.S.C. 78dd–1 and 78dd–2, respectively, that is also a party to the transaction which is the subject of the request.

§ 80.5 Affected parties.

An FCPA Opinion shall have no application to any party which does not join in the request for the opinion.

§ 80.6 General requirements.

Each request shall be specific and must be accompanied by all relevant and material information bearing on the conduct for which an FCPA Opinion is requested and on the circumstances of the prospective conduct, including background information, complete copies of all operative documents, and detailed statements of all collateral or oral understandings, if any. The requesting issuer or domestic concern is under an affirmative obligation to make full and true disclosure with respect to the conduct for which an opinion is requested. Each request on behalf of a requesting issuer or corporate domestic concern must be signed by an appropriate senior officer with operational responsibility for the conduct that is the subject of the request and who has been designated by the requestor's chief executive officer to sign the opinion request. In appropriate cases, the Department of Justice may require the chief executive officer of each requesting issuer or corporate domestic concern to sign the request. All requests of other domestic concerns must also be signed. The person signing the request must certify that it contains a true, correct and complete disclosure with respect to the proposed conduct and the circumstances of the conduct.

§ 80.7 Additional information.

If an issuer's or domestic concern's submission does not contain all of the information required by § 80.6, the Department of Justice may request whatever additional information or documents it deems necessary to review the matter. The Department must do so within 30 days of receipt of the opinion request, or, in the case of an incomplete response to a previous request for additional information, within 30 days of receipt of such response. Each issuer or domestic concern requesting an FCPA Opinion must promptly provide the information requested. A request will not be deemed complete until the Department of Justice receives such additional information. Such additional information, if furnished orally, shall be promptly confirmed in writing, signed by the same person or officer who signed the initial request and certified by this person or officer to be a true, correct and complete disclosure of the requested information. In connection with any request for an FCPA Opinion, the Department of Justice may conduct whatever independent investigation it believes appropriate.

§ 80.8 Attorney General opinion.

The Attorney General or his designee shall, within 30 days after receiving a request that complies with the foregoing procedure, respond to the request by issuing an opinion that states whether the prospective conduct, would, for purposes of the Department of Justice's present enforcement policy, violate 15 U.S.C. 78dd–1 and 78dd–2. The Department of Justice may also take such other positions or action as it considers appropriate. Should the Department request additional information, the Department's response shall be made within 30 days after receipt of such additional information.

§ 80.9 No oral opinion.

No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting issuer or domestic concern may rely only upon a written FCPA Opinion letter signed by the Attorney General or his designee.

§ 80.10 Rebuttable presumption.

In any action brought under the applicable provisions of 15 U.S.C. 78dd–1 and 78dd–2, there shall be a rebuttable presumption that a requestor's conduct, which is specified in a request, and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department's present enforcement policy, is in compliance with those provisions of the FCPA. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption, a court, in accordance with the statute, shall weigh all relevant factors, including but not limited to whether information submitted to the Attorney General was accurate and complete and whether the activity was within the scope of the conduct specified in any request received by the Attorney General.

§ 80.11 Effect of FCPA Opinion.

Except as specified in § 80.10, an FCPA Opinion will not bind or obligate any agency other than the Department of Justice. It will not affect the requesting issuer's or domestic concern's obligations to any other agency, or under any statutory or regulatory provision other than those specifically cited in the particular FCPA Opinion.

§ 80.12 Accounting requirements.

Neither the submission of a request for an FCPA Opinion, its pendency, nor the issuance of an FCPA Opinion, shall in any way alter the responsibility of an issuer to comply with the accounting requirements of 15 U.S.C. 78m(b)(2) and (3).

§ 80.13 Scope of FCPA Opinion.

An FCPA Opinion will state only the Attorney General's opinion as to whether the prospective conduct would violate the Department's present enforcement policy under 15 U.S.C. 78dd–1 and 78dd–2. If the conduct for which an FCPA Opinion is requested is subject to approval by any other agency, such FCPA Opinion shall in no way be taken to indicate the Department of Justice's views on the legal or factual issues that may be raised before that agency, or in an appeal from the agency's decision.

§ 80.14 Disclosure.

(a) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer or domestic concern under the foregoing procedure shall be exempt from disclosure under 5 U.S.C. 552 and shall not, except with the consent of the issuer or domestic concern, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer or domestic concern withdraws such request before receiving a response.

(b) Nothing contained in paragraph (a) of this section shall limit the Department of Justice's right to issue, at its discretion, a release describing the identity of the requesting issuer or domestic concern, the identity of the foreign country in which the proposed conduct is to take place, the general nature and circumstances of the proposed conduct, and the action taken by the Department of Justice in response to the FCPA Opinion request. Such release shall not disclose either the identity of any foreign sales agents or other types of identifying information. The Department of Justice shall index such releases and place them in a file available to the public upon request.

(c) A requestor may request that the release not disclose proprietary information.

§ 80.15 Withdrawal.

A request submitted under the foregoing procedure may be withdrawn prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect. The Department of Justice reserves the right to retain any FCPA Opinion request, documents and information submitted to it under this procedure or otherwise and to use them for any governmental purposes, subject to the restrictions on disclosures in § 80.14.

§ 80.16 Additional requests.

Additional requests for FCPA Opinions may be filed with the Attorney General under the foregoing procedure regarding other prospective conduct that is beyond the scope of conduct specified in previous requests.

PART 81—CHILD ABUSE AND CHILD PORNOGRAPHY REPORTING DESIGNATIONS AND PROCEDURES

Subpart A—Child Abuse Reporting Designations and Procedures

Sec.

81.1 Purpose.
81.2 Submission of reports; designation of agencies to receive reports of child abuse.
81.3 Designation of Federal Bureau of Investigation.
81.4 Referral of reports where the designated agency is not a law enforcement agency.
81.5 Definitions.

Subpart B—Child Pornography Reporting Designations and Procedures

81.11 Purpose.
81.12 Submission of reports to the ''Cyber Tipline'' at the National Center for Missing and Exploited Children.
81.13 Submission of reports by the National Center for Missing and Exploited Children to designated agencies; designation of agencies.

AUTHORITY: 28 U.S.C. 509, 510; 42 U.S.C. 13031, 13032.

SOURCE: Order No. 2009–96, 61 FR 7706, Feb. 29, 1996, unless otherwise noted.

§ 81.1 Purpose.

The regulations in this subpart designate the agencies that are authorized to receive and investigate reports of child abuse under the provisions of section 226 of the Victims of Child Abuse Act of 1990, Public Law 101–647, 104 Stat. 4806, codified at 42 U.S.C. 13031.

[Order No. 2009–96, 61 FR 7706, Feb. 29, 1996, as amended by Order No. 2692–2003, 68 FR 62372, Nov. 4, 2003]

§ 81.2 Submission of reports; designation of agencies to receive reports of child abuse.

Reports of child abuse required by 42 U.S.C. 13031 shall be made to the local law enforcement agency or local child protective services agency that has jurisdiction to investigate reports of child abuse or to protect child abuse victims in the land area or facility in question. Such agencies are hereby respectively designated as the agencies to receive and investigate such reports, pursuant to 42 U.S.C. 13031(d), with respect to federal lands and federally operated or contracted facilities within their respective jurisdictions, provided that such agencies, if non-federal, enter into formal written agreements to do so with the Attorney General, her delegate, or a federal agency with jurisdiction for the area or facility in question. If the child abuse reported by the covered professional pursuant to 42 U.S.C. 13031 occurred outside the federal area or facility in question, the designated local law enforcement agency or local child protective services agency receiving the report shall immediately forward the matter to the appropriate authority with jurisdiction outside the federal area in question.

§ 81.3 Designation of Federal Bureau of Investigation.

For federal lands, federally operated facilities, or federally contracted facilities where no agency qualifies for designation under § 81.2, the Federal Bureau of Investigation is hereby designated as the agency to receive and investigate reports of child abuse made pursuant to 42 U.S.C. 13031 until such time as another agency qualifies as a designated agency under § 81.2.

§ 81.4 Referral of reports where the designated agency is not a law enforcement agency.

Where a report of child abuse received by a designated agency that is not a law enforcement agency involves allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, that agency shall immediately report such occurrence to a law enforcement agency with authority to take emergency action to protect the child.

§ 81.5 Definitions.

Local child protective services agency means that agency of the federal government, of a state, of a tribe or of a local government that has the primary responsibility for child protection within a particular portion of the federal lands, a particular federally operated facility, or a particular federally contracted facility in which children are cared for or reside.

Local law enforcement agency means that federal, state, tribal or local law enforcement agency that has the primary responsibility for the investigation of an instance of alleged child abuse occurring within a particular portion of the federal lands, a particular federally operated facility, or a particular federally contracted facility in which children are cared for or reside.

Subpart B—Child Pornography Reporting Designations and Procedures

SOURCE: Order No. 2692–2003, 68 FR 62372, Nov. 4, 2003, unless otherwise noted.

§ 81.11 Purpose.

The regulations in this subpart B designate the agencies that are authorized to receive and investigate reports of child pornography that are forwarded from the National Center for Missing and Exploited Children under the provisions of 42 U.S.C. 13032.

§ 81.12 Submission of reports to the "Cyber Tipline" at the National Center for Missing and Exploited Children.

(a) When a provider of electronic communications services or remote computing services to the public (''provider'') obtains knowledge of facts or circumstances concerning an apparent violation of Federal child pornography statutes designated by 42 U.S.C. 13032(b)(1), it shall, as soon as reasonably possible, report all such facts or circumstances to the ''Cyber Tipline'' at the National Center for Missing and Exploited Children Web site (*http://www.CyberTipline.com*), which contains a reporting form for use by providers.

(b) A provider should initially call the National Center for Missing and Exploited Children to receive an identification number and a password that will enable it to log on to the section of the ''Cyber Tipline'' that is designed for provider reporting.

§ 81.13 Submission of reports by the National Center for Missing and Exploited Children to designated agencies; designation of agencies.

When the National Center for Missing and Exploited Children receives a report from a provider concerning an apparent violation of Federal child pornography statutes specified in 42 U.S.C. 13032(b)(1), it shall immediately forward that report, to the Federal Bureau of Investigation, the Bureau of Immigration and Customs Enforcement, the United States Postal Inspection Service, and the United States Secret Service, designated pursuant to 42 U.S.C. 13032(b)(2).

PART 83—GOVERNMENT-WIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Subpart A—Purpose and Coverage

Sec.
83.100 What does this part do?
83.105 Does this part apply to me?
83.110 Are any of my Federal assistance awards exempt from this part?
83.115 Does this part affect the Federal contracts that I receive?

Subpart B—Requirements for Recipients Other Than Individuals

83.200 What must I do to comply with this part?
83.205 What must I include in my drug-free workplace statement?
83.210 To whom must I distribute my drug-free workplace statement?
83.215 What must I include in my drug-free awareness program?
83.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?
83.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?
83.230 How and when must I identify workplaces?

Subpart C—Requirements for Recipients Who Are Individuals

83.300 What must I do to comply with this part if I am an individual recipient?
83.301 [Reserved]

Subpart D—Responsibilities of Department of Justice Awarding Officials

83.400 What are my responsibilities as a Department of Justice awarding official?

Subpart E—Violations of This Part and Consequences

83.500 How are violations of this part determined for recipients other than individuals?
83.505 How are violations of this part determined for recipients who are individuals?
83.510 What actions will the Federal Government take against a recipient determined to have violated this part?
83.515 Are there any exceptions to those actions?

Subpart F—Definitions

83.605 Award.
83.610 Controlled substance.
83.615 Conviction.
83.620 Cooperative agreement.

83.625 Criminal drug statute.
83.630 Debarment.
83.635 Drug-free workplace.
83.640 Employee.
83.645 Federal agency or agency.
83.650 Grant.
83.655 Individual.
83.660 Recipient.
83.665 State.
83.670 Suspension.

AUTHORITY: Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*).

SOURCE: 68 FR 66557, 66600, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 83.100 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.

§ 83.105 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 Justice; or

(2) A(n) Department of Justice awarding official. (See definitions of award and recipient in §§ 83.605 and 83.660, 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(n) Department of Justice awarding official.	A, D and E.

§ 83.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Attorney General or designee 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.

§ 83.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 83.510(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

§ 83.200 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 §§ 83.205 through 83.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 83.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 83.230).

§ 83.205 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.

§ 83.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 83.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 83.215 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.

§ 83.220 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 § 83.205 and an ongoing awareness program as described in § 83.215, 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 Justice 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.

§ 83.225 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 § 83.205(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.

§ 83.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each Department of Justice 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 Justice 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 Justice 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 Justice 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 Justice awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 83.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) Department of Justice 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 Justice awarding official or other designee for each award that you currently have, unless § 83.301 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.

§ 83.301 [Reserved]

Subpart D—Responsibilities of Department of Justice Awarding Officials

§ 83.400 What are my responsibilities as a(n) Department of Justice awarding official?

As a(n) Department of Justice 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

§ 83.500 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 Attorney General or designee 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.

§ 83.505 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 Attorney General or designee 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.

§ 83.510 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 § 83.500 or § 83.505, the Department of Justice 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 28 CFR Part 67, for a period not to exceed five years.

§ 83.515 Are there any exceptions to those actions?

The Attorney General 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 Attorney General determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 83.605 Award.

Award means an award of financial assistance by the Department of Justice 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 28 CFR Part 70 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).

§ 83.610 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.

§ 83.615 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.

§ 83.620 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 § 83.650), 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.

§ 83.625 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.

§ 83.630 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.

§ 83.635 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.

§ 83.640 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).

§ 83.645 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.

§ 83.650 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.

§ 83.655 Individual.

Individual means a natural person.

§ 83.660 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.

§ 83.665 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.

§ 83.670 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, Governmentwide 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 85—CIVIL MONETARY PENALTIES INFLATION ADJUSTMENT

Sec.
85.1 In general.
85.2 Calculation of adjustment.
85.3 Adjustments to penalties.

AUTHORITY: 5 U.S.C. 301, 28 U.S.C. 503; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321.

SOURCE: Order No. 2249–99, 64 FR 47103, Aug. 30, 1999, unless otherwise noted.

§ 85.1 In general.

(a) In accordance with the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 104–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104–134, 110 Stat. 1321, the civil monetary penalties provided by law within the jurisdiction of the Department of Justice and listed in section 85.3 are adjusted as set forth in this part, effective for violations occurring on or after September 29, 1999.

(b) Reference should be made to regulations of the Immigration and Naturalization Service in title 8 of the Code of Federal Regulations for the adjustment of civil monetary penalties pertaining to immigration matters. In addition, adjustments to civil penalties relating to unauthorized employment of aliens, immigration related unfair employment practices, and civil document fraud are addressed in 28 CFR 68.52.

§ 85.2 Calculation of adjustment.

(a) The inflation adjustments described in § 85.3 were determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty assessed or enforced by the Department of Justice by the cost-of-living adjustment as that term is defined by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410. Any increase so determined was rounded to the nearest—

(1) Multiples of $10 in the case of penalties less than or equal to $100;

(2) Multiples of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) Multiples of $1000 in the case of penalties greater than $1000 but less than or equal to $10,000;

(4) Multiples of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) Multiples of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) Multiples of $25,000 in the case of penalties greater than $200,000.

(b) Notwithstanding the provisions of paragraph (a) of this section, the initial adjustment for each penalty is capped at 10%.

§ 85.3 Adjustments to penalties.

The civil monetary penalties provided by law within the jurisdiction of the respective components of the Department, as set forth in paragraphs (a) through (d) of this section, are adjusted in accordance with the inflation adjustment procedures prescribed in section 5 of the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, as follows. The adjusted penalties set forth in paragraphs (a), (c), and (d) of this section are effective for violations occurring on or after September 29, 1999.

(a) *Civil Division*. (1) 5 U.S.C. App. 4 102(f)(6)(C)(i), Ethics in Government Act of 1978, knowing and willful disclosure, solicitation, or receipt of information with respect to blind trusts: from $10,000 to $11,000.

(2) 5 U.S.C. App. 4 102(f)(6)(C)(ii), Ethics in Government Act of 1978, negligent disclosure, solicitation, or receipt of information with respect to blind trusts: from $5,000 to $5,500.

(3) 5 U.S.C. App. 4 104(a), Ethics in Government Act of 1978, falsification or failure to file required reports: from $10,000 to $11,000.

(4) 5 U.S.C. App. 4 105(c)(2), Ethics in Government Act of 1978, unlawful acquisition or use of public reports: from $10,000 to $11,000.

(5) 5 U.S.C. App. 4 504(a), Ethics Reform Act of 1989, violations of limitations on outside earned income and employment: from $10,000 to $11,000.

(6) 12 U.S.C. 1833a(b)(1), Financial Institutions Reform, Recovery, and Enforcement Act of 1989, violation: from $1,000,000 to $1,100,000.

(7) 12 U.S.C. 1833a(b)(2), Financial Institutions Reform, Recovery, and Enforcement Act of 1989, continuing violations (per day): minimum from $1,000,000 to $1,100,000; maximum from $5,000,000 to $5,500,000.

(8) 22 U.S.C. 2399b(a)(3)(A), Foreign Assistance Act of 1961, fraudulent claim for assistance: from $2,000 to $2,200.

(9) 31 U.S.C. 3729(a), False Claims Act, violations: minimum from $5,000

to $5,500; maximum from $10,000 to $11,000.

(10) 31 U.S.C. 3802(a)(1), Program Fraud Civil Remedies Act, violation involving false claim: from $5,000 to $5,500.

(11) 31 U.S.C. 3802(a)(2), Program Fraud Civil Remedies Act, violation involving false statement: from $5,000 to $5,500.

(12) 40 U.S.C. 489(b)(1), Federal Property and Administrative Services Act of 1949, violation involving surplus government property: from $2,000 to $2,200.

(13) 41 U.S.C. 55(a)(1)(B), Anti-Kickback Act of 1986, violation involving kickbacks: from $10,000 to $11,000.

(b) Civil Rights Division. (1) 18 U.S.C. 248(c)(2)(B), Freedom of Access to Clinic Entrances Act of 1994 (Nonviolent Physical Obstruction):

(i) The civil monetary penalty amount for a first order for nonviolent physical obstruction, initially set at $10,000, is adjusted to $11,000 for a violation occurring on or after September 29, 1999, and before April 28, 2014, and is adjusted to $16,000 for a violation occurring on or after April 28, 2014.

(ii) The civil monetary penalty amount for a subsequent order for nonviolent physical obstruction, initially set at $15,000, is adjusted to $16,500 for a violation occurring on or after April 28, 2014.

(2) 18 U.S.C. 248(c)(2)(B), Freedom of Access to Clinic Entrances Act of 1994 (Other Violations):

(i) The civil monetary penalty amount for a first order other than for nonviolent physical obstruction, initially set at $15,000, is adjusted to $16,500 for a violation occurring on or after April 28, 2014.

(ii) The civil monetary penalty amount for a subsequent order other than for nonviolent physical obstruction, initially set at $25,000, is adjusted to $27,500 for a violation occurring on or after September 29, 1999, and before April 28, 2014, and is adjusted to $37,500 for a violation occurring on or after April 28, 2014.

(3) 42 U.S.C. 3614(d)(1)(C), Fair Housing Act of 1968, as amended (Pattern or Practice Violation):

(i) The civil monetary penalty amount for a first order, initially set at $50,000, is adjusted to $55,000 for a violation occurring on or after September 29, 1999, and before April 28, 2014, and is adjusted to $75,000 for a violation occurring on or after April 28, 2014.

(ii) The civil monetary penalty amount for a subsequent order, initially set at $100,000, is adjusted to $110,000 for a violation occurring on or after September 29, 1999, and before April 28, 2014, and is adjusted to $150,000 for a violation occurring on or after April 28, 2014.

(4) 50 U.S.C. App. 597(b)(3), Servicemembers Civil Relief Act of 2003, as amended:

(i) The civil monetary penalty amount for a first violation, initially set at $55,000, is adjusted to $60,000 for a violation occurring on or after April 28, 2014.

(ii) The civil monetary penalty amount for a subsequent violation, initially set at $110,000, is adjusted to $120,000 for a violation occurring on or after April 28, 2014.

(c) *Criminal Division.* 18 U.S.C. 216(b), Ethics Reform Act of 1989, violation: from $50,000 to $55,000.

(d) *Drug Enforcement Administration.* 21 U.S.C. 961(1), Controlled Substances Import Export Act, transshipment and in-transit shipment of controlled substances: from $25,000 to $27,500.

[Order No. 2249–99, 64 FR 47103, Aug. 30, 1999, as amended by AG Order No. 3324–2014, 79 FR 17436, Mar. 28, 2014]

PART 90—VIOLENCE AGAINST WOMEN

Subpart A—General Provisions

Sec.
90.1 General.
90.2 Definitions.
90.3 Participation by faith-based organizations.

Subpart B—The STOP (Services • Training • Officers • Prosecutors) Violence Against Women Formula Grant Program

90.10 Description of STOP (Services • Training • Officers • Prosecutors) Violence Against Women Formula Grant Program.
90.11 Program criteria.
90.12 Eligible purposes.
90.13 Eligibility.
90.14 Forensic medical examination payment requirement.

90.15 Filing costs for criminal charges.
90.16 Availability and allocation of funds.
90.17 Matching requirements.
90.18 Non-supplantation.
90.19 State office.
90.20 Application content.
90.21 Evaluation.
90.22 Review of State applications.
90.23 State implementation plan.
90.24 Grantee reporting.

Subpart C [Reserved]

Subpart D—Arrest Policies in Domestic Violence Cases

90.60 Scope.
90.61 Definitions.
90.62 Purposes.
90.63 Eligibility.
90.64 Application content.
90.65 Evaluation.
90.66 Review of applications.
90.67 Grantee reporting.

Subpart E [Reserved]

AUTHORITY: 42 U.S.C. 3711–3796gg–7; Sec. 826, Part E, Title VIII, Pub. L. 105–244, 112 Stat. 1581, 1815.

SOURCE: 60 FR 19477, Apr. 18, 1995, unless otherwise noted.

Subpart A—General Provisions

§90.1 General.

(a) This part implements certain provisions of the Violence Against Women Act (VAWA), which was enacted by title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322 (Sept. 13, 1994).

(b) Subpart B of this part defines program eligibility criteria and sets forth requirements for application for and administration of formula grants to States to combat violent crimes against women. This Program under the VAWA was enacted as a new ''part T'' of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (the Omnibus Act), codified at 42 U.S.C. 3796gg through 3796gg–5. Offices and agencies of State government, units of local government, Indian tribal governments, and nonprofit, nongovernmental victim services programs are eligible to apply for subgrants from this Program.

(c) Indian tribal governments are eligible to receive assistance as part of the State program pursuant to subpart B of this part. In addition, Indian tribal governments may apply directly for discretionary grants under subpart C of this part.

§90.2 Definitions.

(a) *Domestic violence*. (1) As used in this part, *domestic violence* includes felony or misdemeanor crimes of violence (including threats or attempts) committed:

(i) By a current or former spouse of the victim;

(ii) By a person with whom the victim shares a child in common;

(iii) By a person who is co-habitating with or has co-habitated with the victim as a spouse;

(iv) By a person similarly situated to a spouse of the victim under domestic or family violence laws of the jurisdiction receiving grant monies; or

(v) By any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction receiving grant monies. Section 2003(1).

(2) For the purposes of this Program, *domestic violence* also includes any crime of violence considered to be an act of domestic violence according to State law.

(b) *Forensic medical examination*. The term *forensic medical examination* means an examination provided to a sexual assault victim by medical personnel trained to gather evidence of a sexual assault in a manner suitable for use in a court of law.

(1) The examination should include at a minimum:

(i) Examination of physical trauma;

(ii) Determination of penetration or force;

(iii) Patient interview; and

(iv) Collection and evaluation of evidence.

(2) The inclusion of additional procedures (e.g., testing for sexually transmitted diseases) to obtain evidence may be determined by the State, Indian tribal government, or unit of local government in accordance with its current laws, policies, and practices.

(c) *Indian tribe*. The term *Indian Tribe* means a tribe, band, pueblo, nation, or other organized group or community of Indians, including any Alaska Native

village or regional or village corporation (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Section 2003(3).

(d) *Law enforcement*. The term *law enforcement* means a public agency charged with policing functions, including any of its component bureaus (such as governmental victim services programs). Section 2003(4).

(e) *Prosecution*. For the purposes of this Program, the term *prosecution* means any public office or agency charged with direct responsibility for prosecuting criminal offenders, including such office's or agency's component departments or bureaus (such as governmental victims services programs). Prosecution support services, such as overseeing or participating in Statewide or multi-jurisdictional domestic violence task forces, conducting training for State and local prosecutors or enforcing victim compensation and domestic violence-related restraining orders shall be considered *direct responsibility* for purposes of this program. Section 2003(5).

(f) *Sexual assault*. The term *sexual assault* means any conduct proscribed by chapter 109A of title 18, United States Code, and includes both assaults committed by offenders who are strangers to the victim and assaults committed by offenders who are known or related by blood or marriage to the victim. Section 2003(6).

(g) *State*. The term *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(h) *Unit of local government*. For the purposes of subpart B of this part, the term *unit of local government* means any city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State, or Indian tribe which performs law enforcement functions as determined by the Secretary of Interior, or for the purpose of assistance eligibility, any agency of the District of Columbia government or the United States Government performing law enforcement functions in and for the District of Columbia and the Trust Territory of the Pacific Islands.

(i) *Victim services*. The term *victim services* means a nonprofit, nongovernmental organization, that assist victims of domestic violence and/or sexual assault victims. Included in this definition are rape crisis centers, battered women's shelters, and other sexual assault or domestic violence programs, such as nonprofit, nongovernmental organizations assisting domestic violence or sexual assault victims through the legal process. (Section 2003(8).)

(1) For the purposes of this Program, funding may include support for lawyer and nonlawyer advocates, including specialized domestic violence court advocates. Legal or defense services for perpetrators of violence against women may not be supported with grant funds.

(2) The definition also encompasses Indian victim assistance programs and Statewide domestic violence and sexual assault coalitions to the extent they provide direct services to domestic violence and sexual assault victims.

(3) Governmental victim services programs attached to a law enforcement agency or a prosecutor's office may apply for the portions of the State grant designated for law enforcement and prosecution. Governmental victim services programs contracting with nonprofit organizations (e.g., a county nonprofit shelter) are eligible to apply for the portion of the State grant designated for nonprofit, nongovernmental victim services. Governmental victim services programs that are not connected to a law enforcement agency or a prosecutor's office and are not considered nonprofit organizations may apply for funding through the remaining portion of the State grant that is not designated for a specific program area.

§ 90.3 Participation by faith-based organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

[Order No. 2703–2004, 69 FR 2841, Jan. 21, 2004]

Subpart B—The STOP (Services • Training • Officers • Prosecutors) Violence Against Women Formula Grant Program

§90.10 Description of STOP (Services • Training • Officers • Prosecutors) Violence Against Women Formula Grant Program.

It is the purpose of this Program to assist States, Indian tribal governments, and units of local government to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women. Section 2001(a).

§90.11 Program criteria.

(a) The Assistant Attorney General for the Office of Justice Programs is authorized to make grants to the States, for use by States, Indian tribal governments, units of local government and nonprofit, nongovernmental victim services programs for the purpose of developing and strengthening effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women.

(b) Grantees and subgrantees shall develop a plan for implementation and shall consult and coordinate with nonprofit, nongovernmental victim services programs, including sexual assault and domestic violence victim services programs. Section 2002(c)(2). The goal of the planning process is the enhanced coordination and integration of law enforcement, prosecution, courts, probation and parole agencies, and victim services in the prevention, identification, and response to cases involving violence against women. States and localities are encouraged to include Indian tribal governments in developing their plans. States and localities should, therefore, consider the needs of Indian tribal governments in developing their law enforcement, prosecution and victims services in cases involving violence against women. Indian tribal governments may also be considered subgrantees of the State. Section 2002(a).

§90.12 Eligible purposes.

(a) *In general*. Grants under this Program shall provide personnel, training, technical assistance, evaluation, data collection and equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women.

(b) *Eligible purposes*. Section 2001(b). Grants under this Program may be used for the following purposes:

(1) Training law enforcement officers and prosecutors to more effectively identify and respond to violent crimes against women, including the crimes of sexual assault and domestic violence;

(2) Developing, training, or expanding units of law enforcement officers and prosecutors specifically targeting violent crimes against women, including the crimes of sexual assault and domestic violence;

(3) Developing and implementing more effective police and prosecution policies, protocols, orders, and services specifically devoted to preventing, identifying, and responding to violent crimes against women, including the crimes of sexual assault and domestic violence;

(4) Developing, installing, or expanding data collection and communication systems, including computerized systems, linking police, prosecutors, and courts or for the purpose of identifying and tracking arrests, protection orders, violations of protection orders, prosecutions, and convictions for violent crimes against women, including the crimes of sexual assault and domestic violence;

(5) Developing, enlarging, or strengthening victim services programs, including sexual assault and domestic violence programs; developing or improving delivery of victim services to racial, cultural, ethnic, and language minorities; providing specialized domestic violence court advocates in courts where a significant number of protection orders are granted; and increasing reporting and reducing attrition rates for cases involving violent crimes against women, including crimes of sexual assault and domestic violence;

(6) Developing, enlarging, or strengthening programs addressing stalking; and

(7) Developing, enlarging, or strengthening programs addressing the needs and circumstances of Indian tribes in dealing with violent crimes against women, including the crimes of sexual assault and domestic violence.

§ 90.13 Eligibility.

(a) All States are eligible to apply for, and to receive, grants to combat violent crimes against women under this Program. Indian tribal governments, units of local government, and nonprofit, nongovernmental victim service programs may receive subgrants from the States under this Program.

(b) For the purpose of this subpart B, American Samoa and the Commonwealth of the Northern Mariana Islands shall be considered as one State and, for these purposes, 67% of the amounts allocated shall be allocated to American Samoa, and 33% to the Commonwealth of the Northern Mariana Islands.

§ 90.14 Forensic medical examination payment requirement.

(a) For the purpose of this subpart B, a State, Indian tribal government or unit of local government shall not be entitled to funds under this Program unless the State, Indian tribal government, unit of local government, or another governmental entity incurs the full out-of-pocket costs of forensic medical examinations for victims of sexual assault. *Full out-of-pocket costs* means any expense that may be charged to a victim in connection with a forensic medical examination for the purpose of gathering evidence of a sexual assault (e.g., the full cost of the examination, an insurance deductible, or a fee established by the facility conducting the examination). Section 2005(a)(1). For individuals covered by insurance, *full out-of-pocket costs* means any costs that the insurer does not pay.

(b) A State, Indian tribal government, or unit of local government shall be deemed to incur the full out-of-pocket costs of forensic medical examinations for victims of sexual assault if that governmental entity or some other:

(1) Provides such examinations to victims free of charge;

(2) Arranges for victims to obtain such examinations free of charge; or

(3) Reimburses victims for the cost of such examinations if:

(i) The reimbursement covers the full out-of-pocket costs of such examinations, without any deductible requirement and/or maximum limit on the amount of reimbursement;

(ii) The governmental entity permits victims to apply for reimbursement for not less than one year from the date of the examination;

(iii) The governmental entity provides reimbursement to the victim not later than ninety days after written notification of the victim's expense; and

(iv) The governmental entity provides information at the time of the examination to all victims, including victims with limited or no English proficiency, regarding how to obtain reimbursement. Section 2005(b).

(c) Coverage of the cost of additional procedures (e.g., testing for sexually transmitted diseases) may be determined by the State or governmental entity responsible for paying the costs; however, formula grant funds cannot be used to pay for the cost of the forensic medical examination or any additional procedures.

§ 90.15 Filing costs for criminal charges.

(a) A State shall not be entitled to funds under this subpart B unless it:

(1) Certifies that its laws, policies, and practices do not require, in connection with the prosecution of any misdemeanor or felony domestic violence offense, that the victim bear the costs associated with the filing of criminal charges against the domestic violence offender, or the costs associated with the issuance or service of a warrant, protection order, and witness subpoena (arising from the incident that is the subject of the arrest or criminal prosecution); or

(2) Assures that its laws, policies and practices will be in compliance with the requirements of paragraph (a)(1) of this section by the date on which the

next session of the State legislature ends, or by September 13, 1996, whichever is later.

(b) An Indian tribal government or unit of local government shall not be eligible for subgrants from the State unless it complies with the requirements of paragraph (a) of this section with respect to its laws, policies and practices.

(c) If a State does not come into compliance within the time allowed in paragraph (a)(2) of this section, the State will not receive its share of the grant money whether or not individual units of local government are in compliance.

§90.16 Availability and allocation of funds.

(a) Section 2002(b) provides for the allocation of the amounts appropriated for this Program as follows:

(1) *Allocation to Indian tribal governments.* Of the total amounts appropriated for this Program, 4% shall be available for grants directly to Indian tribal governments. This Program is addressed in subpart C of this part.

(2) *Allocation to States.* Of the total amounts appropriated for this Program in any fiscal year, after setting aside the portion allocated for discretionary grants to Indian tribal governments covered in paragraph (a) (1) of this section, and setting aside a portion for evaluation, training and technical assistance, a base amount shall be allocated for grants to eligible applicants in each State. After these allocations are made, the remaining funds will be allocated to each State on the basis of the State's relative share of total U.S. population (not including Indian tribal populations). For purposes of determining the distribution of the remaining funds, the most accurate and complete data compiled by the U.S. Bureau of the Census shall be used.

(3) *Allocation of funds within the State.* Funds granted to qualified States are to be further subgranted by the State to agencies, offices, and programs including, but not limited to State agencies and offices; public or private nonprofit organizations; units of local government; Indian tribal governments; nonprofit, nongovernmental victim services programs; and legal services programs for victims to carry out programs and projects specified in §90.12.

(b) In distributing funds received under this part, States must:

(1) Give priority to areas of varying geographic size with the greatest showing of need. In assessing need, States must consider the range and availability of existing domestic violence and sexual assault programs in the population and geographic area to be served in relation to the availability of such programs in other such populations and geographic areas, including Indian reservations. Applications submitted by a State for program funding must include a proposal which delineates the method by which States will distribute funds within the State to assure compliance with this requirement on an annual or multi-year basis. Section 2002(e)(2)(A).

(2) Take into consideration the population of the geographic area to be served when determining subgrants. Section 2002(e)(2)(B). Applications submitted by a State for program funding must include a proposal which delineates the method by which States will distribute funds within the State to assure compliance with this requirement on an annual or multi-year basis.

(3) Equitably distribute monies on a geographic basis, including non-urban and rural areas of various geographic sizes. Section 2002(e)(2)(C). Applications submitted by the State for program funding must include a proposal which delineates the method by which States will distribute funds within the State to assure compliance with this requirement on an annual or multi-year basis.

(4) In disbursing monies, States must ensure that the needs of previously underserved populations are identified and addressed in its funding plan. Section 2002(e)(2)(D). For the purposes of this Program, underserved populations include, but are not limited to, populations underserved because of geographic location (such as rural isolation), underserved racial or ethnic populations, including Indian populations, and populations underserved because of special needs such as language barriers or physical disabilities. Section 2003(7). Each State has flexibility to determine its basis for identifying underserved

populations, which may include public hearings, needs assessments, task forces, and U.S. Bureau of Census data. Applications submitted by the State for program funding must include a proposal which delineates the method by which States will distribute funds within the State to assure compliance with this requirement on an annual or multi-year basis.

(c) States must certify that a minimum of 25% of each year's grant award (75% total) will be allocated, without duplication, to each of the following areas: prosecution, law enforcement, and victim services. Section 2002(c)(3). This requirement applies to States and does not apply to individual subrecipients. This requirement applies to Indian tribal governments to the extent they have law enforcement or prosecution.

§ 90.17 Matching requirements.

(a) The Federal share of a subgrant made under the State formula program may not be expended for more than 75% of the total costs of the individual projects described in a State's implementation plan. Section 2002(f). A 25% non-Federal match is required. This 25% match may be cash or in-kind services. States are expected to submit a narrative that identifies the source of the match.

(b) In-kind match may include donations of expendable equipment, office supplies, workshop or classroom materials, work space, or the monetary value of time contributed by professional and technical personnel and other skilled and unskilled labor if the services they provide are an integral and necessary part of a funded project. The value placed on loaned or donated equipment may not exceed its fair rental value. The value placed on donated services must be consistent with the rate of compensation paid for similar work in the organization or the labor market. Fringe benefits may be included in the valuation. Volunteer services must be documented and, to the extent feasible, supported by the same methods used by the recipient organization for its own employees. The value of donated space may 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. The basis for determining the value of personal services, materials, equipment, and space must be documented.

(c) The match expenditures must be committed for each funded project and cannot be derived from other Federal funds. Nonprofit, nongovernmental victim services programs funded through subgrants are exempt from the matching requirement; all other subgrantees must provide a 25% match.

(d) Indian tribes, who are subgrantees of a State under this Program, may meet the 25% matching requirement for programs under this subpart B by using funds appropriated by Congress for the activities of any agency of an Indian tribal government or for the activities of the Bureau of Indian Affairs performing law enforcement functions on any Indian lands.

(e) All funds designated as match are restricted to the same uses as the Violence Against Women Program funds and must be expended within the grant period. The State must ensure that match is identified in a manner that guarantees its accountability during an audit.

§ 90.18 Non-supplantation.

Federal funds received under this part shall be used to supplement, not supplant non-Federal funds that would otherwise be available for expenditure on activities described in this part. Monies disbursed under this Program must be used to fund new projects, or expand or enhance existing projects. The VAWA funds cannot be used to supplant or replace existing funds already allocated to funding programs. Grant funds may not be used to replace State or local funds (or, where applicable, funds provided by the Bureau of Indian Affairs) that would, in the absence of Federal aid, be available or forthcoming for programs to combat violence against women. This requirement applies only to State and local public agencies. Section 2002(c)(4).

§ 90.19 State office.

(a) *Statewide plan and application*. The chief executive of each participating

State shall designate a State office for the purposes of:

(1) Certifying qualifications for funding under this subpart B;

(2) Developing a Statewide plan for implementation of the grants to combat violence against women in consultation and coordination with nonprofit, nongovernmental victim services programs, including sexual assault and domestic violence service programs; and

(3) Preparing an application to obtain funds under this subpart B.

(b) *Administration and fund disbursement.* In addition to the duties specified by paragraph (a) of this section, the office shall:

(1) Administer funds received under this subpart B, including receipt, review, processing, monitoring, progress and financial report review, technical assistance, grant adjustments, accounting, auditing and fund disbursements; and

(2) Coordinate the disbursement of funds provided under this part with other State agencies receiving Federal, State, or local funds for domestic or family violence and sexual assault prosecution, prevention, treatment, education, and research activities and programs.

§90.20 Application content.

(a) *Format.* Applications from the States for the STOP Violence Against Women Formula Grant Program must be submitted on Standard Form 424, Application for Federal Assistance. The Office of Justice Programs will request the Governor of each State to identify which State agency should receive the Application Kit. The Application Kit will include a Standard Form 424, an Application for Federal Assistance, a list of assurances to which the applicant must agree, and additional guidance on how to prepare and submit an application for grants under this subpart.

(b) *Requirements.* Applicants in their applications shall at the minimum:

(1) Include documentation from nonprofit, nongovernmental victim services programs describing their participation in developing the plan as provided in §90.19(a);

(2) Include documentation from prosecution, law enforcement, and victim services programs to be assisted, demonstrating the need for grant funds, the intended use of the grant funds, the expected results from the use of grant funds, and demographic characteristics of the populations to be served, including age, marital status, disability, race, ethnicity and linguistic background. Section 2002(d)(1);

(3) Certify compliance with the requirements for forensic medical examination payments as provided in §90.14(a); and

(4) Certify compliance with the requirements for filing and service costs for domestic violence cases as provided in §90.15

(c) *Certifications.* (1) As required by section 2002(c) each State must certify in its application that it has met the requirements of this subpart regarding the use of funds for eligible purposes (§90.12); allocation of funds for prosecution, law enforcement, and victims services (§90.16(c)); non-supplantation (§90.18); and the development of a Statewide plan and consultation with victim services programs (§90.19(a)(2)).

(2) Each State must certify that all the information contained in the application is correct, that all submissions will be treated as a material representation of fact upon which reliance will be placed, that any false or incomplete representation may result in suspension or termination of funding, recovery of funds provided, and civil and/or criminal sanctions.

§90.21 Evaluation.

(a) The National Institute of Justice will conduct an evaluation of these programs. A portion of the overall funds authorized under this grant Program will be set aside for this purpose. Recipients of funds under this subpart must agree to cooperate with Federally-sponsored evaluations of their projects.

(b) Recipients of program funds are strongly encouraged to develop a local evaluation strategy to assess the impact and effectiveness of the program funded under this subpart. Applicants should consider entering into partnerships with research organizations that

are submitting simultaneous grant applications to the National Institute of Justice for this purpose.

§ 90.22 Review of State applications.

(a) *Review criteria*. The provisions of part T of the Omnibus Act and of these regulations provide the basis for review and approval or disapproval of State applications and amendments in whole or in part.

(b) *Intergovernmental review*. This Program is covered by Executive Order 12372 (Intergovernmental Review of Federal Programs) and implementing regulations at 28 CFR part 30. A copy of the application submitted to the Office of Justice Programs should also be submitted at the same time to the State's Single Point of Contact, if there is a Single Point of Contact.

(c) *Written notification and reasons for disapproval*. The Office of Justice Programs shall approve or disapprove applications within sixty days of official receipt and shall notify the applicant in writing of the specific reasons for the disapproval of the application in whole or in part. Section 2002(e)(1).

§ 90.23 State implementation plan.

(a) Each State must submit a plan describing its identified goals and how the funds will be used to accomplish those goals. States may use grant funds to accomplish any of the seven identified purposes of the Violence Against Women Act.

(b) The implementation plan should describe how the State, in disbursing monies, will:

(1) Give priority to areas of varying geographic size with the greatest showing of need based on the availability of existing domestic violence and sexual assault programs in the population and geographic area to be served in relation to the availability of such programs in other such populations and geographic areas;

(2) Determine the amount of subgrants based on the population and geographic area to be served;

(3) Equitably distribute monies on a geographic basis including nonurban and rural areas of various geographic sizes; and

(4) Recognize and address the needs of underserved populations. State plans may include but are not required to submit information on specific projects.

(c) State plans will be due 120 days after the date of the award.

§ 90.24 Grantee reporting.

(a) Upon completion of the grant period under this subpart, a State shall file a performance report with the Assistant Attorney General for the Office of Justice Programs explaining the activities carried out, including an assessment of the effectiveness of those activities in achieving the purposes of this part.

(b) A section of the performance report shall be completed by each grantee and subgrantee that performed the direct services contemplated in the application, certifying performance of direct services under the grant. The grantee is responsible for collecting demographics about the victims served and including this information in the Annual Performance Report. In addition, the State should assess whether or not annual goals and objectives were achieved and provide a progress report on Statewide coordination efforts. Section 2002(h)(2).

(c) The Assistant Attorney General shall suspend funding for an approved application if:

(1) An applicant fails to submit an annual performance report;

(2) Funds are expended for purposes other than those described in this subchapter; or

(3) A report under this section or accompanying assessments demonstrate to the Assistant Attorney General that the program is ineffective or financially unsound.

Subpart C [Reserved]

Subpart D—Arrest Policies in Domestic Violence Cases

SOURCE: 61 FR 40733, Aug. 6, 1996, unless otherwise noted.

§ 90.60 Scope.

This subpart sets forth the statutory framework of the Violence Against

Women Act's sections seeking to encourage States, Indian tribal governments, and units of local government to treat domestic violence as a serious violation of criminal law.

§ 90.61 Definitions.

For purposes of this subpart, the following definitions apply.

(a) *Domestic violence* includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the eligible State, Indian tribal government, or unit of local government that receives a grant under this subchapter.

(b) *Protection order* includes any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary and final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(c) *Unit of local government* means any city, county, township, town, borough, parish, village, or other general-purpose political subdivision of a State; an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior; or, for the purpose of assistance eligibility, any agency of the District of Columbia government or the United States Government performing law enforcement functions in and for the District of Columbia, and the Trust Territory of the Pacific Islands.

§ 90.62 Purposes.

(a) The purposes of this program are:

(1) To implement mandatory arrest or pro-arrest programs and policies in police departments, including mandatory arrest programs or pro-arrest programs and policies for protection order violations;

(2) To develop policies and training programs in police departments and other criminal justice agencies to improve tracking of cases involving domestic violence;

(3) To centralize and coordinate police enforcement, prosecution, probation, parole or judicial responsibility for domestic violence cases in groups or units of police officers, prosecutors, probation and parole officers or judges;

(4) To coordinate computer tracking systems to ensure communication between police, prosecutors, and both criminal and family courts;

(5) To strengthen legal advocacy service programs for victims of domestic violence; and

(6) To educate judges, and others responsible for judicial handling of domestic violence cases, in criminal, tribal, and other courts about domestic violence and improve judicial handling of such cases.

(b) Grants awarded for these purposes must demonstrate meaningful attention to victim safety and offender accountability.

§ 90.63 Eligibility.

(a) Eligible grantees are States, Indian tribal governments, or units of local government that:

(1) Certify that their laws or official policies—

(i) Encourage or mandate the arrest of domestic violence offenders based on probable cause that an offense has been committed; and

(ii) Encourage or mandate the arrest of domestic violence offenders who violate the terms of a valid and outstanding protection order;

(2) Demonstrate that their laws, policies, or practices and their training programs discourage dual arrests of offender and victim;

(3) Certify that their laws, policies, or practices prohibit issuance of mutual restraining orders of protection except in cases where both spouses file a claim and the court makes detailed findings of fact indicating that both spouses acted primarily as aggressors and that neither spouse acted primarily in self-defense; and

(4) Certify that their laws, policies, or practices do not require, in connection with the prosecution of any misdemeanor or felony domestic violence offense, that the abused bear the costs associated with filing criminal charges or the service of such charges on an abuser, or that the abused bear the costs associated with the issuance or service of a warrant, protection order, or witness subpoena (arising from the incident that is the subject of arrest or criminal prosecution).

(b) If these laws, policies, or practices are not currently in place, States, Indian tribal governments, and units of local government must provide assurances that they will be in compliance with the requirements of this section by the date on which the next session of the State or Indian Tribal legislature ends, or September 13, 1996, whichever is later. Omnibus Act 2102(a)(1) 42 U.S.C. 3796hh–1(a)(1).

(c) For the purposes of this Program, a jurisdiction need not have pre-existing policies encouraging or mandating arrest to meet the eligibility requirements listed in this section. However, in its application for funding through this Program, a State, Indian tribal government, or unit of local government must identify the type of policy that it intends to develop, and specify the process by which the policy will be developed and enacted. The policy development process must involve a coordinated effort by criminal justice personnel and non-profit, private, domestic violence or sexual assault programs, including State coalitions.

§ 90.64 Application content.

(a) *Format*. Applications from States, Indian tribal governments and units of local government must be submitted on Standard Form 424, Application for Federal Assistance, at a time designated by the Office of Justice Programs. The Violence Against Women Grants Office of the Office of Justice Programs will develop and disseminate to States, Indian tribal governments, local governments and other interested parties a complete Application Kit which will include a Standard Form 424, a list of assurances to which applicants must agree, and additional guidance on how to prepare and submit an application for grants under this subpart. To receive a complete Application Kit, please contact: The Violence Against Women Grants Office, Office of Justice Programs, Room 442, 633 Indiana Avenue, N.W., Washington, D.C. 20531. Telephone: (202) 307–6026.

(b) *Programs*. Applications must set forth programs and projects that meet the purposes and criteria of the Grants to Encourage Arrest program set out in §§ 90.62 and 90.63 of this part.

(c) *Requirements*. Applicants in their applications shall, at a minimum:

(1) Describe plans to further the purposes stated in § 90.62 of this part;

(2) Identify the agency or office or groups of agencies or offices responsible for carrying out the program. Examples of these agencies or offices include police departments, prosecution agencies, courts and probation or parole departments; and

(3) Include documentation from nonprofit, private sexual assault and domestic violence programs demonstrating their participation in developing the application, and explain how these groups will be involved in the development and implementation of the project.

(d) *Certifications*. (1) As required by section 2102(a) of the Omnibus Act, 42 U.S.C. 3796hh–1(a), each State, Indian tribal government or unit of local government must certify in its application that it has met the eligibility requirements set out in § 90.63 of this part.

(2) Each State, Indian tribal government or unit of local government must certify that all the information contained in the application is correct. All submissions will be treated as a material representation of fact upon which reliance will be placed, and any false or incomplete representation may result in suspension or termination of funding, recovery of funds provided, and civil and/or criminal sanctions.

§ 90.65 Evaluation.

(a) The National Institute of Justice will conduct evaluations and studies of programs funded through this Program. The Office of Justice Programs will set aside a small portion of the overall funds authorized for the Program for this purpose. Recipients of funds must agree to cooperate with

such federally-sponsored research and evaluation studies of their projects. In addition, grant recipients are required to report to the Attorney General on the effectiveness of their project(s). Section 2103, codified at 42 U.S.C. 3796hh–2.

(b) Recipients of program funds are strongly encouraged to develop a local evaluation strategy to assess the impact and effectiveness of their programs. Applicants should consider entering into partnerships with research organizations that are submitting simultaneous grant applications to the National Institute of Justice for this purpose.

§ 90.66 Review of applications.

(a) *Review criteria.* (1) The provisions of part U of the Omnibus Act and of the regulations is this subpart provide the basis for review and approval or disapproval of applications and amendments in whole or in part. Priority will be given to applicants that

(i) Do not currently provide for centralized handling of cases involving domestic violence by police, probation and parole officers, prosecutors, and courts; and

(ii) Demonstrate a commitment to strong enforcement of laws, and prosecution of cases, involving domestic violence. Omnibus Act § 2102(b)(1)–(2), 42 U.S.C. 3796hh–1(b)(1)–(2) (1994).

(2) Commitment may be demonstrated in a number of ways including: Clear communication from top departmental management that domestic violence prevention is a priority; strict enforcement of arrest policies; innovative approaches to officer supervision in domestic violence matters; acknowledgment of officers who consistently enforce domestic violence arrest policies and sanctions for those who do not; education and training for all officers and supervisors on enforcement of domestic violence arrest policies and the phenomenon of domestic violence; and the creation of special units to investigate and monitor spousal and partner abuse cases.

(3) Priority also will be given to applicants who provide evidence of meaningful attention to victims' safety and those who demonstrate a strong commitment to provide victims with information on the status of their cases from the time the complaint is filed through sentencing.

(b) *Intergovernmental review.* This program is covered by Executive Order 12372 (Intergovernmental Review of Federal Programs) and implementing regulations at 28 CFR part 30. A copy of the application submitted to the Office of Justice Programs should also be submitted at the same time to the State's Single Point of Contact, if there is a Single Point of Contact.

§ 90.67 Grantee reporting.

Each grantee receiving funds under this subpart shall submit a report to the Attorney General evaluating the effectiveness of projects developed with funds provided under this subpart and containing such additional material as the Assistant Attorney General of the Office of Justice Programs may prescribe.

Subpart E [Reserved]

PART 91—GRANTS FOR CORRECTIONAL FACILITIES

Subpart A—General

Sec.
91.1 Purpose.
91.2 Definitions.
91.3 General eligibility requirements.
91.4 Truth in Sentencing Incentive Grants.
91.5 Violent Offender Incarceration Grants.
91.6 Matching requirement.

Subpart B—FY 95 Correctional Boot Camp Initiative

91.10 General.

Subpart C—Correctional Facilities on Tribal Lands

91.21 Purpose.
91.22 Definitions.
91.23 Grant authority.
91.24 Grant distribution.

Subpart D—Environmental Impact Review Procedures for VOI/TIS Grant Program

IN GENERAL

91.50 Purpose.
91.51 Policy.
91.52 Definitions.
91.53 Other guidance.

APPLICATION TO VOI/TIS GRANT PROGRAM

91.54 Applicability.
91.55 Categorical exclusions.
91.56 Actions that normally require the preparation of an environmental assessment.
91.57 Actions that normally require the preparation of an environmental impact statement.

ENVIRONMENTAL REVIEW PROCEDURES

91.58 Timing of the environmental review process.
91.59 OJP's responsibilities.
91.60 Grantee's responsibilities.
91.61 Subgrantee's responsibilities.
91.62 Preparing an Environmental Assessment.
91.63 Preparing an Environmental Impact Statement.
91.64 Supplemental EA or EIS
91.65 Responsible OJP officials.
91.66 Public participation.

OTHER STATE AND FEDERAL LAW REQUIREMENTS

91.67 State Environmental Policy Acts.
91.68 Compliance with other federal environmental statutes, regulations and executive orders.

AUTHORITY: 42 U.S.C. 13701 through 14223.

SOURCE: 59 FR 63019, Dec. 7, 1994, unless otherwise noted.

Subpart A—General

§ 91.1 Purpose.

The Attorney General, through the Assistant Attorney General for the Office of Justice Programs, will make grants to states and to states organized as multi-state compacts to construct, develop, expand, operate or improve correctional facilities, including boot camp facilities and other alternative correctional facilities that can free conventional space for the confinement of violent offenders, to:

(a) Ensure that prison space is available for the confinement of violent offenders; and

(b) Implement truth in sentencing laws for sentencing violent offenders.

§ 91.2 Definitions.

(a) *Violent offender*. [Reserved]

(b) *Serious drug offense* means an offense involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of 10 years or more is prescribed by state law.

(c) *Part 1 violent crimes* means murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports. If such data is unavailable, Bureau of Justice Statistics (BJS) publications may be utilized. See, e.g., ''Census of State and Federal Correctional Facilities, 1990.'' (''Part 1 violent crimes'' are defined here solely as the statutorily prescribed basis for the formula allocation of funding.)

(d) *Recipient* means individual states or multi-state compacts awarded funds under this part.

(e) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam and the Northern Mariana Islands.

(f) *Comprehensive correctional plan* means a plan which represents an integrated approach to the management and operation of adult and juvenile correctional facilities and programs and which includes diversion programs, particularly drug diversion programs, community corrections programs, a prisoner screening and security classification system, appropriate professional training for corrections officers in dealing with violent offenders, prisoner rehabilitation and treatment programs, prisoner work activities (including to the extent practicable, activities relating to the development, expansion, modification, or improvement of correctional facilities) and job skills programs, educational programs, a pre-release prisoner assessment to provide risk reduction management, post-release assistance and an assessment of recidivism rates.

(g) *Correctional facilities* includes boot camps and other alternative correctional facilities for adults or juveniles that can free conventional bed space for the confinement of violent offenders.

(h) *Boot camp* means a corrections program for adult or juvenile offenders

of not more than six-months confinement (not including time in confinement prior to assignment to the boot camp) involving:

(1) Assignment for participation in the program, in conformity with state law, by prisoners other than prisoners who have been convicted at any time for a violent felony;

(2) Adherence by inmates to a highly regimented schedule that involves strict discipline, physical training, and work;

(3) Participation by inmates in appropriate education, job training, and substance abuse counseling or treatment; and

(4) Post-incarceration aftercare services for participants that are coordinated with the program carried out during the period of imprisonment.

(i) *Truth in sentencing laws* means laws that:

(1) Ensure that violent offenders serve a substantial portion of sentences imposed;

(2) Are designed to provide sufficiently severe punishment for violent offenders, including violent juvenile offenders; and

(3) The prison time served is appropriately related to the determination that the inmate is a violent offender and for a period of time deemed necessary to protect the public.

§91.3 General eligibility requirements.

(a) Recipients must be individual states, or states organized as multistate compacts.

(b) *Application requirements.* To be eligible to receive either a formula or a discretionary grant under subtitle A, an applicant must submit an application which includes:

(1) Assurances that the state(s) have implemented, or will implement, correctional policies and programs, including truth in sentencing laws. No specific requirements for complying with this condition are prescribed by this interim rule for fiscal 1995 funding because of the need for further review of the status of truth in sentencing laws and the impact and needs requirements relating to reform in state systems.

(2) Assurances that the state(s) have implemented or will implement policies that provide for the recognition of the rights and needs of crime victims. States are not required to adopt any specific set of victims rights measures for compliance, but the adoption by a state of measures which are comparable to or exceed those applied in federal proceedings will be deemed sufficient compliance for eligibility for funding. If the state has not adopted victims rights measures which are comparable to or exceed federal law, the adequacy of compliance will be determined on a case-by-case basis. States will be afforded a reasonable amount of time to achieve compliance. States may comply with this condition by providing recognition of the rights and needs of crime victims in the following areas:

(i) Providing notice to victims concerning case and offender status;

(ii) Providing an opportunity for victims to be present at public court proceedings in their cases;

(iii) Providing victims the opportunity to be heard at sentencing and parole hearings;

(iv) Providing for restitution to victims; and

(v) Establishing administrative or other mechanisms to effectuate these rights.

(3) Assurances that funds received under this section will be used to construct, develop, expand, operate or improve correctional facilities to ensure that secure space is available for the confinement of violent offenders.

(4) Assurances that the state(s) has a comprehensive correctional plan in accordance with the definition elements in §91.2. If the state(s) does not have an adequate comprehensive correctional plan, technical assistance will be available for compliance. States will be afforded a reasonable amount of time to develop their plans.

(5) Assurances that the state(s) has involved counties and other units of local government, when appropriate, in the construction, development, expansion, modification, operation or improvement of correctional facilities designed to ensure the incarceration of violent offenders and that the state(s) will share funds received with counties and other units of local government, taking into account the burden placed

on these units of government when they are required to confine sentenced prisoners because of overcrowding in state prison facilities.

(6) Assurances that funds received under this section will be used to supplement, not supplant, other federal, state, and local funds.

(7) Assurances that the state(s) has implemented, or will implement within 18 months after the date of the enactment of the Violent Crime Control and Law Enforcement Act of 1994 (September 13, 1994), policies to determine the veteran status of inmates and to ensure that incarcerated veterans receive the veterans benefits to which they are entitled.

(8) Assurances that correctional facilities will be made accessible to persons conducting investigations under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997.

(9) If applicable, documentation of the multi-state compact agreement that specifies the construction, development, expansion, modification, operation, or improvement of correctional facilities.

(10) If applicable, a description of the eligibility criteria for participation in any boot camp that is to be funded.

(c) States, and states organized as multi-state compacts, which can demonstrate affirmative responses to the assurances outlined above will be eligible to receive funds.

(d) Each state application for such funds must be accompanied by a comprehensive correctional plan. The plan shall be developed in consultation with representatives of appropriate state and local units of government, shall include both the adult and juvenile correctional systems, and shall provide an assessment of the state and local correctional needs, and a long-range implementation strategy for addressing those needs.

(e) Local units of government, i.e., any city, county, town, township, borough, parish, village or other general purpose subdivision of a state, or Indian tribe which performs law enforcement functions as determined by the secretary of the Interior, are in turn eligible to receive subgrants from a participating state(s). Such subgrants shall be made for the purpose(s) of carrying out the implementation strategy, consistent with state(s) comprehensive correctional plan.

(f) In awarding grants, consideration shall be given to the special burden placed on states which incarcerate a substantial number of inmates who are in the United States illegally. States will not be required to submit additional information on numbers of criminal aliens. The Bureau of Justice Assistance (BJA) and the Immigration and Naturalization Service (INS) are currently working together to implement the State Criminal Alien Assistance Program (SCAAP) to assist the states with the costs of incarcerating criminal aliens. The Office of Justice Programs will coordinate with the SCAAP program to obtain the relevant information.

(g) The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

[59 FR 63019, Dec. 7, 1994, as amended by Order No. 2703–2004, 69 FR 2841, Jan. 21, 2004]

§ 91.4 Truth in Sentencing Incentive Grants.

(a) Half of the total amount of funds appropriated to carry out subtitle A for each of the fiscal years 1996, 1997, 1998, 1999 and 2000 will be made available for Truth in Sentencing Incentive Grants.

(b) *Eligibility*. To be eligible to receive such a grant, a state, or states organized as multi-state compacts, must meet the requirements of § 91.3 and must demonstrate that the state(s)—

(1) Has in effect laws which require that persons convicted of violent crimes serve not less than 85% of the sentence imposed; or

(2) Since 1993—

(i) Has increased the percentage of convicted violent offenders sentenced to prison;

(ii) Has increased the average prison time which will be served in prison by convicted violent offenders sentenced to prison;

(iii) Has increased the percentage of sentence which will be served in prison by violent offenders sentenced to prison; and

(iv) Has in effect at the time of application laws requiring that a person

who is convicted of a violent crime shall serve not less than 85% of the sentence imposed if—

(A) The person has been convicted on 1 or more prior occasions in a court of the United States or of a state of a violent crime or a serious drug offense; and

(B) Each violent crime or serious drug offense was committed after the defendant's conviction of the preceding violent crime or serious drug offense.

(c) *Formula allocation*. The amount available to carry out this section for any fiscal year will be allocated to each eligible state in the ratio that the number of Part 1 violent crimes reported by such state to the Federal Bureau of Investigation for 1993 bears to the number of Part 1 violent crimes reported by all states to the Federal Bureau of Investigation for 1993.

(d) *Transfer of unused funds*. On September 30 of each fiscal years 1996, 1998, 1999 and 2000, the Attorney General will transfer to the funds to be allocated under the Violent Offender Incarceration Grant formula allocation (section 91.5) any funds made available to carry out this section that are not allocated to an eligible state under paragraph (b) of this section.

§91.5 Violent Offender Incarceration Grants.

(a) Half of the total amount of funds appropriated to carry out this subtitle for each of fiscal years 1996, 1997, 1998, 1999 and 2000 will be made available for Violent Offender Incarceration Grants.

(b) *Eligibility*. To be eligible to receive such a grant, a state, or states organized as multi-state compacts, must meet the requirements of section 91.3(b).

(c) *Allocation of violent offender incarceration funds*—(1) *Formula allocation*. 85% of the sum of the amount available for grants under this section for any fiscal year and any amount transferred as described in §91.4(c) for that fiscal year will be allocated as follows:

(i) 0.25% will be allocated to each eligible state except that the United States Virgin Islands, American Samoa, Guam and the Northern Mariana Islands shall each be allocated 0.05%.

(ii) The amount remaining after application of paragraph (c)(1)(i) of this section will be allocated to each eligible state in the ratio that the number of Part 1 violent crimes reported by such state to the Federal Bureau of Investigation for 1993 bears to the number of Part 1 violent crimes reported by all states to the Federal Bureau of Investigation for 1993.

(2) *Discretionary allocation*. Fifteen percent of the sum of the amount available for Violent Offender Incarceration Grants for any fiscal year under this subsection and any amount transferred as described in §91.4(c) for that fiscal year will be allocated at the discretion of the Assistant Attorney General for OJP to states that have demonstrated:

(i) The greatest need for such grants, and

(ii) The ability to best utilize the funds to meet the objectives of the grant program and ensure that secure cell space is available for the confinement of violent offenders.

(d) *Transfer of unused funds*. On September 30 of each fiscal years 1996, 1997, 1998, 1999 and 2000, the Assistant Attorney General will transfer to the discretionary program under paragraph (c)(2) of this section any funds made available under paragraph (c)(1) of this section that are not allocated to an eligible state under paragraph (c)(1) of this section.

§91.6 Matching requirement.

(a) The federal share of a grant received under this subtitle may not exceed 75 percent of the costs of a proposal described in an application approved under this subtitle. The matching requirement can only be met through a hard cash match, and must be satisfied by the end of the project period. A certification to that effect will be required of each recipient of grant funds and must be submitted to the Office of Justice Programs with the application.

(b) [Reserved]

Subpart B—FY 95 Correctional Boot Camp Initiative

§ 91.10 General.

(a) *Scope of boot camp program.* Funding is appropriated in fiscal year 1995 to provide grants to states and multistate compacts to plan, develop, construct and expand correctional boot camps for adults and juveniles.

(b) Adult and juvenile boot camps, referred to as ''correctional boot camps,'' are programs that ''provide a structured environment for delivering nontraditional corrections programs to criminal offenders.''

(c) With respect to this program, the mandates of the Juvenile Justice and Delinquency Prevention Act (42 U.S.C. 5601 *et seq.*) shall apply.

(d) *Eligibility.* (1) Funding is available for both adult and juvenile boot camps. To be eligible for the funding of boot camps, states must comply with the general assurances in § 91.3(b) or demonstrate steps taken toward compliance. While the majority of assurances are applicable to the adult correctional system, those states applying for grants for juvenile boot camps must include the juvenile system in the state comprehensive correctional plan and demonstrate how construction of the boot camp will make secure space available to house violent juvenile offenders.

(2) For purposes of the FY '95 boot camp program, a ''violent felony'' means any crime punishable by imprisonment for a term exceeding one year, or an act of juvenile delinquency that would be punishable by imprisonment for such term if committed by an adult, that:

(i) Involves the use or attempted use of a firearm or other dangerous weapon against another person, or

(ii) Results in death or serious bodily injury to another person.

(3) States must document that the boot camp program does not involve more than six-months confinement (not including confinement prior to assignment to the boot camp) and includes:

(i) Assignment for participation in the program, in conformity with state law, by prisoners other than prisoners who have been convicted at any time of a violent felony;

(ii) Adherence by inmates to a highly regimented schedule that involves strict discipline, physical training and work;

(iii) Participation by inmates in appropriate education, job training, and substance abuse counseling or treatment; and

(iv) Post-incarceration aftercare services for participants that are coordinated with the program carried out during the period of imprisonment.

(4) States must provide assurances that boot camp construction will free up secure institutional bed space for violent offenders.

(e) *Evaluation.* (1) Recipients will be required to cooperate with a national evaluation team throughout the planning and implementation process. Recipients are also strongly encouraged to provide for an independent evaluation of the impact and effectiveness of the funded program.

(2) Jurisdictions are strongly encouraged to engage in systematic planning activities and to develop and evaluate boot camps as part of a comprehensive and integrated correctional plan.

(f) *Limitation on funds.* Grant funds cannot be used for operating costs. States will be required to show how operating expenses will be provided.

(g) *Matching requirement.* The federal share of a grant received may not exceed 75 percent of the costs of the proposed boot camp program described in the appoved application. The matching requirement can only be met through a hard cash match, and must be satisfied by the end of the project period; facility operating expenses may not be used to meet the match requirement for the construction project supported. Match may be made through grantee contribution of construction-related costs. A certification to that effect will be required of each recipient of grant funds.

(h) *Innovative boot camp programs.* Jurisdictions are encouraged to explore the development of ''innovative'' boot camp programs which incorporate principles based on the accumulation of research and practical experience, and reflect sound and effective correctional practice.

Subpart C—Correctional Facilities on Tribal Lands

AUTHORITY: 42 U.S.C. 13701 *et seq.*, as amended by Pub. L. 104–134.

SOURCE: 61 FR 49970, Sept. 24, 1996, unless otherwise noted.

§91.21 Purpose.

This part sets forth requirements and procedures to award grants to Indian Tribes for purposes of constructing jails on tribal lands for the incarceration of offenders subject to tribal jurisdiction.

§91.22 Definitions.

(a) *The Act* means the Violent Crime Control and Law Enforcement Act of 1994, Subtitle A of Title II, Public Law 103–322, 108 Stat. 1796 (September 13, 1994) as amended by the Fiscal Year 1996 Omnibus Consolidated Rescissions and Appropriations Act, Public Law 104–134 (April 26, 1996), codified at 42 U.S.C. 13701 *et. seq.*

(b) *Assistant Attorney General* means the Assistant Attorney General for the Office of Justice Programs.

(c) *Tribal lands* means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of way running through the same.

(d) *Indian Tribe* means an eligible Native American tribe as defined by the Indian Self Determination Act, 25 U.S.C. 450b(e).

(e) *Construction* means the erection, acquisition, renovation, repair, remodeling, or expansion of new or existing buildings or other physical facilities, and the acquisition or installation of fixed furnishings and equipment. It includes facility planning (including environmental impact analysis), pre-architectural programming, architectural design, preservation, construction, administration, construction management, or project management costs. Construction does not include the purchase of land.

[61 FR 49970, Sept. 24, 1996, as amended at 69 FR 2299, Jan. 15, 2004]

§91.23 Grant authority.

(a) The Assistant Attorney General may make grants to Indian tribes for programs that involve constructing jails on tribal lands for the incarceration of offenders subject to tribal jurisdiction.

(b) Applications for grants under this program shall be made at such times and in such form as may be specified by the Assistant Attorney General. Applications will be evaluated according to the statutory requirements of the Act and programmatic goals.

(c) Grantees must comply with all statutory and program requirements applicable to grants under this program.

(d) The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

[61 FR 49970, Sept. 24, 1996, as amended by Order No. 2703–2004, 69 FR 2841, Jan. 21, 2004]

§91.24 Grant distribution.

(a) From the amounts appropriated under section 20108 of the Act to carry out sections 20103 and 20104 of the Act, the Assistant Attorney General shall reserve, to carry out this program—

(1) 0.3 percent in each fiscal years 1996 and 1997; and

(2) 0.2 percent in each of fiscal years 1998, 1999 and 2000.

(b) From the amounts reserved under paragraph (a) of this section, the Assistant Attorney General may exercise discretion to award or supplement grants to such Indian Tribes and in such amounts as would best accomplish the purposes of the Act.

Subpart D—Environmental Impact Review Procedures for VOI/TIS Grant Program

AUTHORITY: 42 U.S.C. 13701 *et seq.*, as amended by Pub. L. 104–134; 42 U.S.C. 4321 *et seq.;* 40 CFR Parts 1500–1508.

SOURCE: 65 FR 48595, Aug. 8, 2000, unless otherwise noted.

IN GENERAL

§ 91.50 Purpose.

The purpose of this subpart is to inform grant recipients under the Violent Offender Incarceration and Truth-in-Sentencing Incentive (VOI/TIS) Formula Grant Program of OJP's procedures for complying with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et. seq.*, and related environmental impact review requirements.

§ 91.51 Policy.

(a) *NEPA Policy*. NEPA policy requires that Federal agencies, to the fullest extent possible:

(1) Implement procedures to make the NEPA process more useful to decision-makers and the public; reduce paperwork and the accumulation of extraneous background data; and emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(2) Integrate the requirements of NEPA with other planning and environmental review procedures required by law and by agency practice so that all such procedures run concurrently rather than consecutively.

(3) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(4) Use the NEPA process to identify and assess reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(5) Use all practicable means to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of the actions upon the quality of the human environment.

(b) *OJP's policy to minimize harm to the environment*. It is OJP's policy to minimize harm to the environment. Consequently, OJP can reject proposals or prohibit a State from using formula grant funds for a project that would have a substantial adverse impact on the human environment. Additionally, federal law prohibits the implementation of a project that jeopardizes the continued existence of an endangered species or that violates certain regulations related to water quality. Generally, though, where an EA or EIS reveals that a project will have adverse environmental impacts, OJP will work with the State grantee to identify ways to modify the project to mitigate any adverse impacts, or will encourage the State to consider an alternative site.

(c) *Mitigation*. OJP may require the following mitigation measures to reduce or eliminate a project's adverse environmental impacts:

(1) Avoiding the impact altogether by not taking certain action or part of an action.

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the impact by replacing or providing substitute resources or environments.

(d) *Use of grant funds*. In accordance with OJP's general policy of providing the States with the maximum amount of control and flexibility over the use of formula grant funds, the States can use VOI/TIS grant funds to pay for the costs of preparing environmental documents, to implement mitigation measures to reduce adverse environmental impacts, and to cover the costs of construction delays or other project changes resulting from compliance with the NEPA process. However, any funds used for these purposes must be included as a portion of the State's grant which requires a State match.

§91.52 Definitions.

The definitions supplied by the Council on Environmental Quality in its *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 40 CFR Parts 1500 through 1508, (CEQ Regulations), shall apply to the terms in this subpart.

§91.53 Other guidance.

The Department of Justice has also published NEPA procedures that incorporate the CEQ regulations at 28 CFR part 61. Additionally, the Office of Justice Programs' Corrections Program Office has prepared a handbook for VOI/TIS grantees, *Program Guidance on Environmental Protection Requirements*. This publication and other relevant documents can be found at *http://www.ojp.usdoj.gov/cpo*.

APPLICATION TO VOI/TIS GRANT PROGRAM

§91.54 Applicability.

(a) *Major Federal action*. NEPA's requirements apply to any proposal for legislation or other major federal action that might significantly impact the quality of the human environment. The CEQ regulations in 40 CFR 1508.18 define ''major federal actions'' as actions with effects that may be major and which are potentially subject to Federal control and responsibility. The CEQ regulations categorize ''major federal actions'' as, among other things, the ''[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and Federally assisted activities.'' (40 CFR 1508.18(b)(4)).

(b) *VOI/TIS construction grants subject to NEPA*. This subpart applies to all proposed, new and partially completed VOI/TIS projects (including projects on tribal lands) initiated by state or local units of government with grant funding from OJP that involve construction, expansion, renovation, facility planning, site selection, site preparation, security or facility upgrades or other activities that may significantly impact the environment.

(c) *Projects*. Although VOI/TIS money cannot be used for a project's operations expenses, the definition of ''project'' or ''proposal'' for NEPA review purposes is defined as both the construction and the long-term operation of correctional facilities and related components such as all off-site projects to accommodate the needs of the correctional facilities project (e.g., road and utility construction or expansion, projects offered to the affected community as an incentive to accept the correctional facility construction or expansion, and other reasonably foreseeable future actions regardless of what agency or third party undertakes such action). Reasonably foreseeable actions include future prison construction phases, especially when either current acreage requirements or design capacities for utilities are based on needs stemming from future phases.

§91.55 Categorical exclusions.

Activities undertaken by State, local, or tribal entities using VOI/TIS funds that are consistent with any of the following categories are presumed not to have a significant effect on the human environment and thus, are categorically excluded from the preparation of either an EA or an EIS. Although these activities are excluded from environmental reviews under NEPA, they are not excluded from compliance with other applicable local, State, or Federal environmental laws. Additionally, an otherwise excluded activity loses its exclusion and is subject to environmental review if it either would be located within or potentially affect any of the following: a 100-year flood plain, a wetland, important farmland, a proposed or listed endangered or threatened species, a proposed or listed critical habitat, a property that is listed or eligible for listing on the National Register of Historic Places, an area within an approved State Coastal Zone Management Program, a coastal barrier or a portion of a barrier within the Coastal Barrier Resources System, a river or portion of a river included in or designated for potential addition to the Wild and Scenic Rivers System, a designated or proposed Wilderness Area, or a sole source aquifer

recharge area designated by the Environmental Protection Agency (EPA). The resulting environmental review for those activities that lose their exclusion status shall focus on the factor or factors that caused the loss of the exclusion.

(a) *Minor renovations.* Projects for minor renovations within an existing facility, unless the renovation would impact a structure which is on the National Register of Historic Places, or is eligible for listing on the register.

(b) *Limited expansion.* Projects for the expansion of an existing facility or within an existing correctional complex, which does not add more than 50 beds or increase the capacity of the facility by more than 50 percent whichever is smaller. This exclusion does not apply to either a phased project that exceeds these numerical thresholds or projects to expand facilities that:

(1) Are located in a floodplain;

(2) Will affect a wetland;

(3) Will affect a facility on the National Register of Historic Places or that is eligible for listing on the register;

(4) Will affect a federally proposed or listed endangered or threatened species or its habitat;

(5) Is controversial for environmental reasons; or

(6) Would not be served by adequate sewage treatment, solid waste disposal, or water facilities.

(c) *Expansion of support facilities.* Projects for the expansion of bed space within an existing facility (e.g., double bunking or conversion of non-cell space) which are using grant funds to expand or add support facilities, such as a kitchen, medical facilities, recreational space, or program space, to accommodate the increased number of inmates. This does not include projects to increase capacity for support facilities which might pose a threat to the environment, such as solid waste and waste water management, new roads, new or upgraded utilities coming into the facility, or prison industry programs that involve the use of chemicals and produce hazardous waste or water or air pollution.

(d) *Security upgrades.* Security upgrades of an existing facility which are inside the existing perimeter fence or involve the upgrade of the existing perimeter fence. This exclusion does not include such upgrades as adding lethal fences or increasing height or lighting of a perimeter fence in a residential area or other areas sensitive to the visual impacts resulting from height or lighting changes.

(e) *Privatization.* Projects that involve the leasing of bed space (which may include operational costs) from a facility operated by a private correctional corporation or that contract with a private correctional corporation for the operation of a state facility or program. This exclusion does not apply if the correctional agency has contracted with the private vendor to build the facility, operate the facility, or lease beds to the correctional agency using federal grant funds.

(f) *Drug testing and treatment.* Projects that use grant funds to implement drug treatment, testing, sanctions, or interdiction programs.

§ 91.56 Actions that normally require the preparation of an environmental assessment.

(a) *Renovation or expansion of existing correctional facility.* Renovation or expansion activities not categorically excluded under § 91.55 require an environmental assessment (EA). An environmental assessment is generally prepared when a project is not expected to have a significant impact on the environment. Since projects for the renovation or expansion of an existing facility or the construction of a new facility within an existing correctional complex may have limited impact on the environment, preparing an EA may be sufficient.

(b) *Proposed construction of a new correctional facility.* The proposed construction of a new correctional facility will require the preparation of an environmental assessment unless the proposal will clearly have a significant environmental impact in which case an environmental impact statement can be initiated immediately without the preparation of an environmental assessment.

§91.57 Actions that normally require the preparation of an environmental impact statement.

Significant impact. For the proposed construction of a new correctional facility or the proposed expansion of an existing facility, if the proposal is large or complex and/or controversial because of the nature of possible environmental impacts, and/or if any EA determines that the project will have a significant impact on the environment, an environmental impact statement (EIS) will be required. For those projects that clearly will have significant environmental impact, a grantee can save time and resources by initiating the EIS immediately without going through the EA process.

ENVIRONMENTAL REVIEW PROCEDURES

§91.58 Timing of the environmental review process.

(a) *Initial planning and site selection phase*. The NEPA procedures must be initiated as part of the planning and site selection phase of all new construction, expansion, and renovation projects and completed before the construction or renovation on the project can begin.

(b) *Early consultation with OJP*. As grantees identify proposed, new projects, the grantees must inform OJP and after consulting OJP's *Program Guidance on Environmental Protection Requirements*, must recommend to OJP whether:

(1) The proposed project meets the criteria of a categorical exclusion;

(2) An environmental assessment should be initiated;

(3) Because of the project size and/or anticipated environmental impacts, an environmental impact statement should be initiated.

(c) *Design phase*. Projects currently in the planning and design phase must complete the NEPA procedures and no further decisions or new commitments of resources can be made on these projects by the State or local entity that would either have an adverse impact on the environment or limit the choice of reasonable alternative sites.

(d) *Prohibited pre-analysis activities*. None of the following actions can be taken until the NEPA analysis is completed for the affected project:

(1) Starting construction;

(2) Accepting construction bids;

(3) Advertising for construction bids;

(4) Initiating the development of or approving final plans and specifications; or

(5) Purchasing property.

(e) *Ongoing or completed construction projects*. For grant-funded projects under construction, OJP will work with the States to determine what environmental analysis has been done, making every effort to limit disruption to projects under construction. For completed grant-funded projects, OJP will work with the States to determine whether those projects may pose continuing environmental problems. For example, NEPA issues may exist due to excessive noise, light pollution, excessive water consumption or draw down on an important stream, or adverse visual impact due to an inappropriate facade color in an environmentally scenic area. Consequently, performing an analysis for those VOI/TIS VOI/TIS projects for which construction is completed may still serve the useful purpose of determining the extent of a project's continuing adverse environmental impacts, and the feasibility of mitigation measures.

(f) *Avoiding duplication of efforts*. If an EA or EIS was completed on an original structure, any environmental research that was conducted at the time the original structure was being planned and is still relevant need not be duplicated in any required environmental impact analysis for proposed modifications or additions to that structure.

§91.59 OJP's responsibilities.

(a) *In general*. All NEPA decisions such as determining the adequacy of assessments, the need for environmental impact statements, and their adequacy must, by statute, remain with OJP. Therefore, OJP, as the Federal agency sponsoring the major federal action, shall determine if a proposed project qualifies for a categorical exclusion, if a finding of no significant impact can be issued based on the EA, or if an EIS will be required.

(b) *Specific duties.* As part of its role in the NEPA process, OJP shall:

(1) Issue guidance on the preparation of environmental documents and the NEPA process.

(2) Review all draft documents.

(3) Participate in giving notice to state and federal agencies, as well as to the public, and attend public meetings with the grantee, as appropriate.

(4) Identify and solicit appropriate state, local, and tribal agencies to be a cooperating or joint lead agency, as appropriate.

(5) Prepare a written assessment of any environmental impacts that another state or federal land management or environmental protection agency believes have not been adequately addressed through the NEPA process.

(6) Monitor implementation by the states to ensure the completion of any required mitigation measures.

(7) Develop a sample Statement of Work for preparing an EIS that States employing their own contractor can use to ensure that the services provided meet the requirements.

§ 91.60 Grantee's responsibilities.

Specific duties. As part of its role in the NEPA process, the grantee agency must:

(a) Work closely with OJP on the development and review of the environmental documents, and follow the NEPA process, with the full participation of OJP.

(b) Issue the documents for public comment jointly with OJP.

(c) Solicit comment from other state and federal agencies, interested organizations, and the public.

(d) Refrain from purchasing land, beginning bidding process, or starting construction on any project until all environmental work has been completed.

(e) Complete a project Status Report form for all projects under construction or completed prior to the effective date of this subpart.

(f) Ensure that appropriate environmental analysis, as determined by OJP, is completed for all projects and that appropriate alternatives are considered and mitigation measures are implemented to reduce the impact of identified environmental impacts, if any.

(g) Identify and inform OJP of all applicable state and local environmental impact review requirements.

(h) Notify all subgrantees of the requirements of this subpart in the initial planning and site selection phase.

§ 91.61 Subgrantee's responsibilities.

If delegated by the grantee, the subgrantee shall:

(a) Prepare (if the required expertise exists) or contract for the preparation of an environmental assessment (EA); and

(b) Submit all environmental assessments through the grantee to OJP for review and the issuance of a draft finding of no significant impact (FONSI) or a determination that an environmental impact statement (EIS) is required. If OJP issues a draft FONSI, the grantee agency shall make the draft FONSI and the underlying EA available for public comment.

§ 91.62 Preparing an Environmental Assessment.

(a) *In general.* An Environmental Assessment (EA) is a concise public document that provides sufficient evidence and analysis for determining whether OJP should issue a Finding of No Significant Environmental Impact (FONSI) or prepare an Environmental Impact Statement (EIS). It is designed to help public officials make decisions that are based on an understanding of the human and physical environmental consequences of the proposed project and take actions, in the location and design of the project, that protect, restore and enhance the environment. Completing an EA requires considering all potential impacts associated with the construction of the correctional facility project, its operation and maintenance, any related projects including those off-site, and the attainment of the project's major objectives. The latter requires an analysis of the environmental impacts of any training and vocational activities to be conducted by the inmates.

(b) *Project planning and site selection.* During the planning phase of the project, OJP and the grantee jointly define the project, explore the various

alternatives and identify a proposed site for the construction or renovation project. In order to identify possible environmental concerns and reduce the likelihood of later opposition to the project, the grantee should involve other interested parties at this stage through public meetings which allow affected or interested parties to learn about the need for the action, the scope of the proposed action, and any alternatives being considered. These public meetings should also provide interested parties an opportunity to express comments or concerns about potential consequences of the action. Additionally, minority and low-income populations as well as Indian tribes that may be affected by the proposal should be consulted at this early stage. The grantee should obtain their views on proposed sites and mitigation measures as an important step in meeting the environmental justice goals of Executive Order 12898.

(c) *Draft environmental assessment.* The grantee should prepare an EA after identifying the proposed site, but before reaching a final decision to proceed with the effort at that location. The grantee may prepare the EA or contract for the preparation of all or parts of the EA. In order to adequately assess all of the potential environmental impacts, a multi-disciplinary team must be used to perform the environmental analysis. Any state or local environmental impact review requirements should also be incorporated into the EA process. The amount of analysis and detail provided must be commensurate with the magnitude of the expected impact. At a minimum, an EA should include a brief discussion of the need for the proposal, the alternatives considered, the environmental impacts of the proposed action and alternatives considered, and a list of agencies and persons consulted. VOI/TIS grant funds may be used to pay the costs of preparing the environmental assessment.

(d) *OJP's Review of the Draft EA.* The Office of Justice Programs will review the EA for the following:

(1) Has the need for the proposed action been established?

(2) Have the relevant areas of environmental concern been identified?

(3) Have other agencies with an interest been consulted?

(4) Has the grantee provided opportunities for public involvement?

(5) Have reasonable alternatives and mitigation measures been considered and implemented where possible, including the costs and resources to operate the facility?

(6) Has a convincing case been made that the project as presently conceived will have only insignificant impacts on each of the identified areas of environmental concern?

(7) Has the grantee adequately documented compliance with other related federal environmental laws and regulations as well as similar state and local environmental impact review requirements.

(e) *Draft Finding of No Significant Impact (FONSI) or determination that EIS is required.* If the EA satisfies all the factors in OJP's seven-part review set forth in the previous paragraph, OJP will issue a draft FONSI. If OJP's review of the EA results in a response of ''no'' to any of the questions, except question 6, then the EA is incomplete and will be returned for further work. If the only ''no'' is in response to question 6, then OJP will issue a determination requiring an EIS for that particular project at that site. Given the cost and time required to complete an EIS, the grantee may wish to explore another alternative site at this point.

(f) *Circulate EA and draft FONSI for public comment.* The grantee must provide public notice of availability of a Finding of No Significant Impact. The notice must be timed so that interested agencies and the public have 30 days for review and comment on the draft EA.

(g) *Review comments and modify plans, as appropriate.* The grantee must review any public or agency comments received as a result of review of the EA and draft FONSI, and should modify its plans, if appropriate. Modification may include modifying the project to mitigate the environmental impact of the proposed project, or abandoning the proposed site and selecting an alternative that will have a less significant

impact on the environment. The grantee must submit the comments, responses to these comments, and any revisions to the proposed plan to OJP for review. If the grantee recommends proceeding with the project in light of adverse comments on the environmental impact, the grantee must include the rationale for its recommendation.

(h) *Final action on EA.* Unless a significant environmental impact surfaces through the public comments or other means, OJP will issue the FONSI and authorize the grantee to begin the purchase of land, the bidding process, the development of final plans and specifications, and the construction work.

§ 91.63 Preparing an Environmental Impact Statement

(a) *Initial determination.* OJP will determine whether a proposed project may have a significant impact on the quality of the human environment, thereby requiring the preparation of an environmental impact statement (EIS). This determination will be made either:

(1) On the basis of an environmental assessment (EA) prepared for the proposed project or

(2) Without the preparation of an EA, but based on the extensive size of the proposed facility and the resulting variety of environmental impacts, the sensitive environmental nature of the proposed site, and/or the existence of highly controversial environmental impacts.

(b) *CEQ regulations.* The CEQ regulations in 40 CFR parts 1500 through 1508 govern the preparation of the EIS. The Corrections Program Office's Handbook on *Environmental Protection Requirements* offers further guidance.

(c) *EIS preparation team.* (1) Once OJP determines that an EIS is needed, the grantee shall notify OJP in writing about the contracting method that the grantee will use to complete the EIS. The grantee shall establish an EIS preparation team or entity that meets the requirements for an interdisciplinary approach. The team must not have any interest, financial or otherwise, in the outcome of the proposed projected or any related projects.

(2) If the grantee decides to use an alternate method to contracting out for preparation of the EIS (such as using a team of experts from various state agencies or a university), the grantee must submit a written proposal to OJP demonstrating that the team has the necessary interdisciplinary skills and experience in preparing EISs for similar projects. The proposal must include a completion schedule demonstrating that the alternate method will not result in significant delay. The proposal must also document that all members of the team, other than the grantee's employees, do not have any interest, financial or otherwise, in the outcome of the proposed project or any related projects.

(3) The grantee must use an OJP-approved statement of work (SOW) in conducting the EIS.

(4) Any consultant or contractor hired by OJP or the grantee to prepare an EIS must execute a disclosure statement specifying that it has no financial or other interest in the outcome of the project or any related projects.

(d) *Notice of intent.* OJP will publish a notice in the FEDERAL REGISTER to announce its intent to prepare the EIS. The grantee shall be responsible for drafting this notice. This notice must state the date, time and place of the scoping meeting and briefly describe the purpose of the meeting. The grantee should schedule the meeting at least 30 days from the date that the grantee submits the draft FEDERAL REGISTER notice to OJP.

(e) *Scoping.* The scoping process shall be conducted in accordance with 40 CFR 1501.7 of the CEQ regulations. The purpose of scoping is to identify and consult with affected federal, state and local agencies, Indian tribes, interested organizations and persons, including minority and low-income populations. The grantee and OPD shall conduct two distinct scoping meetings to assist in identifying both major and less important issues for the draft EIS. At the end of the scoping process, a brief report will be prepared summarizing the results, listing the participants, and attaching the meeting minutes.

(f) *Draft EIS.* The grantee and OJP will prepare the draft EIS in accordance with the requirements of the CEQ regulations in 40 CFR parts 1500

through 1508. The draft EIS must represent the best analysis reasonably possible. The grantee must submit the draft EIS to OJP and any cooperating agencies for internal review and comment. The revised draft must be submitted to OJP and any cooperating agency for approval.

(g) *Public comment*. The grantee, with OJP approval, must establish a distribution list and must mail the draft EIS to those parties. OJP will then submit the approved draft EIS to the Environmental Protection Agency (EPA) and will request EPA to publish a notice of the availability of the draft in the FEDERAL REGISTER. The grantee must publish a similar notice in a newspaper of general circulation in the area of the proposed action. Additionally, the grantee and OJP shall conduct a public information meeting to answer questions and receive comments on the draft EIS.

(h) *Final EIS*. The grantee and OJP will prepare the final EIS, including a copy of all comments on the draft and a summary of the public information meeting. The grantee shall submit the final EIS to OJP and any cooperating agencies for internal review. The grantee and OJP will circulate the final EIS to all parties on the distribution list, to any agency or person that requests a copy, and to EPA for publication in the FEDERAL REGISTER. The grantee must also announce the availability of the final EIS locally.

(i) *Record of decision*. When the waiting period for circulation of the final EIS expires, OJP shall prepare the record of decision in accordance with 40 CFR 1505.2 of the CEQ regulations and in consultation with the grantee. This record of decision shall determine the allowable uses of the grantee's VOI/TIS fund with respect to the proposed action or its alternatives.

(j) *Final action on EIS*. In proceeding with the proposed action, the grantee must implement any mitigation measures or other conditions established in the Record of Decision. As part of any mitigation, the grantee must report back to OJP on the status of implementing the mitigation.

§91.64 Supplemental EA or EIS.

(a) *OJP's duty to supplement*. OJP shall prepare supplements to either completed environmental assessments or draft or final environmental impact statements if the grantee proposes to make substantial changes in the proposed action that are relevant to previously assessed environmental concerns; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Additionally, OJP shall include the supplement in its formal administrative record.

(b) *Grantee's duty to supplement*. A grantee has a duty to inform OJP if it plans to make substantial changes in the proposed action that are relevant to environmental concerns; or if it learns of significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

§91.65 Responsible OJP officials.

(a) *Corrections Program Office Director*. The Director of the Corrections Program Office is primarily responsible for ensuring the completion of these procedures and for working with grantees to ensure that grantees and subgrantees meet their responsibilities under this subpart. The Director also has the authority to execute on behalf of OJP all FONSIs required under this subpart.

(b) *Assistant Attorney General*. The Assistant Attorney General of OJP is responsible for executing all records of decisions resulting from the completion of environmental impact statements on projects subject to this subpart.

§91.66 Public participation.

Environmental impact documents are public documents and the public should be provided an opportunity to review and comment on them.

(a) *Early project planning stages*. During the early planning stages of a project, the grantee should make reasonable efforts to meet with the affected public and other interested parties in order to obtain their views and any concerns regarding the potential environmental impacts of the proposed project.

(b) *Environmental assessment process*—(1) *Newspaper notice.* At a minimum, the grantee must provide public notice of the availability of the draft EA and draft Finding of No Significant Impact (FONSI) for review and comment. The grantee must publish this notice in the non-legal section of at least two consecutive editions of the newspaper of general circulation in the affected community or area. The notice must:

(i) Explain how and where a copy of the assessment can be accessed or obtained for review;

(ii) Include a request for comments; and

(iii) Provide at least a thirty-day comment period that begins from the date of the last published notice.

(2) *Post Office notice.* If the project area is not served by a regularly published local or area-wide newspaper, the notice described in paragraph (b)(1) of this section must be prominently displayed at the local post office.

(3) *Site notice.* The grantee must send a copy of the notice to owners and occupants of properties that are nearby or directly affected by the proposed project. Additionally, the grantee must place or post the notice on the site of the proposed project.

(4) *Distribution of the draft EA.* At the same time that the grantee provides the public notice of the availability of the EA for review and comment, the grantee must mail a copy of the draft EA and FONSI to any individuals and groups that have expressed an interest in the planned project to either the grantee or OJP and also to appropriate local, state, and Federal agencies. OJP will advise the grantee of the identities of any parties who have directly requested project information from OJP.

(5) *Public information meeting.* A public information meeting is not required for each environmental assessment. Rather, OJP will decide if a public meeting would be helpful in those cases in which the public comments either reflect a serious misunderstanding of the proposed project and its potential environmental impacts or raise substantial questions or issues concerning the content of the draft EA. If OJP determines that a meeting is necessary, the grantee must schedule and hold a public meeting. An OJP representative will attend.

(c) *EIS process*—(1) *Scoping meeting.* As one of the first steps in the preparation of a draft EIS, OJP and the grantee will sponsor a public meeting in the area(s) that would be affected by the proposed project and the alternative sites under consideration. This meeting is referred to as a scoping meeting and is intended to identify the proposed project's environmental impacts that are:

(i) Of most concern to the affected public and local, state, and federal agencies and

(ii) Of least concern to the affected public and agencies.

(2) *Review and comment process for draft EIS.* OJP's procedures require the grantee to obtain the public's comments on the draft EIS by:

(i) Publishing a notice of availability of the draft EIS in the newspaper(s) serving the area(s) that would be impacted by the proposed project and the alternatives sites;

(ii) Distributing copies of the draft EIS to all interested agencies, organizations, and individuals for their review and comment;

(iii) Holding near the site of the proposed project a public information meeting in order to obtain the comments of the attendees; and

(iv) Allowing, at a minimum, a forty-five day review and comment period for the draft EIS. Grantees should refer to OJP's Guidance Handbook for further information on how to conduct these public review and comment procedures.

(3) *Distribution of final EIS.* Any interested person or group can request a copy of the final EIS and will be provided a copy.

OTHER STATE AND FEDERAL LAW REQUIREMENTS

§ 91.67 State Environmental Policy Acts.

(a) *Coordination.* OJP will coordinate with grantees to ensure that any state, local, or tribal environmental impact review requirements similar to the Federal NEPA procedures will be met concurrently, to the extent possible, through requesting the appropriate non-federal agency(ies) to be a joint

lead agency(ies). This effort would involve joint analyses, public involvement and documentation. Grantees are responsible for identifying the application of and informing OJP of these state and local requirements.

(b) *Completed analysis.* For projects that had state or local environmental impact analysis completed prior the implementation of these procedures, OJP will review the documents prepared to meet the state and local requirements. In order to minimize any duplication of analysis, OJP will advise the State on whether additional environmental impact review is required.

§ 91.68 Compliance with other Federal environmental statutes, regulations and executive orders.

(a) *Other Federal environmental laws.* All projects initiated by State or local units of government with VOI/TIS grant funding are also subject, where applicable, to the environmental impact analysis requirements of the following statutes, their implementing regulations, and the relevant executive orders:

(1) Archeological and Historical Preservation Act,

(2) Coastal Zone Management Act,

(3) Coastal Barrier Resources Act,

(4) Clean Air Act,

(5) Safe Drinking Water Act,

(6) Federal Water Pollution Control Act,

(7) Endangered Species Act,

(8) Wild and Scenic Rivers Act,

(9) National Historic Preservation Act,

(10) Wilderness Act,

(11) Farmland Protection Policy Act,

(12) Flood Disaster Protection Act

(13) Executive Order on Floodplain Management,

(14) Executive Order on Wetland Protection,

(15) Executive Order on Environmental Justice, and

(16) Executive Order on Protection and Enhancement of the Cultural Environment.

(b) *Combined requirements.* Documenting compliance with the environmental requirements in paragraph (a) of this section does not normally require separate documents or separate processes. Rather, documenting compliance with all of these requirements is generally accomplished by incorporating them into the NEPA documents. For example, one category of environmental impacts that must be addressed in a NEPA analysis is potential impacts to historic properties. The National Historic Preservation Act, as well as the Advisory Council on Historic Preservation's regulations at 36 CFR part 800, also contain Federal requirements for addressing the impacts on historic properties from Federal actions. In order to avoid duplicate compliance procedures, the NEPA document traditionally becomes the process for meeting the requirements of both laws.

PART 92—OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (COPS)

Subpart A—Police Corps Eligibility and Selection Criteria

Sec.
92.1 Scope.
92.2 Am I eligible to apply to participate in the Police Corps?
92.3 How and when should I apply to participate in the Police Corps?
92.4 How will participants be selected from applicants?
92.5 What educational expenses does the Police Corps cover, and how will they be paid?
92.6 What colleges or universities can I attend under the Police Corps?

Subpart B—Police Recruitment Program Guidelines

92.7 Scope.
92.8 Providing recruitment services.
92.9 Publicizing the Police Recruitment Program.
92.10 Providing tutorials and other academic assistance programs.
92.11 Content of the recruitment and retention programs.
92.12 Program funding length.
92.13 Program eligibility.

AUTHORITY: 42 U.S.C. 13811–13812; 42 U.S.C. 14091–14102.

SOURCE: 61 FR 49972, Sept. 24, 1996, unless otherwise noted.

Subpart A—Police Corps Eligibility and Selection Criteria

§ 92.1 Scope.

This subpart sets forth guidance on the eligibility for and selection to participate in the Police Corps. The Police Corps offers scholarships and educational expense reimbursements to individuals who agree to serve as a State or local police officer or sheriff's deputy for four years. In addition, Police Corps participants receive sixteen weeks of training in basic law enforcement, including vigorous physical and mental training to teach self-discipline and organizational loyalty and to impart knowledge and understanding of legal processes and law enforcement.

§ 92.2 Am I eligible to apply to participate in the Police Corps?

(a) You should consider applying to the Police Corps if you are seeking an undergraduate or graduate degree, and are willing to commit to four years of service as a member of a State or local police force. To be eligible to participate in a State Police Corps program, an individual also must:

(1) Be a citizen of the United States or an alien lawfully admitted for permanent residence in the United States as of the date of application;

(2) Meet the requirements for admission as a trainee of the State or local police force to which the participant will be assigned if selected, including achievement of satisfactory scores on any applicable examination, except that failure to meet the age requirement for a trainee of the State or local police force shall not disqualify the applicant if the applicant will be of sufficient age upon completing an undergraduate course of study;

(3) Possess the necessary mental and physical characteristics to discharge effectively the duties of a law enforcement officer;

(4) Be of good character and demonstrate sincere motivation and dedication to law enforcement and public service;

(5) In the case of an undergraduate, agree in writing that the participant will complete an educational course of study leading to the award of a baccalaureate degree and will then accept an appointment and complete four years of service as an officer in the State police or in a local police department within the State;

(6) In the case of a participant desiring to undertake or continue graduate study, agree in writing that the participant will accept an appointment and complete 4 years of service as an officer in the State police or in a local police department within the State before undertaking or continuing graduate study;

(7) Contract, with the consent of the participant's parent or guardian if the participant is a minor, to serve four years as an officer in the State police or in a local police department, if an appointment is offered; and

(8) Except as provided in paragraph (a)(8)(i) of this section, be without previous law enforcement experience.

(i) Until September 13, 1999, up to ten percent of the applicants accepted into the State Police Corps program may be persons who have had some law enforcement experience and/or have demonstrated special leadership potential and dedication to law enforcement.

(b) According to the Debt Collection Procedures Act (Pub. L. 101–647 as amended), 28 U.S.C. 3201, persons who have incurred a court judgment in favor of the United States creating a lien against their property arising from a civil or criminal proceeding regarding a debt are precluded from receiving Federal funds (including Police Corps funds) until the judgment lien has been paid in full or otherwise satisfied.

(c) Educational assistance under the Police Corps Act for any course of study also is available to a dependent child of a law enforcement officer:

(1) Who is a member of a State or local police force or is a Federal criminal investigator or uniformed police officer;

(2) Who is not a participant in the Police Corps program, but

(3) Who serves in a State for which the Director has approved a Police Corps plan, and

(4) Who is killed in the course of performing policing duties.

(i) For purposes of this assistance, a dependent child means a natural or adopted child or stepchild of a law enforcement officer who at the time of

the officer's death was no more than 21 years old or, if older than 21 years, was in fact dependent on the child's parents for at least one-half of the child's support (excluding educational expenses), as determined by the Director based on a review of any available documentation.

(ii) The educational assistance available under this subsection is subject to the same dollar limitations set forth in §92.4, but carries no police service obligation, repayment contingencies, or requirement for approval of a course of study.

§92.3 How and when should I apply to participate in the Police Corps?

(a) The application and selection process occurs at the State level. An applicant may apply to participate in more than one State Police Corps program, provided that the applicant is prepared to commit to serve as a law enforcement officer in the State to which application is made. Application forms should be obtained from the State Police Corps agencies.

(b) Applicants may seek admission to the Police Corps either before commencement of or during the applicant's course of undergraduate or graduate study. However, acceptance into the Police Corps will be conditioned on matriculation in or acceptance for admission at a four-year institution of higher education. Specific application deadlines will be established by State Police Corps agencies.

§92.4 How will participants be selected from applicants?

(a) Applicants should be selected competitively based upon selection criteria developed by the State Police Corps agency pursuant to this subsection. Appropriate application materials should be developed by the State Police Corps agency to obtain the information reasonably needed to make selection and assignment decisions and to provide required information to the Director.

(b) The State Police Corps agency should develop selection criteria in consultation with local law enforcement officials, representatives of police labor organizations and police management organizations, and other appropriate State and local agencies. Selection criteria should seek to attract highly qualified individuals with backgrounds and characteristics likely to assure effective participation in the Police Corps. Criteria should include consideration of factors bearing on the statutory eligibility requirements set forth in §92.1, and may include (without limitation) consideration of:

(1) Scholastic record;

(2) Work experience;

(3) Extracurricular and/or community involvement;

(4) Letters of recommendation;

(5) Demonstrated interest in policing as a career.

(c) After selection, the State Police Corps agency will forward to the Director, Office of the Police Corps and Law Enforcement Education a list of persons selected for admission to the Police Corps. With respect to each person, the list should set forth:

(1) Name;

(2) Address;

(3) Social security number;

(4) Name and location of law enforcement agency to which the person has been assigned;

(5) Educational institution in which the person is enrolled or has been accepted for admission, and course of study;

(6) Date on which the person is expected to commence his/her service;

(7) Certification that the person has been found to meet the statutory selection criteria at 42 U.S.C. §14096;

(8) A Police Corps Agreement signed by the applicant; and

(9) An itemization of the educational expenses that the person is eligible to receive through scholarship and/or reimbursement.

(i) With respect to individuals identified to receive educational assistance under §92.2(c), the list should contain the information in paragraphs (c) (1), (2), (3), (5) and (9) of this section.

(ii) With respect to the list in the aggregate, a summary of the racial and gender distribution of the individuals.

(d) After selection, the State Policy Corps agency should notify applicants of their selection, their agency assignment, and their assignment to a training class. However, admission to the

Police Corps is not final until the Police Corps Agreement has been signed both by the applicant and the Director.

§ 92.5 What educational expenses does the Police Corps cover, and how will they be paid?

(a) Educational expenses are paid either in the form of a scholarship or a reimbursement. Scholarships will be paid where Police Corps participants are currently enrolled in an approved course of study in an institution of higher education. Reimbursements will be paid to participants for educational expenses incurred prior to admission to the Police Corps. In certain circumstances, a Police Corps participant may receive a reimbursement for past expenses and a scholarship for current expenses.

(b) Requests for payment of educational expenses by a Police Corps participant should be submitted to the Director through the State Police Corps agency.

(1) Educational expenses are expenses that are directly attributable to a course of education leading to the award of either a baccalaureate or graduate degree, and may include:

(i) Tuition, in an amount billed by the institution of higher education;

(ii) Fees, in an amount billed by the institution of higher education;

(iii) Cost of books required to be purchased pursuant to the curriculum in which the candidate is enrolled;

(iv) Cost of transportation from the candidate's home to school, calculated at actual cost or the current prevailing rate for mileage reimbursement for federal travel;

(v) Cost of room and board;

(vi) Miscellaneous expenses not to exceed $250 per academic semester.

(2) A participant receiving a scholarship may submit payment requests prior to the commencement of each subsequent academic year in which he/she is enrolled in an institution of higher education.

(3) For participants currently enrolled in an institution of higher education, each payment request must be accompanied by:

(i) A certification from the institution that the participant is maintaining satisfactory academic progress;

(ii) A certification by or on behalf of the State or local police force to which the participant will be assigned that the participant's course of study includes appropriate preparation for police service.

(4) The maximum Police Corps payment per participant per academic year, whether in the form of scholarship or reimbursement, is $7,500. In the case of a participant who is pursuing a course of educational study during substantially an entire calendar year, the maximum payment will be $10,000 per such calendar year.

(5) The total of all Police Corps scholarship or reimbursement payments to any one participant shall not exceed $30,000.

(6) Police Corps scholarship payments will be made directly to the institution of higher education that the student is attending. Each institution of higher education receiving a Police Corps scholarship payment shall remit to such student any funds in excess of the costs of tuition, fees, and room and board payable to the institution.

(7) Reimbursements for past expenses will be made directly to the Police Corps participant. One half of the reimbursement will be paid after the participant is sworn in and starts the first year of required service. The remainder will be paid upon successful completion of the first year of required service. The Director may, upon a showing of good cause, advance the date of the first reimbursement payment to an individual participant.

[61 FR 49972, Sept. 24, 1996, as amended at 64 FR 33018, June 21, 1999]

§ 92.6 What colleges or universities can I attend under the Police Corps?

(a) The choice of institution is up to the participant, as long as the institution meets the definition of an ''institution of higher deduction.'' As defined in 20 U.S.C. 1141(a), an ''institution of higher education'' means an educational institution in any State which:

(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate,

(2) Is legally authorized within such State to provide a program of education beyond secondary education,

(3) Provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree,

(4) Is a public or other nonprofit institution, and

(5) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary (of Education) for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) Such term also includes any school which provides not less than a one-year program of training to prepare students for gainful employment in a recognized occupation and which meets the provisions of paragraphs (a)(1), (2), (4), and (5) of this section. Such term also includes a public or nonprofit educational institution in any State which, in lieu of the requirement in paragraph (a)(1) of this section, admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located.

(c) A Police Corps scholarship only may be used to attend a four-year institution of higher education, except that:

(1) A scholarship may be used for graduate and professional study; and

(2) If a participant has enrolled in the Police Corps upon or after transfer to a four-year institution of higher education, the Director may reimburse the participant for prior educational expenses.

Subpart B—Police Recruitment Program Guidelines

SOURCE: 63 FR 50146, Sept. 21, 1998, unless otherwise noted.

§92.7 Scope.

(a) The Police Recruitment program offers funds to qualified community organizations to assist in meeting the costs of programs which are designed to recruit and train police applicants from a variety of neighborhoods and localities.

(b) Individual participants encountering problems throughout the police department application process shall receive counseling, tutorials, and other academic assistance as necessary to assist them in the application process of a police department.

(c) Program goals should include increasing the retention in the hiring process for police applicants participating in the program.

(d) Programs funded under the Police Recruitment program will have a one-year grant period, with allowances for two additional years of no-cost extensions.

§92.8 Providing recruitment services.

The non-profit community organizations that wish to receive a grant under this program should provide for an overall program design with the objective of recruiting and retaining applicants from a variety of populations to a police department. The recruitment strategies employed may include:

(a) A process for recruiting applicants for employment by a police department. These processes should include working in cooperation with a local law enforcement department to develop selection criteria for the participants. The selection criteria may include, but are not limited to:

(1) Demonstrated interest in policing as a career;

(2) Scholastic record (except that failure to meet the satisfactory academic scores shall not disqualify the applicant since the program is designed to provide tutorial service so to help applicant pass the required examinations);

(3) Background screening;

(4) Work experience;

(5) Letters of recommendation.

(b) The recruitment services must ensure that applicants possess the necessary mental and physical capabilities and emotional characteristics to be an effective law enforcement officer.

§ 92.9 Publicizing the Police Recruitment Program.

Participating organizations should have experience in or an ability to develop procedures to publicize the availability of like programs. These programs should be widely publicized throughout the affected geographic area. The methods for publicizing the Police Recruitment programs may include, but are not limited to:

(a) Sending press releases to community bulletins, college and local newspapers, and television stations, as well as public service announcements to local and college radio stations;

(b) Sending information to and/or making presentations at:

(1) Local community colleges;

(2) Colleges and universities serving populations in the geographic area of the program;

(3) Local nonprofit groups;

(4) Academic counseling departments within public and private nonprofit colleges and universities;

(5) Academic counseling departments within public and private nonprofit high schools;

(6) High school and college student associations;

(7) Local religious groups;

(8) Local social services agencies.

(c) Disseminating press releases and/or translated materials to non-English language newspapers and magazines; and

(d) Maintaining toll-free or other easy-access telephone numbers for obtaining application materials.

§ 92.10 Providing tutorials and other academic assistance programs.

(a) The program designed by the community organization must include academic counseling, tutorials and other academic assistance programs to enable individuals to meet police force academic requirements, pass entrance examinations, and meet other requirements. The program should include:

(1) Processes for evaluating educational assistance needs of young adults and adults. These processes should include, but are not limited to: screening procedures and testing batteries to assess individual needs;

(2) Tutorial programs designed to meet the specific and varied academic needs of individual applicants; and

(3) Academic and guidance counseling for adults. Specific counseling programs must be designed for individuals who encounter problems with passing the entrance examinations, and may include specialized counseling in self discipline, study habits, taking written and oral exams, and physical fitness.

(b) These tutorial and academic assistance programs must be provided by individuals or groups that have experience in developing and providing tutorial programs for young adults and adults.

(c) The program provider must also have experience in providing counseling for participants who encounter other problems with the police department application process.

§ 92.11 Content of the recruitment and retention programs.

Applicants must describe in detail the intended program strategies for providing academic and guidance counseling activities for members of the community, as described in §§ 92.2 through 92.4. A review of mandatory topics to be addressed in a detailed concept paper/application to be provided by all applicants follows.

(a) Applicants must address program strategies for responding to program and applicant needs throughout the recruitment process. The process should be based on an examination and understanding of the needs of the population in meeting the qualification requirements of the police department. The project strategy should subsequently be tailored based on the understanding of the current and anticipated problems in meeting police department requirements.

(b) Applicants must describe the manner in which academic services and tutorials, and guidance counseling programs that would assist applicants to pass the entrance examination and related tests will be provided. This should also include the anticipated length of the academic and guidance counseling programs, qualifications of the counselors, and the content of the counseling programs.

(c) Applicants must provide retention services to assist in keeping individuals in the application process of a police department. These may include:

(1) Counseling programs aimed at meeting the needs of potential police applicants before they are eligible to apply for a sworn position;

(2) Pre-police employment programs, such as junior police cadet programs, reserve programs, and police volunteer activities and

(3) Mentoring activities utilizing sworn officers.

(d) Applicants must estimate the number of police applicants to be served by the prospective program, along with an estimation of the total number of potential or actual applicants who will be successfully hired and eventually deployed as police officers.

§ 92.12 Program funding length.

Funding for these programs will be for one year only, but will allow for two additional years of no-cost extension.

§ 92.13 Program eligibility.

(a) Eligible organizations for the Police Recruitment program grant are certified nonprofit organizations that have training and/or experience in:

(1) Working with a police department and with teachers, counselors, and similar personnel;

(2) Providing services to the community in which the organization is located;

(3) Developing and managing services and techniques to recruit and train individuals, and in assisting such individuals in meeting requisite standards and provisions;

(4) Developing and managing services and techniques to assist in the retention of applicants to like programs; and

(5) Developing other programs that contribute to the community.

(b) A program is qualified to receive a grant if:

(1) The overall design of the program is to recruit and retain applicants to a police department;

(2) The program provides recruiting services that include tutorial programs to enable individuals to meet police force academic requirements and to pass entrance examinations;

(3) The program provides counseling to applicants to police departments who may encounter problems throughout the application process; and

(4) The program provides retention services to assist in retaining individuals to stay in the application process of the police department.

(c) To qualify for funding under the Police Recruitment program, the intended activities must support the recruitment services, tutorial and other academic assistance programs, and retention services for individuals. The qualified non-profit organization must submit an application which identifies the law enforcement department with which it will work and includes documentation showing:

(1) The need for the grant;

(2) The intended use of the funds;

(3) Expected results from the use of grant funds;

(4) Demographic characteristics of the population to be served, including age, disability, race, ethnicity, and languages used;

(5) Status as a non-profit organization; and

(6) Contains satisfactory assurances that the program for which the grant is made will meet the applicable requirements of the program guidelines prescribed in this document.

PART 93—PROVISIONS IMPLEMENTING THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

Subpart A—Drug Courts

Sec.
93.1 Purpose.
93.2 Statutory authority.
93.3 Definitions.
93.4 Grant authority.
93.5 Exclusion of violent offenders.

Subpart B [Reserved]

AUTHORITY: 42 U.S.C. 3797u through 3797y–4.

SOURCE: 60 FR 32105, June 20, 1995, unless otherwise noted.

Subpart A—Drug Courts

§ 93.1 Purpose.

This part sets forth requirements and procedures to ensure that grants to States, State courts, local courts, units of local government, and Indian tribal governments, acting directly or through agreements with other public or private entities, exclude violent offenders from participation in programs authorized and funded under this part.

§ 93.2 Statutory authority.

This program is authorized under the Violent Crime Control and Law Enforcement Act of 1994, Title V, Public Law 103–322, 108 Stat. 1796, (September 13, 1994), 42 U.S.C. 3796ii–3796ii–8.

§ 93.3 Definitions.

(a) *State* has the same meaning as set forth in section 901(a)(2) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

(b) *Unit of Local Government* has the same meaning as set forth in section 901(a)(3) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

(c) *Assistant Attorney General* means the Assistant Attorney General for the Office of Justice Programs.

(d) *Violent offender* means a person who either—

(1) Is currently charged with or convicted of an offense during the course of which:

(i) The person carried, possessed, or used a firearm or other dangerous weapon; or

(ii) There occurred the use of force against the person of another; or

(iii) There occurred the death of, or serious bodily injury to, any person; without regard to whether proof of any of the elements described herein is required to convict; or

(2) Has previously been convicted of a felony crime of violence involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm.

§ 93.4 Grant authority.

(a) The Assistant Attorney General may make grants to States, State courts, local courts, units of local government, and Indian tribal governments, acting directly or through agreements with other public or private entities, for programs that involve:

(1) Continuing judicial supervision over offenders with substance abuse problems who are not violent offenders, and

(2) The integrated administration of other sanctions and services, which shall include—

(i) Mandatory periodic testing for the use of controlled substances or other addictive substances during any period of supervised release or probation for each participant;

(ii) Substance abuse treatment for each participant;

(iii) Diversion, probation, or other supervised release involving the possibility of prosecution, confinement, or incarceration based on noncompliance with program requirements or failure to show satisfactory progress; and

(iv) Programmatic, offender management, and aftercare services such as relapse prevention, health care, education, vocational training, job placement, housing placement, and child care or other family support services for each participant who requires such services.

(b) Applications for grants under this program shall be made at such times and in such form as may be specified in guidelines or notices published by the Assistant Attorney General. Applications will be evaluated according to the statutory requirements of the Act and the programmatic goals specified in the applicable guidelines. Grantees must comply with all statutory and program requirements applicable to grants under this program.

(c) The funds provided under this part shall be administered in compliance with the standards set forth in part 38 (Equal Treatment for Faith-based Organizations) of this chapter.

[60 FR 32105, June 20, 1995, as amended by Order No. 2703–2004, 69 FR 2841, Jan. 21, 2004]

§ 93.5 Exclusion of violent offenders.

(a) The Assistant Attorney General will ensure that grants to States, State courts, local courts, units of local government, and Indian tribal governments, acting directly or through

agreements with other public or private entities, exclude violent offenders from programs authorized and funded under this part.

(b) No recipient of a grant made under the authority of this part shall permit a violent offender to participate in any program receiving funding pursuant to this part.

(c) Applicants must certify as part of the application process that violent offenders will not participate in programs authorized and funded under this part. The required certification shall be in such form and contain such assurances as the Assistant Attorney General may require to carry out the requirements of this part.

(d) If the Assistant Attorney General determines that one or more violent offenders are participating in a program receiving funding under this part, such funding shall be promptly suspended, pending the termination of participation by those persons deemed ineligible to participate under the regulations in this part.

(e) The Assistant Attorney General may carry out or make arrangements for evaluations and request information from programs that receive support under this part to ensure that violent offenders are excluded from participating in programs hereunder.

Subpart B [Reserved]

PART 94—CRIME VICTIM SERVICES

Subpart A—International Terrorism Victim Expense Reimbursement Program

INTRODUCTION

Sec.
94.11 Purpose; construction and severability.
94.12 Definitions.
94.13 Terms.

COVERAGE

94.21 Eligibility.
94.22 Categories of expenses.
94.23 Amount of reimbursement.
94.24 Determination of award.
94.25 Collateral sources.

PROGRAM ADMINISTRATION

94.31 Application procedures.
94.32 Application deadline.
94.33 Investigation and analysis of claims.

PAYMENT OF CLAIMS

94.41 Interim emergency payment.
94.42 Repayment and waiver of repayment.

APPEAL PROCEDURES

94.51 Request for reconsideration.
94.52 Final agency decision.

APPENDIX TO SUBPART A—INTERNATIONAL TERRORISM VICTIM EXPENSE REIMBURSEMENT PROGRAM (ITVERP) CHART OF EXPENSE CATEGORIES AND LIMITS

Subparts B–D [Reserved]

AUTHORITY: Victims of Crime Act (VOCA), Title II, Secs. 1404C and 1407 (42 U.S.C. 10603c, 10604).

SOURCE: 71 FR 52451, Sept. 6, 2006, unless otherwise noted.

Subpart A—International Terrorism Victim Expense Reimbursement Program

INTRODUCTION

§94.11 Purpose; construction and severability.

(a) The purpose of this subpart is to implement the provisions of VOCA, Title II, Sec. 1404C (42 U.S.C. 10603c), which authorize the Director (Director), Office for Victims of Crime (OVC), a component of the Office of Justice Programs (OJP), to establish a program to reimburse eligible victims of acts of international terrorism that occur outside the United States, for expenses associated with that victimization.

(b) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable from this part and shall not affect the remainder thereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

§94.12 Definitions.

The following definitions shall apply to this subpart:

(a) *Child* means any biological or legally-adopted child, or any stepchild, of a deceased victim, who, at the time of the victim's death, is—

(1) Younger than 18 years of age; or

(2) Over 18 years of age and a student, as defined in 5 U.S.C. 8101.

(b) *Claimant* means a victim, or his representative, who is authorized to sign and submit an application, and receive payment for reimbursement, if appropriate.

(c) *Collateral sources* means sources that provide reimbursement for specific expenses compensated under this subpart, including property, health, disability, or other insurance for specific expenses; Medicare or Medicaid; workers' compensation programs; military or veterans' benefits of a compensatory nature; vocational rehabilitation benefits; restitution; and other state, Federal, foreign, and international compensation programs: except that any reimbursement received under this subpart shall be reduced by the amount of any lump sum payment whatsoever, received from, or in respect of the United States or a foreign government, unless the claimant can show that such payment was for a category of expenses not covered under this subpart. To the extent that a claimant has an unsatisfied judgment against a foreign government based on the same act of terrorism, the value of that unsatisfied judgment shall be counted as a lump sum payment for expenses covered under this subpart, unless the claimant agrees to waive his right to sue the United States government for satisfaction of that judgment.

(d) *Deceased means* individuals who are dead, or are missing and presumed dead.

(e) *Dependent* has the meaning given in 26 U.S.C. 152. If the victim was not required by law to file a U.S. Federal income tax return for the year prior to the act of international terrorism, an individual shall be deemed to be a victim's dependent if he was reliant on the income of the victim for over half of his support in that year.

(f) *Employee of the United States Government* means any person who—

(1) Is an employee of the United States government under Federal law; or

(2) Receives a salary or compensation of any kind from the United States Government for personal services directly rendered to the United States, similar to those of an individual in the United States Civil Service, or is a contractor of the United States Government (or an employee of such contractor) rendering such personal services.

(g) *Funeral and burial* means those activities involved in the disposition of the remains of a deceased victim, including preparation of the body and body tissue, refrigeration, transportation, cremation, procurement of a final resting place, urns, markers, flowers and ornamentation, costs related to memorial services, and other reasonably-associated activities, including travel for not more than two family members.

(h) *Incapacitated* means substantially impaired by mental illness or deficiency, or by physical illness or disability, to the extent that personal decision-making is impossible.

(i) *Incompetent* means unable to care for oneself because of mental illness or disability, mental retardation, or dementia.

(j) *International terrorism* has the meaning given in 18 U.S.C. 2331. As of the date of these regulations, the statute defines the term to mean ''activities that—

(1) Involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(2) Appear to be intended—

(i) To intimidate or coerce a civilian population;

(ii) To influence the policy of a government by intimidation or coercion; or

(iii) To affect the conduct of a government by mass destruction, assassination, or kidnaping; and

(3) Occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the

locale in which their perpetrators operate or seek asylum.''

(k) *Legal guardian* means legal guardian, as the term is defined under the laws of the jurisdiction of which the ward is or was a legal resident, except that if the ward is or was a national of the United States, the legal guardianship must be pursuant to an order of a court of competent jurisdiction of or within the United States.

(l) *Medical expenses* means costs associated with the treatment, cure, or mitigation of a disease, injury, or mental or emotional condition that is the result of an act of international terrorism. Allowable medical expenses include reimbursement for eyeglasses or other corrective lenses, dental services, rehabilitation costs, prosthetic or other medical devices, prescription medication, and other services rendered in accordance with a method of healing recognized by the jurisdiction in which the medical care is administered.

(m) *Mental health* care means mental health care provided by an individual who meets professional standards to provide these services in the jurisdiction in which the care is administered.

(n) *National of the United States* has the meaning given in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)). As of the date of these regulations, the statute defines the term to mean ''(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.''

(o) *Officer of the United States government* has the meaning given in 5 U.S.C. 2104.

(p) *Outside the United States* means outside any state of the United States, the District of Columbia, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other possession or territory of the United States.

(q) *Parent* means a biological or legally-adoptive parent, or a step-parent, unless his parental rights have been terminated in the jurisdiction where the child is or was a legal resident, except that if the child or either parent is a national of the United States, the termination must be pursuant to an order of a court of competent jurisdiction of or within the United States.

(r) *Property loss* refers to items of personal property (other than medical devices, which are included in the category of ''medical expenses'') that are lost, destroyed, or held as evidence.

(s) *Rehabilitation costs* includes reasonable costs for the following: physiotherapy; occupational therapy; counseling, and workplace, vehicle, and home modifications.

(t) *Representative* means a family member or legal guardian authorized to file a claim on behalf of a victim who is younger than 18 years of age, incompetent, incapacitated, or deceased, except that no individual who was criminally culpable for the act of international terrorism shall be considered a representative. In the event that no family member or legal guardian is available to file a claim for an interim emergency payment on behalf of a victim, under §94.41, a U.S. consular officer or U.S. embassy official within the country may act as a representative, consistent with any limitation on his authority contained in 22 CFR 92.81(b).

(u) *Victim* has the meaning given in 42 U.S.C. 10603c(a)(3)(A), it being understood that the term ''person'' in that section means the following:

(1) (i) An individual who was present during the act of terrorism;

(ii) An individual who was present during the immediate aftermath of the act of terrorism; or

(iii) An emergency responder who assisted in efforts to search for and recover other victims; and

(2) The spouse, children, parents, and siblings of a victim described in paragraph (u)(1) of this Section, and other persons, at the discretion of the Director, shall be considered ''victims'', when the person described in such paragraph—

(i) Dies as a result of the act of terrorism;

(ii) Is younger than 18 years of age (or is incompetent or incapacitated) at the time of the act of terrorism, or;

(iii) Is rendered incompetent or incapacitated as a result of the act of terrorism.

§ 94.13 Terms.

The first three provisions of 1 U.S.C. 1 (rules of construction) shall apply to this subpart.

COVERAGE

§ 94.21 Eligibility.

(a) Except as provided in paragraphs (b) and (c) of this section, reimbursement of qualified expenses under this subpart is available to a victim of international terrorism or his representative, pursuant to 42 U.S.C. 10603c(a)(3)(A). For purposes of eligibility for this program only, the Attorney General shall determine whether there is a reasonable indication that an act was one of international terrorism, within the meaning of that section.

(b) Reimbursement shall be denied to any claimant if the Director, in consultation with appropriate Department of Justice (DOJ) officials, determines that there is a reasonable indication that either the victim with respect to whom the claim is made, or the claimant, was criminally culpable for the act of international terrorism.

(c) Reimbursement may be reduced or denied to a claimant if the Director, in consultation with appropriate DOJ officials, determines that the victim with respect to whom the claim is made contributed materially to his own death or injury by—

(1) Engaging in conduct that violates U.S. law or the law of the jurisdiction in which the act of international terrorism occurred;

(2) Acting as a mercenary or ''soldier of fortune'';

(3) (As a non-U.S. Government employee), acting as an advisor, consultant, employee, or contractor, in a military or political capacity—

(i) For a rebel or paramilitary organization;

(ii) For a government not recognized by the United States; or

(iii) In a country in which an official travel warning issued by the U.S. Department of State related to armed conflict was in effect at the time of the act of international terrorism; or

(4) Engaging in grossly reckless conduct.

§ 94.22 Categories of expenses.

The following categories of expenses, generally, may be reimbursed, with some limitations, as noted in § 94.23: medical care; mental health care; property loss; funeral and burial; and miscellaneous expenses (including temporary lodging, emergency travel, and transportation). Under this subpart, the Director shall not reimburse for attorneys' fees, lost wages, or non-economic losses (such as pain and suffering, loss of enjoyment of life, loss of consortium, etc.).

§ 94.23 Amount of reimbursement.

Different categories of expenses are capped, as set forth in the chart below. Those caps may be adjusted, from time to time, by rulemaking. The cap in effect within a particular expense category, at the time that the application is received, shall apply to the award.

§ 94.24 Determination of award.

After review of each application, the Director shall determine the eligibility of the victim or representative and the amount, if any, eligible for reimbursement, specifying the reasons for such determination and the findings of fact and conclusions of law supporting it. A copy of the determination shall be mailed to the claimant at his last known address.

§ 94.25 Collateral sources.

(a) The amount of expenses reimbursed to a claimant under this subpart shall be reduced by any amount that the claimant receives from a collateral source in connection with the same act of international terrorism. In cases in which a claimant receives reimbursement under this subpart for expenses that also will or may be reimbursed from another source, the claimant shall subrogate the United States to the claim for payment from the collateral source up to the amount for which the claimant was reimbursed under this subpart.

(b) Notwithstanding paragraph (a) of this section, when a collateral source provides supplemental reimbursement

for a specific expense, beyond the maximum amount reimbursed for that expense under this subpart, the claimant's award under this subpart shall not be reduced by the amount paid by the collateral source, nor shall the claimant be required to subrogate the United States to the claim for payment from the collateral source, except that in no event shall the combined reimbursement under this subpart and any collateral source exceed the actual expense.

PROGRAM ADMINISTRATION

§ 94.31 Application procedures.

(a) To receive reimbursement, a claimant must submit a completed application under this program requesting payment based on an itemized list of expenses, and must submit original receipts.

(b) Notwithstanding paragraph (a) of this Section, in cases involving incidents of terrorism preceding the establishment of this program where claimants may not have original receipts, and in cases in which the claimant certifies that the receipts have been destroyed or lost, the Director may, in his discretion, accept an itemized list of expenses. In each such case, the claimant must certify that original receipts are unavailable and attest that the items and amounts submitted in the list are true and correct to the best of his knowledge. In the event that it is later determined that a fraudulent certification was made, the United States may take action to recover any payment made under this section, and pursue criminal prosecution, as appropriate.

§ 94.32 Application deadline.

For claims related to acts of international terrorism that occurred after October 6, 2006, the deadline to file an application is three years from the date of the act of international terrorism. For claims related to acts of international terrorism that occurred between December 21, 1988, and October 6, 2006, the deadline to file an application is October 6, 2009. At the discretion of the Director, the deadline for filing a claim may be tolled or extended upon a showing of good cause.

[76 FR 19910, Apr. 11, 2011]

§ 94.33 Investigation and analysis of claims.

The Director may seek an expert examination of claims submitted if he believes there is a reasonable basis for requesting additional evaluation. The claimant, in submitting an application for reimbursement, authorizes the Director to release information regarding claims or expenses listed in the application to an appropriate body for review. If the Director initiates an expert review, no identifying information for the victim or representative shall be released.

PAYMENT OF CLAIMS

§ 94.41 Interim emergency payment.

Claimants may apply for an interim emergency payment, prior to a determination under § 94.21(a). If the Director determines that such payment is necessary to avoid or mitigate substantial hardship that may result from delaying reimbursement until complete and final consideration of an application, such payment may be made to cover immediate expenses such as those of medical care, funeral and burial, short-term lodging, and emergency transportation. The amount of an interim emergency payment shall be determined on a case-by-case basis, and shall be deducted from the final award amount.

§ 94.42 Repayment and waiver of repayment.

A victim or representative shall reimburse the program upon a determination by the Director that an interim emergency award or final award was: Made to an ineligible victim or claimant; based on fraudulent information; or an overpayment. Except in the case of ineligibility pursuant to a determination by the Director, in consultation with appropriate DOJ officials, under § 94.21(b), the Director may waive such repayment requirement in whole or in part, for good cause, upon request.

APPEAL PROCEDURES

§ 94.51 Request for reconsideration.

A victim or representative may, within thirty (30) days after receipt of the determination under § 94.24, appeal the same to the Assistant Attorney General for the Office of Justice Programs, by submitting a written request for review. The Assistant Attorney General may conduct a review and make a determination based on the material submitted with the initial application, or may request additional documentation in order to conduct a more thorough review. In special circumstances, the Assistant Attorney General may determine that an oral hearing is warranted; in such cases, the hearing shall be held at a reasonable time and place.

§ 94.52 Final agency decision.

In cases that are not appealed under § 94.51, the Director's determination pursuant to § 94.24 shall be the final agency decision. In all cases that are appealed, the Assistant Attorney General shall issue a notice of final determination, which shall be the final agency decision, setting forth the findings of fact and conclusions of law supporting his determination.

APPENDIX TO SUBPART A OF PART 94—INTERNATIONAL TERRORISM VICTIM EXPENSE REIMBURSEMENT PROGRAM (ITVERP); CHART OF EXPENSE CATEGORIES AND LIMITS

There are five major categories of expenses for which claimants may seek reimbursement under the ITVERP: (1) Medical expenses, including dental and rehabilitation costs; (2) Mental health care; (3) Property loss, repair, and replacement; (4) Funeral and burial costs; and (5) Miscellaneous expenses.

Expense categories	Subcategories and conditions	Expense limits
Medical expenses, including dental and rehabilitation costs.	Victim's medical care, including, without limitation, treatment, cure, and mitigation of disease or injury; replacement of medical devices, including, without limitation, eyeglasses or other corrective lenses, dental services, prosthetic devices, and prescription medication; and other services rendered in accordance with a method of healing recognized by the jurisdiction in which the medical care is administered..	Up to $50,000.
	Victim's cost for physiotherapy; occupational therapy; counseling; workplace, vehicle, and home modifications..	
	For example, if a victim were to sustain a physical injury, such as blindness or paralysis, which would affect his ability to perform current professional duties, physical rehabilitation to address work skills would be appropriate.	
Mental health care	Victim's (and, when victim is a minor, incompetent, incapacitated, or deceased, certain family members') mental health counseling costs.	Up to 12 months, but not to exceed $5,000.
Property loss, repair, and replacement.	Includes crime scene cleanup, and replacement of personal property (not including medical devices) that is lost, destroyed, or held as evidence.	Up to $10,000 to cover repair or replacement, whichever is less.
Funeral and burial costs	Includes, without limitation, the cost of disposition of remains, preparation of the body and body tissue, refrigeration, transportation of remains, cremation, procurement of a final resting place, urns, markers, flowers and ornamentation, costs related to memorial services, and other reasonably associated activities.	Up to $25,000.
Miscellaneous expenses	Includes, without limitation, temporary lodging up to 30 days, local transportation, telephone costs, etc.; with respect to emergency travel, two family members' transportation costs to country where incident occurred (or other location, as appropriate) to recover remains, care for victim, care for victim's dependents, accompany victim to receive medical care abroad, accompany victim back to U.S., and attend to victim's affairs in host country.	Up to $15,000.

Subparts B–D [Reserved]

PART 97—STANDARDS FOR PRIVATE ENTITIES PROVIDING PRISONER OR DETAINEE SERVICES

Sec.
97.1 Purpose.

97.2 Definitions.
97.11 Pre-employment screening.
97.12 Employee training.
97.13 Maximum driving time.
97.14 Guard-to-prisoner ratio.
97.15 Employee uniforms and identification.
97.16 Clothing requirements for transported violent prisoners.
97.17 Mandatory restraints to be used while transporting violent prisoners.
97.18 Notification of local law enforcement prior to scheduled stops.
97.19 Immediate notification of local law enforcement in the event of an escape.
97.20 Standards to ensure the safety of violent prisoners during transport.
97.22 No pre-emption of federal, State, or local laws or regulations.
97.24 No civil defense created.
97.30 Enforcement.

AUTHORITY: Pub. L. 106–560, 114 Stat. 2784 (42 U.S.C. 13726b).

SOURCE: Order No. 2640–2002, 67 FR 78710, Dec. 26, 2002, unless otherwise noted.

§97.1 Purpose.

This part implements the provisions of The Interstate Transportation of Dangerous Criminals Act of 2000, Public Law 106–560, 114 Stat. 2784 (42 U.S.C. 13726b) (enacted December 21, 2000) (''the Act''), to provide minimum security and safety standards for private companies that transport violent prisoners on behalf of State and local jurisdictions.

§97.2 Definitions.

(a) *Crime of violence*. The term ''crime of violence'' has the same meaning as in section 924(c)(3) of title 18, United States Code. Section 924(c)(3) states that the term crime of violence means an offense that is a felony and has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(b) *Private prisoner transport company*. The term ''private prisoner transport company'' (''company'') means any entity, other than the United States, a State, or an inferior political subdivision of a State, that engages in the business of transporting for compensation individuals committed to the custody of any State or of an inferior political subdivision of a State, or any attempt thereof.

(c) *Violent prisoner*. The term ''violent prisoner'' means any individual in the custody of a State or an inferior political subdivision of a State who has previously been convicted of or is currently charged with a crime of violence or any similar statute of a State or the inferior political subdivisions of a State, or any attempt thereof.

§97.11 Pre-employment screening.

Private prisoner transport companies must adopt pre-employment screening measures for all potential employees. The pre-employment screening measures must include a background check and a test for use of controlled substances. The failure of a potential employee to pass either screening measure will act as a bar to employment.

(a) *Background checks must include:*

(1) A fingerprint-based criminal background check that disqualifies persons with either a prior felony conviction or a State or Federal conviction for a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921;

(2) A Credit Report check;

(3) A physical examination; and

(4) A personal interview.

(b) *Testing for controlled substances*. (1) Pre-employment testing for controlled substances must be in accordance with applicable State law.

(2) In the event that there is no applicable State law, pre-employment testing for controlled substances must be in accordance with the provisions of Department of Transportation regulations at 49 CFR 382.301 which will apply regardless of whether a private prisoner transport company is covered by Department of Transportation regulations.

(c) The criminal background check references in paragraph (a)(1) of this section may not be submitted directly to the FBI or any other Federal agency. The private prisoner transport companies must arrange the procedures for accomplishing the criminal background checks with their contracting governmental agencies. In the event that the private prisoner transport company is contracting with a privately run incarceration facility, and

not directly with a governmental entity, the private prisoner transport company will have to make arrangements through the private incarceration facility to have the checks completed by the governmental entity ultimately requesting the transport.

§ 97.12 Employee training.

Private prisoner transport companies must require the completion of a minimum of 100 hours of employee training before an employee may transport violent prisoners. Training must include instruction in each of these six areas:

(a) Use of restraints;

(b) Searches of prisoners;

(c) Use of force, including use of appropriate weapons and firearms;

(d) Cardiopulmonary resuscitation (CPR);

(e) Map reading; and

(f) Defensive driving.

§ 97.13 Maximum driving time.

Companies covered under this part must adhere to the maximum driving time provisions applicable to commercial motor vehicle operators, as set forth in Department of Transportation regulations at 49 CFR 395.3 which will apply regardless of whether a private prisoner transport company is covered by Department of Transportation regulations.

§ 97.14 Guard-to-prisoner ratio.

Companies covered under this part must adhere to certain minimum standards with respect to the number of employees required to monitor violent prisoners during transportation. Private prisoner transport companies must ensure that at least one guard be on duty for every six violent prisoners transported. This requirement does not preclude a contracting entity from establishing more stringent guard-to-prisoner ratios.

§ 97.15 Employee uniforms and identification.

(a) *Employee uniforms*. Uniforms used by private prisoner transport companies must meet the following requirements:

(1) Uniforms must be readily distinguishable in style and color from official uniforms worn by United States Department of Justice employees who transport violent offenders;

(2) Uniforms must prominently feature a badge or insignia that identifies the employee as a prisoner transportation employee; and

(3) Uniforms must be worn at all times while the employee is engaged in the transportation of violent prisoners.

(b) *Employee identification*. Identification utilized by private prisoner transport companies must meet the following requirements:

(1) The identification credentials must clearly identify the employee as a transportation employee. The credentials must have a photograph of the employee that is at least one inch square, a printed personal description of the employee including the employee's name, the signature of the employee, and date of issuance; and

(2) The employee must display proper identification credentials on his or her uniform and ensure that the identification is visible at all times during the transportation of violent prisoners.

§ 97.16 Clothing requirements for transported violent prisoners.

Companies covered under this part must ensure that all violent prisoners they transport are clothed in brightly colored clothing that clearly identifies them as violent prisoners, unless security or other specific considerations make such a requirement inappropriate.

§ 97.17 Mandatory restraints to be used while transporting violent prisoners.

Companies covered under this part must, at a minimum, require that violent prisoners be transported wearing handcuffs, leg irons, and waist chains unless the use of all three restraints would create a serious health risk to the prisoner, or extenuating circumstances (such as pregnancy or physical disability) make the use of all three restraints impracticable.

§ 97.18 Notification of local law enforcement prior to scheduled stops.

When transporting violent prisoners, private prisoner transport companies are required to notify local law enforcement officials 24 hours in advance

of any scheduled stops in their jurisdiction. For the purposes of this part, a scheduled stop is defined as a predetermined stop at a State, local, or private correctional facility for the purpose of loading or unloading prisoners or using such facilities for overnight, meal, or restroom breaks. Scheduled stops do not include routine fuel stops or emergency stops.

§97.19 Immediate notification of local law enforcement in the event of an escape.

Private prisoner transport companies must be sufficiently equipped to provide immediate notification to law enforcement in the event of a prisoner escape. Law enforcement officials must receive notification no later than 15 minutes after an escape is detected unless the company can demonstrate that extenuating circumstances necessitated a longer delay. In the event of the escape of a violent prisoner, a private prisoner transport company must:

(a) Ensure the safety and security of the remaining prisoners;

(b) Provide notification within 15 minutes to the appropriate State and local law enforcement officials;

(c) Provide notification as soon as practicable to the governmental entity or the privately run incarceration facility that contracted with the transport company; and

(d) Provide complete descriptions of the escapee and the circumstances surrounding the escape to State and local law enforcement officials if needed.

§97.20 Standards to ensure the safety of violent prisoners during transport.

Companies covered under this section must comply with applicable State and federal laws that govern the safety of violent prisoners during transport. In addition, companies covered under this section are to ensure that:

(a) Protective measures are in place to ensure that all vehicles are safe and well-maintained;

(b) Vehicles are equipped with efficient communications systems that are capable of immediately notifying State and local law enforcement officials in the event of a prisoner escape;

(c) Policies, practices, and procedures are in effect to ensure the health and physical safety of the prisoners during transport, including a first-aid kit and employees who are qualified to dispense medications and administer CPR and emergency first-aid;

(d) Policies, practices, and procedures are in effect to prohibit the mistreatment of prisoners, including prohibitions against covering a prisoner's mouth with tape, the use of excessive force, and sexual misconduct;

(e) Policies, practices, and procedures are in effect to ensure that juvenile prisoners are separated from adult prisoners during transportation, where practicable;

(f) Policies, practices, and procedures are in effect to ensure that female prisoners are separated from male prisoners during transportation, where practicable;

(g) Policies, practices, and procedures are in effect to ensure that female guards are on duty to supervise the transportation of female violent prisoners, where practicable;

(h) Staff are well trained in the handling and restraint of prisoners, including the proper use of firearms and other restraint devices, and have received specialized training in the area of sexual harassment; and

(i) Private transport companies are responsible for taking reasonable measures to insure the well being of the prisoners in their custody including, but not limited to, necessary stops for restroom use and meals, proper heating and ventilation of the transport vehicle, climate-appropriate uniforms, and prohibitions on the use of tobacco, in any form, in the transport vehicle.

§97.22 No pre-emption of federal, State, or local laws or regulations.

The regulations in this part implement the Act and do not pre-empt any applicable federal, State, or local law that may impose additional obligations on private prisoner transport companies or otherwise regulate the transportation of violent prisoners. All federal laws and regulations governing interstate commerce will continue to apply to private prisoner transport companies including, but not limited

to: federal laws regulating the possession of weapons, Federal Aviation Administration or Transportation Security Administration rules and regulations governing travel on commercial aircraft, and all applicable federal, State, or local motor carrier regulations. The regulations in this part in no way pre-empt, displace, or affect the authority of States, local governments, or other federal agencies to address these issues.

§ 97.24 No civil defense created.

The regulations in this part on private prisoner transport companies are not intended to create a defense to any civil action, whether initiated by a unit of government or any other party. Compliance with the regulations in this part is not intended to and does not establish a defense against an allegation of negligence or breach of contract. Regardless of whether a contractual agreement establishes minimum precautions, the companies affected by the regulations in this part will remain subject to the standards of care that are imposed by constitutional, statutory, and common law upon their activities (or other activities of a similarly hazardous nature).

§ 97.30 Enforcement.

Any person who is found in violation of the regulations in this part will:

(a) Be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each violation;

(b) Be liable to the United States for the costs of prosecution; and

(c) Make restitution to any entity of the United States, of a State, or of an inferior political subdivision of a State, that expends funds for the purpose of apprehending any violent prisoner who escapes from a prisoner transport company as the result, in whole or in part, of a violation of the regulations in this part promulgated pursuant to the Act.

PART 100—COST RECOVERY REGULATIONS, COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT ACT OF 1994

Sec.

100.9 General.
100.10 Definitions.
100.11 Allowable costs.
100.12 Reasonable costs.
100.13 Directly assignable costs.
100.14 Directly allocable costs.
100.15 Disallowed costs.
100.16 Cost estimate submission.
100.17 Request for payment.
100.18 Audit.
100.19 Adjustments to agreement estimate.
100.20 Confidentiality of trade secrets/proprietary information.
100.21 Alternative dispute resolution.

AUTHORITY: 47 U.S.C. 1001–1010; 28 CFR 0.85(o).

SOURCE: 62 FR 13324, Mar. 20, 1997, unless otherwise noted.

§ 100.9 General.

These Cost Recovery Regulations were developed to define allowable costs and establish reimbursement procedures in accordance with section 109(e) of Communications Assistance for Law Enforcement Act (CALEA) (Public Law 103–414, 108 Stat. 4279, 47 U.S.C. 1001–1010). Reimbursement of costs is subject to the availability of funds, the reasonableness of costs, and an agreement by the Attorney General or designee to reimburse costs prior to the carrier's incurrence of said costs.

§ 100.10 Definitions.

Allocable means chargeable to one or more cost objectives and can be distributed to them in reasonable proportion to the benefits received.

Business unit means any segment of an organization for which cost data are routinely accumulated by the carrier for tracking and measurement purposes.

Cooperative agreement means the legal instrument reflecting a relationship between the government and a party when—

(1) The principal purpose of the relationship is to reimburse the carrier to carry out a public purpose of support or stimulation authorized by a law of the United States; and

(2) Substantial involvement is expected between the government and carrier when carrying out the activity contemplated in the agreement.

Cost element means a distinct component or category of costs (e.g. materials, direct labor, allocable direct costs, subcontracting costs, other

costs) which is assigned to a cost objective.

Cost objective means a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.

Cost pool means groupings of incurred costs identified with two or more cost objectives, but not identified specifically with any final cost objective.

Direct supervision means immediate or first-level supervision.

Directly allocable cost means any cost that is directly chargeable to one or more cost objectives and can be distributed to them in reasonable proportion to the benefits received.

Directly assignable cost means any cost that can be wholly attributed to a cost objective.

Directly associated cost means any directly assignable cost or directly allocable cost which is generated solely as a result of incurring another cost, and which would not have been incurred had the said cost not been incurred.

Final cost objective means a cost objective that has allocated to it, both assignable and allocable costs and, in the carrier's accumulation system, is one of the final accumulation points.

Installed or deployed means that, on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers.

Labor cost means the sum of the payroll cost, payroll taxes, and directly associated benefits.

Network operations costs means all directly associated costs related to the ongoing management and maintenance of a telecommunications carrier's network.

Plant costs means the directly associated costs related to the modifications of specific kinds of telecommunications plants, such as switches, intelligent peripherals and other network elements. These costs shall include the costs of inspecting, testing and reporting on the condition of telecommunications plant to determine the need for replacements, rearranges and changes; rearranging and changing the location of plant not retired; inspecting after modifications have been made; the costs of modifying equipment records, such as administering trunking and circuit layout work; modifying operating procedures; property held for future telecommunications use; provisioning costs; network operations costs; and receiving training to perform plant work. Also included are the costs of direct supervision and office support of this work.

Provisioning costs means all costs directly associated with the resources expended within a telecommunications carrier's network to provide a connection and/or service to an end user of the telecommunications service.

Trade secrets/proprietary information means information which is in the possession of a carrier but not generally available to the public, which that carrier desires to protect against unrestricted disclosure or competitive use, and which is clearly identified as such at the time of its disclosure to the government.

Unit cost means the directly associated cost of a single unit of a good or service which is included in a cost element.

§ 100.11 Allowable costs.

(a) Costs that are eligible for reimbursement under section 109(e) CALEA are:

(1) All reasonable plant costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with section 103 of CALEA, until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modifications;

(2) Additional reasonable plant costs directly associated with making the assistance capability requirements found in section 103 of CALEA reasonably achievable with respect to equipment, facilities, or services installed or deployed after January 1, 1995, in accordance with the procedures established in CALEA section 109(b); and

(3) Reasonable plant costs directly associated with modifications to any of

a carrier's systems or services, as identified in the Carrier Statement required by CALEA section 104(d), that do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices set forth in the Capacity Notice(s) published in accordance with CALEA section 104.

(b) Allowable plant costs shall include:

(1) The costs of installation, inspection, and testing of the telecommunications plant, and inspection after modifications have been made; and

(2) The costs of direct supervision and office support for this work for plant costs.

(c) In the case of any modification that may be used for any purpose other than lawfully authorized electronic surveillance by a government law enforcement agency, this part permits recovery of only the incremental cost of making the modification suitable for such law enforcement purposes.

(d) Reasonable costs that are directly associated with the modifications performed by a carrier as described in § 100.11(a) are recoverable. These allowable costs are limited to directly assignable and directly allocable costs incurred by the business units whose efforts are expended on the implementation of CALEA requirements.

§ 100.12 Reasonable costs.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with the carrier or its separate divisions that may not be subject to effective competitive restraints.

(1) No presumption of reasonableness shall be attached to the incurrence of costs by a carrier.

(2) The burden of proof shall be upon the carrier to justify that such cost is reasonable under this part.

(b) Reasonableness depends upon considerations and circumstances, including, but not limited to:

(1) Whether a cost is of the type generally recognized as ordinary and necessary for the conduct of the carrier's business or the performance of this obligation; or

(2) Whether it is a generally accepted sound business practice, arm's-length bargaining or the result of Federal or State laws and/or regulations.

(c) It is the carrier's responsibility to inform the Government of any deviation from the carrier's established practices.

§ 100.13 Directly assignable costs.

(a) A cost is directly assignable to the CALEA compliance effort if it is a plant cost incurred specifically to meet the requirements of CALEA sections 103 and 104.

(1) A cost which has been incurred for the same purpose, in like circumstances, and which has been included in any allocable cost pool to be assigned to any final cost objective other than the CALEA compliance effort, shall not be assigned to the CALEA compliance effort (or any portion thereof).

(2) Costs identified specifically with the work performed are directly assignable costs to be charged directly to the CALEA compliance effort. All costs specifically identified with other projects, business units, or cost objectives of the carrier shall not be charged to the CALEA compliance effort, directly or indirectly.

(3) The burden of proof shall be upon the carrier to justify that such cost is an assignable cost under this part.

(b) For reasons of practicality, any directly assignable cost may be treated as a directly allocable cost if the accounting treatment is consistently applied within the carrier's accounting system and the application produces substantially the same results as treating the cost as a directly assignable cost.

§ 100.14 Directly allocable costs.

(a) A cost is directly allocable to the CALEA compliance effort:

(1) If it is a plant cost incurred specifically to meet the requirements of CALEA sections 103 and 104; or

(2) If it benefits both the CALEA compliance effort and other work, and can be distributed to them in reasonable proportion to the benefits received.

(b) The burden of proof shall be upon the carrier to justify that such cost is an allocable cost under this part.

(c) An allocable cost shall not be assigned to the CALEA compliance effort if other costs incurred for the same purpose in like circumstances have been included as a direct cost of that, or any other, cost objective.

(d) The accumulation of allocable costs shall be as follows:

(1) Allocable costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring such costs.

(i) Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the multiple cost objectives.

(ii) Similarly, the particular case may require subdivision of these groupings (e.g., building occupancy costs might be separable from those of personnel administration within the engineering group).

(2) Such allocation necessitates selecting a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the multiple cost objectives.

(3) When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(4) Once a methodology for determining an appropriate base for distributing allocable costs has been agreed to, it shall not be modified without written approval of the FBI, if that modification affects the level of reimbursement from the government. All items properly includable in an allocable cost base should bear a pro rata share of allocable costs irrespective of their acceptance as reimbursable under this part.

(5) The carrier's method of allocating allocable costs shall be in accordance with the accounting principles used by the carrier in the preparation of their externally audited financial statements and consistently applied, to the extent that the expenses are allowable under there regulations. The method may require further examination when:

(i) Substantial differences occur between the cost patterns of work under CALEA compliance effort and the carrier's other work;

(ii) Significant changes occur in the nature of the business, the extent of subcontracting, fixed-asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the carrier's products, or other relevant circumstances; or

(iii) Allocable cost groupings developed for a carrier's primary location are applied to off-site locations. Separate cost groupings for costs allocable to off-site locations may be necessary to permit equitable distribution of costs on the basis of the benefits accruing to the multiple cost objectives.

(6) The base period for allocating allocable costs is the cost accounting period during which such costs are incurred and accumulated for distribution to work performed in that period. The base period for allocating allocable costs will normally be the carrier's fiscal year. A shorter period may be appropriate when performance involves only a minor portion of the fiscal year, or when it is general practice to use a shorter period. When the compliance effort is performed over an extended period, as many base periods shall be used as are required to accurately represent the period of performance.

§ 100.15 Disallowed costs.

(a) General and Administrative (G&A) costs are disallowed. G&A costs include, but are not limited to, any management, financial, and other expenditures which are incurred by or allocated to a business unit as a whole. These include, but are not limited to:

(1) Accounting and Finance, External Relations, Human Resources, Information Management, Legal, Procurement; and

(2) Other general administrative activities such as library services, food services, archives, and general security investigation services.

(b) Customer Service costs are disallowed. These costs include, but are not limited to, any Marketing, Sales,

Product Management, and Advertising expenses.

(c) Plant costs that are not directly associated with the modifications identified in § 100.11 are disallowed. These include, but are not limited to, repairing materials for reuse, performing routine work to prevent trouble; expenses related to property held for future telecommunications use; provisioning costs; network operations costs; and depreciation and amortization expenses.

(d) Costs that have already been recovered from any governmental or nongovernmental entity are disallowed.

(e) Costs that cannot be either directly assigned or directly allocated are disallowed.

(f) Additional costs that are incurred due to the carrier's failure to complete the CALEA compliance effort in the time frame agreed to by the government and the carrier are disallowed.

(g) Costs associated with modifications of any equipment, facility or service installed or deployed after January 1, 1995 which are deemed reasonably achievable by the Federal Communications Commission under section 109(b) of CALEA are disallowed.

(h) To ensure that the Government does not reimburse carriers for disallowed costs, the following provisions are included:

(1) Costs that are expressly disallowed or mutually agreed to be disallowed, including mutually agreed to be disallowed directly associated costs, shall be excluded from any billing, claim, or proposal applicable to reimbursement under CALEA. When a disallowed cost is incurred, its directly associated costs are also disallowed.

(2) Disallowed costs involved in determining rates used for standard costs, or for allocable cost proposals or billing, need be identified only at the time rates are proposed, established, revised, or adjusted. These requirements may be satisfied by any form of cost identification which is adequate for purposes of cost determination and verification.

§ 100.16 Cost estimate submission.

(a) The carrier shall provide sufficient cost data at the time of proposal submission to allow adequate analysis and evaluation of the estimated costs. The FBI reserves the right to request additional cost data from carriers in order to ensure compliance with this part.

(b) The requirement for submission of cost data is met if, as determined by the FBI, all cost data reasonably available to the carrier are either submitted or identified in writing by the date of agreement on the costs.

(c) If cost data and information to explain the estimating process are required by the FBI and the carrier refuses to provide necessary data, or the FBI determines that the data provided are so deficient as to preclude adequate analysis and evaluation, the FBI will attempt to obtain the data and/or elicit corrective action.

(d) Instructions for submission of the cost data for the estimate are as follows:

(1) The carrier shall submit to the FBI estimated costs by line item with supporting information.

(2) A cost element breakdown as described in § 100.16(h) shall be attached for each proposed line item.

(3) Supporting breakdowns shall be furnished for each cost element, consistent with the carrier's cost accounting system.

(4) When more than one line item is proposed, summary total amounts covering all line items shall be furnished for each cost element.

(5) Depending on the carrier's accounting system, the carrier shall provide breakdowns for the following categories of cost elements, as applicable:

(i) *Materials*. Provide a consolidated cost summary of individual material quantities included in the various tasks, orders, or agreement line items being proposed and the basis upon which they were developed (vendor quotes, invoice prices, etc.). Include raw materials, parts, software, components, and assemblies. For all items proposed, identify the item, source, quantity, and cost.

(ii) *Direct labor*. Provide a time-phased (e.g., monthly, quarterly) breakdown of labor hours, rates, and costs by appropriate category, and furnish the methodologies used in developing estimates.

(iii) *Allocable direct costs.* Indicate how allocable costs are computed and applied, including cost breakdowns that provide a basis for evaluating the reasonableness of proposed rates.

(iv) *Subcontracting costs.* For any subcontractor costs submitted for reimbursement, the carrier is responsible for ensuring that documentation requirements set forth herein are passed on to any and all subcontractors utilized in the carrier's efforts to meet CALEA requirements.

(v) *Other costs.* List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services) and provide bases for costs.

(e) As part of the specific information required, the carrier shall submit with its cost estimate and clearly identify as such, costs that are verifiable and factual. In addition, the carrier shall submit information reasonably required to explain its estimating process, including:

(1) The judgmental factors applied, such as trends or budgetary data, and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(2) The nature and amount of any contingencies included in the proposed estimate.

(f) There is a clear distinction between submitting cost data and merely making available books, records, and other documents without identification. The requirement for submission of cost data is met when all accurate cost data reasonably available to the carrier have been submitted, either actually or by specific identification, to the FBI.

(g) In submitting its estimate, the carrier must include an index, appropriately referenced, of all the cost data and information accompanying or identified in the estimate. In addition, any future additions and/or revisions, up to the date of agreement on the costs, must be annotated in a supplemental index.

(h) Headings for submission are as follows:

(1) Total Project Cost: Summary.

(i) Cost Elements (Enter appropriate cost elements.)

(ii) Proposed Cost Estimate—Total Cost (Enter those necessary and reasonable costs that in the carrier's judgment will properly be incurred in efficient completion of CALEA requirements. When any of the costs in this have already been incurred (e.g., under a letter contract), describe them on an attached supporting schedule.)

(iii) Proposed Cost Estimate—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

(2) Total Project Costs: Detail (at Switch Level or Project Level, as appropriate).

(i) Cost Elements (Enter appropriate cost elements.)

(ii) Proposed Cost Estimate—Total Cost (Enter those necessary and reasonable costs that in the carrier's judgment will properly be incurred in efficient completion of CALEA requirements. When any of the costs in this have already been incurred (e.g., under a letter contract), describe them on an attached supporting schedule.)

(iii) Proposed Cost Estimate—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

§ 100.17 Request for payment.

(a) The carrier shall provide sufficient supporting documentation at the time of submission of request for payment to allow adequate analysis and evaluation of the incurred costs. The FBI reserves the right to request additional cost data from carriers in order to ensure compliance with this part.

(b) Instructions for submission of the supporting documentation for the request for payment are as follows:

(1) The carrier shall submit to the FBI incurred costs by line item with supporting information.

(2) A cost element breakdown as described in § 100.17(f) shall be attached for each agreed upon line item.

(3) Supporting breakdowns shall be furnished for each cost element, consistent with the carrier's cost accounting system.

(c) When more than one line item has been agreed upon, summary total amounts covering all line items shall be furnished for each cost element. Depending on the carrier's accounting system, breakdowns shall be provided to the FBI for the following categories of cost elements, as applicable:

(1) *Materials*. Provide a consolidated cost summary of individual material quantities included in the various tasks, orders, or agreement line items and the basis upon which they were determined (vendor invoices, time sheets, payroll records, etc.). Include raw materials, parts, software, components, and assemblies. For all reimbursable items, identify the item, source, quantity, and cost.

(2) *Direct labor*. Provide a breakdown of labor hours, rates, and cost by appropriate category, and furnish the methodologies used in identifying these costs. Have available for audit, in accordance with § 100.18, time sheet and labor rate calculation justification for all direct labor charged to the agreement.

(3) *Allocable direct costs*. Indicate how allocable costs are computed and applied, including cost breakdowns, comparing estimates to actual data as a basis for evaluating the reasonableness of actual costs.

(4) *Subcontracting costs*. For any subcontractor costs submitted for reimbursement, along with a copy of the invoice, the carrier must have available for audit in accordance with § 100.18, documentation that costs incurred are just and reasonable.

(5) *Other costs*. List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services) and have available for audit in accordance with § 100.18, documentation that costs incurred are just and reasonable.

(d) There is a clear distinction between submitting cost data and merely making available books, records, and other documents without identification.

(1) The requirement for submission of cost data is met when all accurate cost data reasonably available to the carrier have been submitted, either actually or by specific identification of the data that are available for review in the carrier's files, to the FBI.

(2) Should later information which affects the level of reimbursement come into the carrier's possession, it must be promptly submitted to the FBI.

(3) The requirement for submission of cost data continues up to the time of final reimbursement.

(e) In submitting its invoice, the carrier must include an index, which cross references the actual cost data submitted with the cost estimate.

(f) Headings for submission are as follows:

(1) Total Project Cost: Summary.

(i) Cost Elements (Enter appropriate cost elements.)

(ii) Actual Costs Incurred—Total Cost (Enter those necessary and reasonable costs that were incurred in the efficient completion of CALEA requirements.)

(iii) Actual Costs Incurred—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

(2) Total Project Costs: Detail (at Switch Level or Project Level, as appropriate.)

(i) Cost Elements (Enter appropriate cost elements.)

(ii) Actual Costs Incurred—Total Cost (Enter those necessary and reasonable costs that were incurred in the efficient completion of CALEA requirements.)

(iii) Actual Costs Incurred—Unit Cost (Enter the unit costs for each cost element.)

(iv) Supporting Material (Identify the attachment in which the information supporting the specific cost element may be found.)

§ 100.18 Audit.

(a) *General*. In order to evaluate the accuracy, completeness, and timeliness of the cost data, the FBI or other representatives of the Government shall

have the right to examine and audit all of the carrier's supporting materials.

(1) These materials include, but are not limited to books, records, documents, and other data, regardless of form (e.g., machine readable media such as disk, tape) or type (e.g., data bases, applications software, data base management software, utilities), including computations and projections related to proposing, negotiating, costing, or performing CALEA compliance efforts or modifications.

(2) The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost data submitted, along with the computations and projections used.

(b) *Audits of request for payment.* The carrier shall maintain and the FBI or representatives of the Government shall have the right to examine and audit supporting materials.

(1) These materials include, but are not limited to, books, records, documents, and other evidence and accounting procedures and practices, regardless of form (e.g., machine readable media such as disk, tape) or type (e.g., date bases, applications software, data base management software, utilities), sufficient to reflect properly all costs claimed to have been incurred, or anticipated to be incurred, in performing the CALEA compliance effort.

(2) This right of examination shall include inspection at all reasonable times of the carrier's plants, or parts of them, engaged in performing the effort.

(c) *Reports.* If the carrier is required to furnish cost, funding, or performance reports, the FBI or representatives of the Government shall have the right to examine and audit books, records, other documents, and supporting materials, for the purpose of evaluating the effectiveness of the carrier's policies and procedures to produce data compatible with the objectives of these reports and the data reported.

(d) *Availability.* The carrier shall make available at its office at all reasonable times the costs and support material described herein, for examination, audit, or reproduction, until three (3) years after final reimbursement payment. In addition,

(1) If the CALEA compliance effort is completely or partially terminated, the records relating to the work terminated shall be made available for three (3) years after any resulting final termination settlement; and

(2) Records relating to appeals, litigation or the settlement of claims arising under or relating to the CALEA compliance effort shall be made available until such appeals, litigation, or claims are disposed of.

(e) *Subcontractors.* The carrier shall ensure that all terms and conditions herein are incorporated in any agreement with a subcontractor that may be utilized by the carrier to perform any or all portions of the agreement.

§ 100.19 Adjustments to agreement estimate.

(a) *Adjustments prior to the incurrence of a cost.* (1) In accordance with § 100.17(d)(2), the carrier shall notify the FBI when any change affecting the level of reimbursement occurs.

(2) Upon such notification, if the adjustment results in an increase in the estimated reimbursement, the FBI will review the submission and determine if

(i) Funds are available;

(ii) The adjustment is justified and necessary to accomplish the goals of the agreement; and

(iii) It is in the best interest of the government to approve the expenditure.

(3) The FBI will provide the decision as to the acceptability of any increase to the carrier in writing.

(b) *Adjustments after the incurrence of a cost.* Any cost incurred that exceeds the provision in § 100.16(e)(2) will be reviewed by the FBI to determine reasonability, allowability, and if it is in the best interest of the government to approve the expenditure for reimbursement.

(c) *Reduction for defective cost data.* (1) The cost shall be reduced accordingly and the agreement shall be modified to reflect the reduction if any cost estimate negotiated in connection with the CALEA compliance effort, or any cost reimbursable under the effort is increased because:

(i) The carrier or a subcontractor furnished cost data to the government

that were not complete, accurate, and current;

(ii) A subcontractor or prospective subcontractor furnished the cost data to the carrier that were not complete, accurate, and current; or

(iii) Any of these parties furnished data of any description that were not accurate.

(2) Any reduction in the negotiated cost under § 100.19(c)(1) due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount by which either the actual subcontract or the actual cost to the carrier, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the carrier, provided that the actual subcontract cost was not itself affected by defective cost data.

(3) If the FBI determines under § 100.19(c)(1) that a cost reduction should be made, the carrier shall not raise the following matters as a defense:

(i) The carrier or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the costs of the agreement would not have been modified even if accurate, complete, and current cost data had been submitted;

(ii) The FBI should have known that the cost data at issue were defective even though the carrier or subcontractor took no affirmative action to bring the character of the data to the attention of the FBI;

(iii) The carrier or subcontractor did not submit accurate cost data. Except as prohibited, an offset in an amount determined appropriate by the FBI based upon the facts shall be allowed against the cost reimbursement of an agreement amount reduction if the carrier certifies to the FBI that, to the best of the carrier's knowledge and belief, the carrier is entitled to the offset in the amount requested and the carrier proves that the cost data were available before the date of agreement on the cost of the agreement (or cost of the modification) and that the data were not submitted before such date. An offset shall not be allowed if the understated data were known by the carrier to be understated when the agreement was signed; or the Government proves that the facts demonstrate that the agreement amount would not have increased even if the available data had been submitted before the date of agreement on cost; or

(4) In the event of an overpayment, the carrier shall be liable to and shall pay the United States at that time such overpayment as was made, with simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the carrier to the date the Government is repaid by the carrier at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2).

§ 100.20 Confidentiality of trade secrets/proprietary information.

With respect to any information provided to the FBI under this part that is identified as company proprietary information, it shall be treated as privileged and confidential and only shared within the government on a need-to-know basis. It shall not be disclosed outside the government for any reason inclusive of Freedom of Information requests, without the prior written approval of the company. Information provided will be used exclusively for the implementation of CALEA. This restriction does not limit the government's right to use the information provided if obtained from any other source without limitation.

§ 100.21 Alternative dispute resolution.

(a) If an impasse arises in negotiations between the FBI and the carrier which precludes the execution of a cooperative agreement, the FBI will consider using mediation with the goal of achieving, in a timely fashion, a consensual resolution of all outstanding issues through facilitated negotiations.

(b) Should the carrier agree to mediation, the costs of that mediation process shall be shared equally by the FBI and the carrier.

(c) Each mediation shall be governed by a separate mediation agreement prepared by the FBI and the carrier.

PART 104—SEPTEMBER 11TH VICTIM COMPENSATION FUND

Subpart A—General; Eligibility

Sec.
104.1 Purpose.
104.2 Eligibility definitions and requirements.
104.3 Other definitions.
104.4 Personal Representative.
104.5 Foreign claims.
104.6 Amendments to this part.

Subpart B—Filing for Compensation

104.21 Presumptively covered conditions.
104.22 Filing for compensation.

Subpart C—Claim Intake, Assistance, and Review Procedures

104.31 Procedure for claims evaluation.
104.32 Eligibility review.
104.33 Hearing.
104.34 Publication of awards.
104.35 Claims deemed abandoned by claimants.

Subpart D—Amount of Compensation for Eligible Claimants

104.41 Amount of compensation.
104.42 Applicable state law.
104.43 Determination of presumed economic loss for decedents.
104.44 Determination of presumed noneconomic losses for decedents.
104.45 Determination of presumed economic loss for claimants who suffered physical harm.
104.46 Determination of presumed noneconomic losses for claimants who suffered physical harm.
104.47 Collateral sources.

Subpart E—Payment of Claims

104.51 Payments to eligible individuals.
104.52 Distribution of award to decedent's beneficiaries.

Subpart F—Limitations

104.61 Limitation on civil actions.
104.62 Time limit on filing claims.
104.63 Subrogation.

Subpart G—Measures To Protect the Integrity of the Compensation Program

104.71 Procedures to prevent and detect fraud.

Subpart H—Attorney Fees

104.81 Limitation on attorney fees.

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Subpart A—General; Eligibility

§ 104.1 Purpose.

This part implements the provisions of the September 11th Victim Compensation Fund of 2001, Title IV of Public Law 107–42, 115 Stat. 230 (Air Transportation Safety and System Stabilization Act), as amended by the James Zadroga 9/11 Health and Compensation Act of 2010, Title II of Public Law 111–347, to provide compensation to eligible individuals who were physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001, or debris removal during the immediate aftermath of those crashes, and to the ''personal representatives'' of those who were killed as a result of the crashes. All compensation provided through the Fund will be on account of personal physical injuries or death.

§ 104.2 Eligibility definitions and requirements.

(a) *Eligible claimants*. The term eligible claimants means:

(1) Individuals present at a 9/11 crash site at the time of or in the immediate aftermath of the terrorist-related aircraft crashes and who suffered physical harm, as defined herein, as a direct result of the crashes or debris removal;

(2) The Personal Representatives of deceased individuals aboard American Airlines flights 11 or 77 and United Airlines flights 93 or 175; and

(3) The Personal Representatives of individuals who were present at a 9/11 crash site at the time of or in the immediate aftermath of the crashes and who died as a direct result of the terrorist-related aircraft crash.

(4) The term eligible claimants does not include any individual or representative of an individual who is identified to have been a participant or conspirator in the terrorist-related crashes of September 11.

(b) *Immediate aftermath*. The term immediate aftermath means any period beginning with the terrorist-related

aircraft crashes of September 11, 2001, and ending on May 30, 2002.

(c) *Physical harm.* (1) The term physical harm shall mean a physical injury to the body that was treated by a medical professional within a reasonable time from the date of discovering such harm; and

(2) The physical injury must be verified by medical records created by or at the direction of the medical professional who provided the medical care contemporaneously with the care.

(d) *Personal Representative.* The term Personal Representative shall mean the person determined to be the Personal Representative under § 104.4 of this part.

(e) *WTC Health Program.* The term WTC Health Program means the World Trade Center Health Program established by Title I of Public Law 111–347 (codified at Title XXXIII of the Public Health Service Act, 42 U.S.C. 300mm through 300mm–61).

(f) *WTC-related health condition.* The term WTC-related health condition means those health conditions identified as WTC-related by Title I of Public Law 111–347 and by regulations implementing that Title.

(g) *9/11 crash site.* The term 9/11 crash site means:

(1) The World Trade Center site, Pentagon site, and Shanksville, Pennsylvania site; or

(2) The buildings or portions of buildings that were destroyed as a result of the terrorist-related airplane crashes of September 11, 2001; or

(3) The area in Manhattan south of the line that runs along Canal Street from the Hudson River to the intersection of Canal Street and East Broadway, north on East Broadway to Clinton Street, and east on Clinton Street to the East River; or

(4) Any other area contiguous to the crash sites that the Special Master determines was sufficiently close to the site that there was a demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions, or building collapses (including the immediate area in which the impact occurred, fire occurred, portions of buildings fell, or debris fell upon and injured individuals); or

(5) Any area related to, or along, routes of debris removal, such as barges and Fresh Kills.

§ 104.3 Other definitions.

(a) *Beneficiary.* The term beneficiary shall mean a person to whom the Personal Representative shall distribute all or part of the award under § 104.52 of this part.

(b) *Dependents.* The Special Master shall identify as dependents those persons so identified by the victim on his or her Federal tax return for the year prior to the year of the victim's death (or those persons who legally could have been identified by the victim on his or her Federal tax return for the year prior to the year of the victim's death) unless:

(1) The claimant demonstrates that a minor child of the victim was born or adopted on or after January 1 of the year of the victim's death;

(2) Another person became a dependent in accordance with then-applicable law on or after January 1 of the year of the victim's death; or

(3) The victim was not required by law to file a Federal income tax return for the year prior to the year of the victim's death.

(c) *Spouse.* The Special Master shall identify as the spouse of a victim the person reported as spouse on the victim's Federal tax return for the year prior to the year of the victim's death (or the person who legally could have been identified by the victim on his or her Federal tax return for the year prior to the year of the victim's death) unless:

(1) The victim was married or divorced in accordance with applicable state law on or after January 1 of the year of the victim's death; or

(2) The victim was not required by law to file a Federal income tax return for the year prior to the year of the victim's death.

(d) *The Act.* The Act, as used in this part, shall mean Public Law 107–42, 115 Stat. 230 (''Air Transportation Safety and System Stabilization Act''), 49 U.S.C. 40101 note, as amended by the James Zadroga 9/11 Health and Compensation Act of 2010, Title II of Public Law 111–347.

(e) *Victim*. The term victim shall mean an eligible injured claimant or a decedent on whose behalf a claim is brought by an eligible Personal Representative.

(f) *Substantially Complete*. A claim becomes substantially complete when, in the opinion of the Special Master or her designee, the claim contains sufficient information and documentation to determine both the claimant's eligibility and, if the claimant is eligible, an appropriate award.

§ 104.4 Personal Representative.

(a) *In general*. The Personal Representative shall be:

(1) An individual appointed by a court of competent jurisdiction as the Personal Representative of the decedent or as the executor or administrator of the decedent's will or estate.

(2) In the event that no Personal Representative or executor or administrator has been appointed by any court of competent jurisdiction, and such issue is not the subject of pending litigation or other dispute, the Special Master may, in her discretion, determine that the Personal Representative for purposes of compensation by the Fund is the person named by the decedent in the decedent's will as the executor or administrator of the decedent's estate. In the event no will exists, the Special Master may, in her discretion, determine that the Personal Representative for purposes of compensation by the Fund is the first person in the line of succession established by the laws of the decedent's domicile governing intestacy.

(b) *Notice to beneficiaries*. (1) Any purported Personal Representative must, before filing an Eligibility Form, provide written notice of the claim (including a designated portion of the Eligibility Form) to the immediate family of the decedent (including, but not limited to, the decedent's spouse, former spouses, children, other dependents, and parents), to the executor, administrator, and beneficiaries of the decedent's will, and to any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to recover damages relating to the wrongful death of the decedent.

(2) Personal delivery or transmission by certified mail, return receipt requested, shall be deemed sufficient notice under this provision. The claim forms shall require that the purported Personal Representative certify that such notice (or other notice that the Special Master deems appropriate) has been given. In addition, as provided in § 104.21(b)(5) of this part, the Special Master may publish a list of individuals who have filed Eligibility Forms and the names of the victims for whom compensation is sought, but shall not publish the content of any such form.

(c) *Objections to Personal Representatives*. Objections to the authority of an individual to file as the Personal Representative of a decedent may be filed with the Special Master by parties who assert a financial interest in the award up to 30 days following the filing by the Personal Representative. If timely filed, such objections shall be treated as evidence of a ''dispute'' pursuant to paragraph (d) of this section.

(d) *Disputes as to identity*. The Special Master shall not be required to arbitrate, litigate, or otherwise resolve any dispute as to the identity of the Personal Representative. In the event of a dispute over the appropriate Personal Representative, the Special Master may suspend adjudication of the claim or, if sufficient information is provided, calculate the appropriate award and authorize payment, but place in escrow any payment until the dispute is resolved either by agreement of the disputing parties or by a court of competent jurisdiction. Alternatively, the disputing parties may agree in writing to the identity of a Personal Representative to act on their behalf, who may seek and accept payment from the Fund while the disputing parties work to settle their dispute.

§ 104.5 Foreign claims.

In the case of claims brought by or on behalf of foreign citizens, the Special Master may alter the requirements for documentation set forth herein to the extent such materials are unavailable to such foreign claimants.

§ 104.6 Amendments to this part.

Claimants are entitled to have their claims processed in accordance with

the provisions of this Part that were in effect at the time that their claims were submitted under §104.22(d). All claims will be processed in accordance with the current provisions of this Part, unless the claimant has notified the Special Master that he or she has elected to have the claim resolved under the regulations that were in effect at the time that the claim was submitted under §104.22(d).

Subpart B—Filing for Compensation

§104.21 Presumptively covered conditions.

(a) *In general.* The Special Master shall maintain and publish on the Fund's Web site a list of presumptively covered conditions that resulted from the terrorist-related air crashes of September 11, 2001, or debris removal. The list shall consist of physical injuries that are determined to be WTC-related health conditions by the WTC Health Program.

(b) *Updates.* The Special Master shall update the list of presumptively covered conditions as the list of WTC-related health conditions by the WTC Health Program is updated. Claims may then be amended pursuant to §104.22(e)(ii).

(c) *Conditions other than presumptively covered conditions.* A claimant may also be eligible for payment under §104.51 where the claimant—

(1) Presents extraordinary circumstances not adequately addressed by the list of presumptively covered conditions; and

(2) Is otherwise eligible for payment.

§104.22 Filing for compensation.

(a) *Compensation form; ''filing.''* A claim shall be deemed ''filed'' for purposes of section 405(b)(3) of the Act (providing that the Special Master shall issue a determination regarding the matters that were the subject of the claim not later than 120 calendar days after the date on which a claim is filed), and for any time periods in this part, when it is substantially complete.

(b) *Eligibility Form.* The Special Master shall develop an Eligibility Form, which may be a portion of a complete claim form, that will require the claimant to provide information necessary for determining the claimant's eligibility to recover from the Fund.

(1) The Eligibility Form may require that the claimant certify that he or she has dismissed any pending lawsuit seeking damages as a result of the terrorist-related airplane crashes of September 11, 2001, or for damages arising from or related to debris removal (except for actions seeking collateral source benefits) within 90 days of the effective date of this part pursuant to section 405(c)(3)(C)(ii) of the Act and that there is no pending lawsuit brought by a dependent, spouse, or beneficiary of the victim.

(2) The Special Master may require as part of the notice requirement pursuant to §104.4(b) that the claimant provide copies of a designated portion of the Eligibility Form to the immediate family of the decedent (including, but not limited to, the spouse, former spouses, children, other dependents, and parents), to the executor, administrator, and beneficiaries of the decedent's will, and to any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to recover damages relating to the wrongful death of the decedent.

(3) The Eligibility Form may require claimants to provide the following proof:

(i) Proof of death: Death certificate or similar official documentation;

(ii) Proof of presence at site: Documentation sufficient to establish presence at a 9/11 crash site, which may include, without limitation, a death certificate, proof of residence, such as a lease or utility bill, records of employment or school attendance, contemporaneous medical records, contemporaneous records of federal, state, city or local government, a pay stub, official personnel roster, site credentials, an affidavit or declaration of the decedent's or injured claimant's employer, or other sworn statement (or unsworn statement complying with 28 U.S.C. 1746) regarding the presence of the victim;

(iii) Proof of physical harm: Certification of a conclusion by the WTC

Health Program that the claimant suffers from a WTC-related health condition and is eligible for treatment under the program; or a health form provided by the Fund and completed by a licensed medical professional.

(iv) Personal Representative: Copies of relevant legal documentation, including court orders; letters testamentary or similar documentation; proof of the purported Personal Representative's relationship to the decedent; copies of wills, trusts, or other testamentary documents; and information regarding other possible beneficiaries as requested by the Eligibility Form;

(v) Any other information that the Special Master deems necessary to determine the claimant's eligibility.

(4) The Special Master may also require waivers, consents, or authorizations from claimants to obtain directly from third parties tax returns, medical information, employment information, or other information that the Special Master deems relevant in determining the claimant's eligibility or award, and may request an opportunity to review originals of documents submitted in connection with the Fund.

(5) The Special Master may publish a list of individuals who have filed Eligibility Forms and the names of the victims for whom compensation is sought, but shall not publish the content of any such form.

(c) *Personal Injury Compensation Form and Death Compensation Form.* The Special Master shall develop a Personal Injury Compensation Form that each injured claimant must submit. The Special Master shall also develop a Death Compensation Form that each Personal Representative must submit. These forms shall require the claimant to provide certain information that the Special Master deems necessary to determining the amount of any award, including information concerning income, collateral sources, benefits, settlements and attorneys' fees relating to civil actions described in section 405(c)(3)(C)(iii) of the Act, and other financial information, and shall require the claimant to state the factual basis for the amount of compensation sought. It shall also allow the claimant to submit certain other information that may be relevant, but not necessary, to the determination of the amount of any award.

(1) Claimants shall, at a minimum, submit all tax returns that were filed for the period beginning three years prior to the year of death or discovery of the injury and ending with the year the claim was filed or the year of death. The Special Master may, at the Special Master's discretion, require that claimants submit copies of tax returns or other records for any other period of years the Special Master deems appropriate for determination of an award. The Special Master may also require waivers, consents, or authorizations from claimants to obtain directly from third parties medical information, employment information, or other information that the Special Master deems relevant to determining the amount of any award.

(2) Claimants may attach to the ''Personal Injury Compensation Form'' or ''Death Compensation Form'' any additional statements, documents or analyses by physicians, experts, advisors, or any other person or entity that the claimant believes may be relevant to a determination of compensation.

(d) *Submission of a claim.* Section 405(c)(3)(C) of the Act provides that upon the submission of a claim under the Fund, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, or debris removal, except for civil actions to recover collateral source obligations and civil actions against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act. A claim shall be deemed submitted for purposes of section 405(c)(3)(C) of the Act when the claim is deemed filed pursuant to §104.22, regardless of whether any time limits are stayed or tolled.

(e) *Amendment of claims.* A claimant who has previously submitted a claim may amend such claim to include:

(1) An injury that the claimant had not suffered (or did not reasonably know the claimant suffered) at the time the claimant filed the previous claim;

(2) A condition that the Special Master has identified and published in accordance with 104.21(a), since the time the claimant filed the previous claim, as a presumptively covered condition;

(3) An injury for which the claimant was previously compensated by the Fund, but only if that injury has substantially worsened, resulting in damages or loss that was not previously compensated; and

(4) Claims for which the individual is an eligible claimant as a result of amendments contained in the James Zadroga 9/11 Health and Compensation Act of 2010, Title II of Public Law 111–347.

(f) *Provisions of information by third parties.* Any third party having an interest in a claim brought by a Personal Representative may provide written statements or information regarding the Personal Representative's claim. The Claims Evaluator or the Special Master or the Special Master's designee may, at his or her discretion, include the written statements or information as part of the claim.

Subpart C—Claim Intake, Assistance, and Review Procedures

§ 104.31 Procedure for claims evaluation.

(a) *Initial review.* Claims Evaluators shall review the forms filed by the claimant and either deem the claim ''filed'' (pursuant to § 104.22(a)) or notify the claimant of any deficiency in the forms or any required documents.

(b) *Procedure.* The Claims Evaluator shall determine eligibility and the claimant's presumed award pursuant to §§ 104.43 to 104.46 of this part and, within 75 days of the date the claim was deemed filed, notify the claimant in writing of the eligibility determination, the amount of the presumed award, and the right to request a hearing before the Special Master or her designee under § 104.33 of this part. After an eligible claimant has been notified of the presumed award, within 30 days the claimant may either accept the presumed compensation determination as the final determination and request payment, or may instead request a review before the Special Master or her designee pursuant to § 104.33. Claimants found to be ineligible may appeal pursuant to § 104.32.

(c) *Multiple claims from the same family.* The Special Master may treat claims brought by or on behalf of two or more members of the same immediate family as related or consolidated claims for purposes of determining the amount of any award.

§ 104.32 Eligibility review.

Any claimant deemed ineligible by the Claims Evaluator may appeal that decision to the Special Master or her designee by filing an eligibility appeal within 30 days on forms created by the office of the Special Master.

§ 104.33 Hearing.

(a) *Supplemental submissions.* The claimant may prepare and file Supplemental Submissions within 21 calendar days from notification of the presumed award. The Special Master shall develop forms appropriate for Supplemental Submissions.

(b) *Conduct of hearings.* Hearings shall be before the Special Master or her designee. The objective of hearings shall be to permit the claimant to present information or evidence that the claimant believes is necessary to a full understanding of the claim. The claimant may request that the Special Master or her designee review any evidence relevant to the determination of the award, including without limitation: The nature and extent of the claimant's injury; evidence of the claimant's presence at a 9/11 crash site; factors and variables used in calculating economic loss; the identity of the victim's spouse and dependents; the financial needs of the claimant; facts affecting noneconomic loss; and any factual or legal arguments that the claimant contends should affect the award. Claimants shall be entitled to submit any statements or reports in writing. The Special Master or her designee may require authentication of documents, including medical records and reports, and may request and consider information regarding the financial resources and expenses of the victim's family or other material that the Special Master or her designee deems relevant.

(c) *Location and duration of hearings.* The hearings shall, to the extent practicable, be scheduled at times and in locations convenient to the claimant or his or her representative. The hearings shall be limited in length to a time period determined by the Special Master or her designee.

(d) *Witnesses, counsel, and experts.* Claimants shall be permitted, but not required, to present witnesses, including expert witnesses. The Special Master or her designee shall be permitted to question witnesses and examine the credentials of experts. The claimant shall be entitled to be represented by an attorney in good standing, but it is not necessary that the claimant be represented by an attorney. All testimony shall be taken under oath.

(e) *Waivers.* The Special Master shall have authority and discretion to require any waivers necessary to obtain more individualized information on specific claimants.

(f) *Award Appeals.* For award appeals, the Special Master or her designee shall make a determination whether:

(1) There was an error in determining the presumptive award, either because the claimant's individual criteria were misapplied or for another reason; or

(2) The claimant presents extraordinary circumstances not adequately addressed by the presumptive award.

(g) *Determination.* The Special Master shall notify the claimant in writing of the final amount of the award, but need not create or provide any written record of the deliberations that resulted in that determination. There shall be no further review or appeal of the Special Master's determination. In notifying the claimant of the final amount of the award, the Special Master may designate the portions or percentages of the final award that are attributable to economic loss and noneconomic loss, respectively, and may provide such other information as appropriate to provide adequate guidance for a court of competent jurisdiction and a personal representative.

§ 104.34 Publication of awards.

The Special Master reserves the right to publicize the amounts of some or all of the awards, but shall not publish the name of the claimants or victims that received each award. If published, these decisions would be intended by the Special Master as general guides for potential claimants and should not be viewed as precedent binding on the Special Master or her staff.

§ 104.35 Claims deemed abandoned by claimants.

The Special Master and her staff will endeavor to evaluate promptly any information submitted by claimants. Nonetheless, it is the responsibility of the claimant to keep the Special Master informed of his or her current address and to respond within the duration of this five-year program to requests for additional information. Claims outstanding at the end of this program because of a claimant's failure to complete his or her filings shall be deemed abandoned.

Subpart D—Amount of Compensation for Eligible Claimants

§ 104.41 Amount of compensation.

As provided in section 405(b)(1)(B)(ii) of the Act, in determining the amount of compensation to which a claimant is entitled, the Special Master shall take into consideration the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant. The individual circumstances of the claimant may include the financial needs or financial resources of the claimant or the victim's dependents and beneficiaries. As provided in section 405(b)(6) of the Act, the Special Master shall reduce the amount of compensation by the amount of collateral source compensation the claimant (or, in the case of a Personal Representative, the victim's beneficiaries) has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001. In no event shall an award (before collateral source compensation has been deducted) be less than $500,000 in any case brought on behalf of a deceased victim with a spouse or dependent, or $300,000 in any case brought on behalf of a deceased victim who was single with no dependents.

§ 104.42 Applicable state law.

The phrase ''to the extent recovery for such loss is allowed under applicable state law,'' as used in the statute's definition of economic loss in section 402(5) of the Act, is interpreted to mean that the Special Master is not permitted to compensate claimants for those categories or types of economic losses that would not be compensable under the law of the state that would be applicable to any tort claims brought by or on behalf of the victim.

§ 104.43 Determination of presumed economic loss for decedents.

In reaching presumed determinations for economic loss for Personal Representatives bringing claims on behalf of decedents, the Special Master shall consider sums corresponding to the following:

(a) *Loss of earnings or other benefits related to employment.* The Special Master, as part of the process of reaching a ''determination'' pursuant to section 405(b) of the Act, shall develop a methodology and publish schedules, tables, or charts that will permit prospective claimants to estimate determinations of loss of earnings or other benefits related to employment based upon individual circumstances of the deceased victim, including: The age of the decedent as of the date of death; the number of dependents who survive the decedent; whether the decedent is survived by a spouse; and the amount and nature of the decedent's income for recent years. The Decedent's salary/income in the three years preceding the year of death (or for other years the Special Master deems relevant) shall be evaluated in a manner that the Special Master deems appropriate. The Special Master may, if she deems appropriate, take an average of income figures for the three years preceding the year of death, and may also consider income for other periods that she deems appropriate, including published pay scales for victims who were government or military employees. The Special Master's methodology and schedules, tables, or charts shall yield presumed determinations of loss of earnings or other benefits related to employment for annual incomes up to but not beyond the 98th percentile of individual income in the United States for the year preceding the year of death. In cases where the victim was a minor child, the Special Master may assume an average income for the child commensurate with the average income of all wage earners in the United States. For victims who were members of the armed services or government employees such as firefighters or police officers, the Special Master may consider all forms of compensation (or pay) to which the victim was entitled. For example, military service members' and uniformed service members' compensation includes all of the various components of compensation, including, but not limited to, basic pay (BPY), basic allowance for housing (BAH), basic allowance for subsistence (BAS), federal income tax advantage (TAD), overtime bonuses, differential pay, and longevity pay.

(b) *Medical expense loss.* This loss equals the out-of-pocket medical expenses that were incurred as a result of the physical harm suffered by the victim (i.e., those medical expenses that were not paid for or reimbursed through health insurance or other programs for which the claimant was not charged). This loss shall be calculated on a case-by-case basis, using documentation and other information submitted by the Personal Representative.

(c) *Replacement services loss.* For decedents who did not have any prior earned income, or who worked only part-time outside the home, economic loss may be determined with reference to replacement services and similar measures.

(d) *Loss due to death/burial costs.* This loss shall be calculated on a case-by-case basis, using documentation and other information submitted by the personal representative and includes the out-of pocket burial costs that were incurred.

(e) *Loss of business or employment opportunities.* Such losses shall be addressed through the procedure outlined above in paragraph (a) of this section.

§ 104.44 Determination of presumed noneconomic losses for decedents.

The presumed non-economic losses for decedents shall be $250,000 plus an additional $100,000 for the spouse and

each dependent of the deceased victim. Such presumed losses include a noneconomic component of replacement services loss.

§ 104.45 Determination of presumed economic loss for claimants who suffered physical harm.

In reaching presumed determinations for economic loss for claimants who suffered physical harm (but did not die), the Special Master shall consider sums corresponding to the following:

(a) *Loss of earnings or other benefits related to employment.* The Special Master may determine the loss of earnings or other benefits related to employment on a case-by-case basis, using documentation and other information submitted by the claimant, regarding the actual amount of work that the claimant has missed or will miss without compensation. Alternatively, the Special Master may determine the loss of earnings or other benefits related to employment by relying upon the methodology created pursuant to § 104.43(a) and adjusting the loss based upon the extent of the victim's physical harm.

(1) Disability; in general. In evaluating claims of disability, the Special Master will, in general, make a determination regarding whether the claimant is capable of performing his or her usual profession in light of the injuries.

(2) Total permanent disability. With respect to claims of total permanent disability, the Special Master may accept a determination of disability made by the Social Security Administration as evidence of disability without any further medical evidence or review. The Special Master may also consider determinations of permanent total disability made by other governmental agencies or private insurers in evaluating the claim. The Special Master may require that the claimant submit an evaluation of the claimant's disability and ability to perform his or her occupation prepared by medical experts.

(3) Partial disability. With respect to claims of partial disability, the Special Master may consider evidence of the effect of the partial disability on the claimant's ability to perform his or her usual occupation as well as the effect of the partial disability on the claimant's ability to participate in usual daily activities.

(b) *Medical Expense Loss.* This loss equals the out-of-pocket medical expenses that were incurred as a result of the physical harm suffered by the victim (i.e., those medical expenses that were not paid for or reimbursed through health insurance or other programs for which the claimant was not charged). In addition, this loss equals future out-of-pocket medical expenses that will be incurred as a result of the physical harm suffered by the victim (i.e., those medical expenses that will not be paid for or reimbursed through health insurance). These losses shall be calculated on a case-by-case basis, using documentation and other information submitted by the claimant.

(c) *Replacement services loss.* For injured claimants who did not have any prior earned income, or who worked only part-time outside the home, economic loss may be determined with reference to replacement services and similar measures.

(d) *Loss of business or employment opportunities.* Such losses shall be addressed through the procedure outlined above in paragraph (a) of this section.

§ 104.46 Determination of presumed noneconomic losses for claimants who suffered physical harm.

The Special Master may determine the presumed noneconomic losses for claimants who suffered physical harm (but did not die) by relying upon the noneconomic losses described in § 104.44 and adjusting the losses based upon the extent of the victim's physical harm. Such presumed losses include any noneconomic component of replacement services loss.

§ 104.47 Collateral sources.

(a) *Payments that constitute collateral source compensation.* The amount of compensation shall be reduced by all collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001, or debris removal in the immediate aftermath, including life insurance, pension funds, death benefits programs, payments by Federal, State, or

local governments related to the terrorist-related aircraft crashes of September 11, 2001, or debris removal, including under the World Trade Center Health Program established under section 3001 of the Public Health Service Act (to the extent such program is authorized, at the time of the payment, to continue operations), and payments made pursuant to the settlement of a civil action as described in section 405(c)(3)(C)(iii) of the Act. In determining the appropriate collateral source offset for future benefit payments, the Special Master may employ an appropriate methodology for determining the present value of such future benefits. In determining the appropriate value of offsets for pension funds, life insurance and similar collateral sources, the Special Master may, as appropriate, reduce the amount of offsets to take account of self-contributions made or premiums paid by the victim during his or her lifetime. In determining the appropriate collateral source offset for future benefit payments that are contingent upon one or more future event(s), the Special Master may reduce such offsets to account for the possibility that the future contingencies may or may not occur. In cases where the recipients of collateral source compensation are not beneficiaries of the awards from the Fund, the Special Master shall have discretion to exclude such compensation from the collateral source offset where necessary to prevent beneficiaries from having their awards reduced by collateral source compensation that they will not receive.

(b) *Payments that do not constitute collateral source compensation.* The following payments received by claimants do not constitute collateral source compensation:

(1) The value of services or in-kind charitable gifts such as provision of emergency housing, food, or clothing; and

(2) Charitable donations distributed to the beneficiaries of the decedent, to the injured claimant, or to the beneficiaries of the injured claimant by privately funded charitable entities; provided however, that the Special Master may determine that funds provided to victims or their families through a privately funded charitable entity constitute, in substance, a payment described in paragraph (a) of this section.

(3) Tax benefits received from the Federal government as a result of the enactment of the Victims of Terrorism Tax Relief Act.

Subpart E—Payment of Claims

§ 104.51 Payments to eligible individuals.

(a) *Payment date.* Subject to paragraph (c) of this section, the Special Master shall authorize payment of an award to a claimant not later than 20 days after the date on which:

(1) The claimant accepts the presumed award; or

(2) A final award for the claimant is determined after a hearing on appeal.

(b) *Failure to accept or appeal presumed award.* If a claimant fails to accept or appeal the presumed award determined for that claimant within 30 days, the presumed award shall be deemed to have been accepted and all rights to appeal the award shall have been waived.

(c) *Pro-ration and payment of remaining claims.* The James Zadroga 9/11 Health and Compensation Act of 2010, Title II of Public Law 111–347, requires that the total amount of Federal funds paid for expenditures including compensation with respect to claims filed on or after October 3, 2011, will not exceed $2,775,000,000. Furthermore, the total amount of Federal funds expended during the period from October 3, 2011, through October 3, 2016, may not exceed $875,000,000.

(1) *In general.* The Special Master shall ratably reduce the amount of compensation due claimants in a manner to ensure, to the extent possible, that all claimants who are determined to be entitled to a payment receive a payment during the period from October 3, 2011, to October 3, 2016, and that the total amount of all such payments made during that 5-year period do not exceed the amount available under law during that period. The Special Master may periodically adjust the amount of ratable reduction in light of available information regarding potential future claims and available funds, and may

make additional payments in light of such adjustments.

(2) *Subsequent payments.* Subject to paragraph (c)(3) of this section, in any case in which the amount of a claim is ratably reduced pursuant to paragraph (c)(1) of this section, on or after October 3, 2016, but in no event later than October 3, 2017, the Special Master shall pay to the claimant the amount that is equal to the difference between:

(i) The amount that the claimant would have been paid under the presumed award; and

(ii) The amount the claimant was paid during the period from October 3, 2011, to October 3, 2016.

(3) In the event that the total amount of all claims under paragraph (c)(2) of this section exceeds the amount available under law, the Special Master shall ratably reduce the amount of compensation due claimants in a manner to ensure, to the extent possible, that all claimants who are determined to be entitled to an additional payment receive their pro-rated share of the available funds.

(4) At the time at which subsequent payments are made, the Special Master may review offsets from the World Trade Center Health Program that were included in the award determination and adjust such subsequent payments to reflect the Program's current status.

(5) During the five years that the Fund is accepting claims, the Special Master shall report periodically on the total amount of all claims under paragraph (c)(2) of this section.

§ 104.52 Distribution of award to decedent's beneficiaries.

The Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction. The Personal Representative shall, before payment is authorized, provide to the Special Master a plan for distribution of any award received from the Fund. Notwithstanding any other provision of these regulations or any other provision of state law, in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives.

Subpart F—Limitations

§ 104.61 Limitation on civil actions.

(a) *General.* Section 405(c)(3)(C) of the Act provides that upon the submission of a claim under the Fund, the claimant waives the right to file a civil action (or be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, or for damages arising from or related to debris removal, except that this limitation does not apply to recover collateral source obligations, or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act. The Special Master shall take appropriate steps to inform potential claimants of section 405(c)(3)(C) of the Act.

(b) *Pending actions.* Claimants who have filed a civil action or who are a party to such an action as described in paragraph (a) of this section may not file a claim with the Special Master unless they withdraw from such action not later than January 2, 2012.

(c) *Settled actions.* In the case of an individual who settled a civil action described in Section 405(c)(3)(C) of the Act, such individual may not submit a claim under this title unless such action was commenced after December 22, 2003, and a release of all claims in such action was tendered prior to January 2, 2011.

§ 104.62 Time limit on filing claims.

(a) *In general.* A claim may be filed by an individual (or by a personal representative on behalf of a deceased individual) during the period beginning on October 3, 2011, and ending on October 3, 2016, as follows:

(1) In the case that the individual knew (or reasonably should have known) before October 3, 2011, that the individual suffered a physical harm at

a 9/11 crash site as a result of the terrorist-related aircraft crashes of September 11, 2001, or as a result of debris removal, and is eligible to file a claim under this Part as of October 3, 2011, the individual may file a claim not later than October 3, 2013.

(2) In the case that the individual first knew (or reasonably should have known) on or after October 3, 2011, that the individual suffered such a physical harm or in the case that the individual became eligible to file a claim under this Part on or after that date, the individual may file a claim not later than the last day of the 2-year period beginning on either the date that the individual first knew (or should have known) that the individual both suffered from such harm or the date the individual became eligible to file a claim under this title, whichever is later, but in no event beyond October 3, 2016.

(b) *Determination by Special Master.* The Special Master or the Special Master's designee should determine the timeliness of all claims under paragraph (a) of this section.

§ 104.63 Subrogation.

Compensation under this Fund does not constitute the recovery of tort damages against a third party nor the settlement of a third party action, and the United States shall be subrogated to all potential claims against third party tortfeasors of any victim receiving compensation from the Fund. For that reason, no person or entity having paid other benefits or compensation to or on behalf of a victim shall have any right of recovery, whether through subrogation or otherwise, against the compensation paid by the Fund.

Subpart G—Measures To Protect the Integrity of the Compensation Program

§ 104.71 Procedures to prevent and detect fraud.

(a) *Review of claims.* For the purpose of detecting and preventing the payment of fraudulent claims and for the purpose of assuring accurate and appropriate payments to eligible claimants, the Special Master shall implement procedures to:

(1) Verify, authenticate, and audit claims;

(2) Analyze claim submissions to detect inconsistencies, irregularities, duplication, and multiple claimants; and

(3) Ensure the quality control of claims review procedures.

(b) *Quality control.* The Special Master shall institute periodic quality control audits designed to evaluate the accuracy of submissions and the accuracy of payments, subject to the oversight of the Inspector General of the Department of Justice.

(c) *False or fraudulent claims.* The Special Master shall refer all evidence of false or fraudulent claims to appropriate law enforcement authorities.

Subpart H—Attorney Fees

§ 104.81 Limitation on Attorney Fees.

(a) *In general*—(1) *In general.* Notwithstanding any contract, the representative of an individual may not charge, for services rendered in connection with the claim of an individual under this title, including expenses routinely incurred in the course of providing legal services, more than 10 percent of an award paid under this title on such claim. Expenses incurred in connection with the claim of an individual in this title other than those that are routinely incurred in the course of providing legal services may be charged to a claimant only if they have been approved by the Special Master.

(2) *Certification.* In the case of any claim in connection with which servicers covered by this section were rendered, the representative shall certify his or her compliance with this section and shall provide such information as the Special Master requires to ensure such compliance.

(b) *Limitation*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, in the case of an individual who was charged a legal fee in connection with the settlement of a civil action described in section 405(c)(3)(C)(iii) of the Act, the representative who charged such legal fee may not charge any amount for compensation for services rendered in connection with a claim filed by or on behalf of that individual under this title.

(2) *Exception*. If the legal fee charged in connection with the settlement of a civil action described in section 405(c)(3)(C)(iii) of the Act of an individual is less than 10 percent of the aggregate amount of compensation awarded to such individual through such settlement, the representative who charged such legal fee to that individual may charge an amount for compensation for services rendered to the extent that such amount charged is not more than—

(i) Ten (10) percent of such aggregate amount through the settlement, minus

(ii) The total amount of all legal fees charged for services rendered in connection with such settlement.

(c) *Discretion to lower fee*. In the event that the Special Master finds that the fee limit set by paragraph (a) or (b) of this section provides excessive compensation for services rendered in connection with such claim, the Special Master may, in the discretion of the Special Master, award as reasonable compensation for services rendered an amount lesser than that permitted for in paragraph (a) of this section.

PART 105—CRIMINAL HISTORY BACKGROUND CHECKS

Subpart A [Reserved]

Subpart B—Aviation Training for Aliens and Other Designated Individuals

Sec.
105.10 Definitions, purpose, and scope.
105.11 Individuals not requiring a security risk assessment.
105.12 Notification for candidates eligible for expedited processing.
105.13 Notification for candidates not eligible for expedited processing.
105.14 Risk assessment for candidates.

Subpart C—Private Security Officer Employment

105.21 Purpose and authority.
105.22 Definitions.
105.23 Procedure for requesting criminal history record check.
105.24 Employee's rights.
105.25 Authorized employer's responsibilities.
105.26 State agency's responsibilities.
105.27 Miscellaneous provisions.

AUTHORITY: Section 113 of Pub. L. 107–71, 115 Stat. 622 (49 U.S.C. 44939).

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Subpart A [Reserved]

Subpart B—Aviation Training for Aliens and Other Designated Individuals

§ 105.10 Definitions, purpose, and scope.

(a) *Definitions*.

ATSA means the Aviation and Transportation Security Act, Public Law 107–71.

Candidate means any person who is an alien as defined in section 101(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(3), or a person specified by the Under Secretary of Transportation for Security, who seeks training in the operation of an aircraft with a maximum certificated takeoff weight of 12,500 pounds or more from a Provider.

Certificates with ratings recognized by the United States means a valid pilot or flight engineer certificate with ratings issued by the United States, or a valid foreign pilot or flight engineer license issued by a member of the Assembly of the International Civil Aviation Organization, as established by Article 43 of the Convention on International Civil Aviation.

Notification means providing the information required under this regulation in the format and manner specified.

Provider means a person or entity subject to regulation under Title 49 Subtitle VII, Part A, United States Code. This definition includes individual training providers, training centers, certificated carriers, and flight schools. Virtually all private providers of instruction in the operation of aircraft with a maximum certificated takeoff weight of 12,500 pounds or more are covered by section 113 of ATSA (49 U.S.C. 44939) and are therefore subject to this rule. Providers located in countries other than the United States are included in this definition to the extent that they are providing training leading to a United States license, certification, or rating. Providers who ''dry-lease'' simulator equipment to individuals or entities for use within the

United States are deemed to be providing the training themselves if the lessee is not subject to regulation under Title 49. Providers located in countries other than the United States who are providing training that does not lead to a United States pilot or flight engineer certification, or rating are not included in this definition. When the Department of Defense or the U.S. Coast Guard, or an entity providing training pursuant to a contract with the Department of Defense or the U.S. Coast Guard (including a subcontractor), provides training for a military purpose, such training is not subject to Federal Aviation Administration (FAA) regulation. Accordingly, these entities, when providing such training, are not ''person[s] subject to regulation under this part'' within the meaning of section 113 of ATSA.

Training means any instruction in the operation of an aircraft, including ''ground school,'' flight simulator, and in-flight training. It does not include the provision of training manuals or other materials, and does not include mechanical training that would not enable the trainee to operate the aircraft in flight.

(b) *Purpose and scope.* (1) Section 113 of ATSA (49 U.S.C. 44939) prohibits Providers from furnishing candidates with training in the operation of an aircraft with a maximum certificated takeoff weight of 12,500 pounds or more without the prior notification of the Attorney General. Training in the operation of smaller aircraft is considered to be training in the operation of an aircraft with a maximum certificated takeoff weight of 12,500 pounds or more if the training would lead to a type rating allowing the candidate to operate a model of the same or substantially similar type of aircraft with a maximum certificated takeoff weight of 12,500 pounds or more in accordance with FAA regulations. The purpose of this notification is to allow the Attorney General to determine whether such an individual presents a risk to aviation or national security before training may begin. The Department believes that it is not required to make a candidate wait for 45 days in order to begin training if the Department has completed its risk assessment. Therefore, after providing the required notification to the Attorney General as described in this subpart, the Provider may begin instruction of a candidate if the Attorney General has informed the Provider that the Attorney General has determined as a result of the risk assessment conducted pursuant to section 113 of ATSA that providing the training does not present a risk to aviation or national security. If the Attorney General does not provide either an authorization to proceed with training or a notice to deny training within 45 days after receiving the required notification, the Provider may commence training at that time. All candidates who are not citizens or nationals of the U.S. must show a valid passport establishing their identity to a Provider before commencing training.

(2) The Department may, at any time, require the resubmission of all or a portion of a candidate's training request, including fingerprints. If, after approving any training application, the Department determines that a candidate presents a risk to aviation or national security, it will notify the Provider to cease training. The Provider who submitted the candidate's identifying information will be responsible for ensuring that the training is promptly halted, regardless of whether another Provider is currently training the candidate.

(3) Providing false information or otherwise failing to comply with section 113 of ATSA may present a threat to aviation or national security and is subject to both civil and criminal sanctions. The United States will take all necessary legal action to deter and punish violations of this section.

(4) Providers should make every effort to ensure that approved training occurs on the dates specified in the training request at the location of the Provider who submitted the request. However, where scheduling problems or other exigent circumstances prevent this from happening, training may be rescheduled for any time within 30 days of the approved training dates without submitting an additional request. If any scheduling change of greater than 30 days occurs, a new request with the

corrected training dates must be submitted. Any proposed change in location or Provider must precipitate a new request, although Providers may employ the assistance of other Providers or their facilities for a portion of the training, provided that the substantial majority of the training occurs at location of the Provider who submitted the request.

§ 105.11 Individuals not requiring a security risk assessment.

(a) *Citizens and nationals of the United States.* A citizen or national of the United States is not subject to section 113 of ATSA unless otherwise designated by the Under Secretary of Transportation for Security. A Provider must determine whether a prospective trainee is a citizen or national of the United States prior to providing training in the operation of an aircraft with a maximum certificated takeoff weight of 12,500 pounds or more. To establish United States citizenship or nationality, the prospective trainee must show the Provider from whom he or she seeks training any of the following documents as proof of United States citizenship or nationality:

(1) A valid, unexpired United States passport;

(2) An original or government-issued certified birth certificate with a registrar's raised, embossed, impressed or multicolored seal, registrar's signature, and the date the certificate was filed with the registrar's office, which must be within 1 year of birth, together with a government-issued picture identification of the individual named in the birth certificate (the birth certificate must establish that the person was born in the United States or in an outlying possession, as defined in section 101(a)(29) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(29)));

(3) An original United States naturalization certificate with raised seal, INS Form N–550 or INS Form N–570, together with a government-issued picture identification of the individual named in the certificate;

(4) An original certification of birth abroad with raised seal, Department of State Form FS–545 or Form DS–1350, together with a government-issued picture identification of the individual named in the certificate;

(5) An original certificate of United States citizenship with raised seal, INS Form N–560 or Form N–561, together with a government-issued picture identification of the individual named in the certificate; or

(6) In the case of training provided to a federal employee (including military personnel) pursuant to a contract between a federal agency and a Provider, the agency's written certification as to its employee's United States citizenship/nationality, together with the employee's government-issued credentials or other federally-issued picture identification.

(b) *Exception.* Notwithstanding paragraph (a) of this section, a Provider is required to provide notification to the Attorney General with respect to any individual specified by the Under Secretary of Transportation for Security. Individuals specified by the Under Secretary of Transportation for Security will be identified by procedures developed by the Department of Transportation and are not eligible for expedited processing under § 105.12 of this part.

§ 105.12 Notification for candidates eligible for expedited processing.

(a) *Expedited processing.* The Attorney General has determined that providing aviation training to certain categories of candidates presents a minimal additional risk to aviation or national security because of the aviation training already possessed by these individuals or because of risk assessments conducted by other agencies. Therefore, the following categories of candidates are eligible for expedited processing, unless the candidate is an individual specified by the Under Secretary of Transportation for Security:

(1) Foreign nationals who are current and qualified as pilot in command, second in command, or flight engineer with respective certificates with ratings recognized by the FAA for aircraft with a maximum certificated takeoff weight of over 12,500 pounds, or who are currently employed and qualified by U.S. regulated air carriers as pilots on aircraft with a maximum certificated

takeoff weight of 12,500 pounds or more;

(2) Foreign nationals who are commercial, governmental, corporate, or military pilots of aircraft with a maximum certificated takeoff weight of 12,500 pounds or more who are receiving training on a particular aircraft in connection with the sale of that aircraft, provided that the training provided is limited to familiarization (*i.e.*, training required by one who is already a competent pilot to become proficient in configurations and variations of a new aircraft) and not initial qualification or type rating; or

(3) Foreign military or law enforcement personnel who must receive training on a particular aircraft given by the United States to a foreign government pursuant to a draw-down authorized by the President under section 506(a)(2) of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2318(a)(2)), if the training provided is limited to familiarization.

(b) *Notification*. Before a Provider may conduct training for a candidate eligible for expedited processing under paragraph (a) of this section, the Provider must submit the following information to the Department:

(1) The full name of the candidate;

(2) A unique student identification number created by the Provider as a means of identifying records concerning the candidate;

(3) Date of birth;

(4) Country of citizenship;

(5) Passport issuing authority;

(6) Dates of training; and

(7) The category of expedited processing under paragraph (a) of this section for which the candidate qualifies.

(c) *Commencement of training*. (1) The notification must be provided electronically to the Department by the Provider in the specific format and by the specific means identified by the Department. Notification must be made by electronic mail. Only notifications sent from an electronic mail address registered as a Provider will be accepted. Specific details about the mechanism for the notification will be made available by the Department and distributed through the FAA.

(2) After the complete notification is furnished to the Department, the Provider may commence training the candidate as soon as the Provider receives a response from the Department that the individual does not present a risk to aviation or national security as a result of the risk assessment conducted pursuant to section 113 of ATSA and the foreign national candidate presents a valid passport establishing his or her identity to the Provider. Receipt of this response from the Department will be deemed approval by the Department to commence training.

(d) *Records*. When a Provider conducts training for a candidate eligible for expedited processing, the Provider must retain a copy of the relevant pages of the passport and other records to document how the Provider made the determination that the candidate was eligible. The Provider also must retain certain identifying records regarding the candidate, including date of birth, place of birth, passport issuing authority, and passport number. The Provider must be able to reference these records by the unique student identification number provided to the Department pursuant to this section. Providers also are encouraged to maintain photographs of all candidates trained by the Provider. Such records must be maintained for at least three years following the conclusion of training by the Provider. The Provider must also be able to use the unique student identification number to cross-reference any other documentation that the FAA may require the Provider to retain regarding the candidate.

§ 105.13 Notification for candidates not eligible for expedited processing.

(a) A Provider must submit a complete *Flight Training Candidate Checks Program* (FTCCP) form and arrange for the submission of fingerprints to the Department in accordance with this section prior to providing flight training, except with respect to persons whom the Provider has determined, as provided in § 105.11 of this part, are not subject to a security risk assessment. A separate FTCCP form must be submitted for each course or instance of training requested by a candidate. A set of fingerprints must be submitted in accordance with this rule prior to the commencement of any training.

Where a Provider enlists the assistance of another Provider in training a candidate, no additional request need be submitted, as long as the specific instance of training has been approved.

(b) The completed FTCCP form must be sent to the Attorney General via electronic submission at *https://www.flightschoolcandidates.gov*. The form must be submitted no more than three months prior to the proposed training dates. No paper submissions of this form will be accepted.

(1) In order to ensure that such electronic submissions are made by FAA certificated training providers, Providers must receive initial access to the system through the FAA. Providers should register through their local FAA Flight Standards District Offices. The FAA has decided that registration will be only by appointment. Upon registration, Providers will be sent (via electronic mail) an access password to use the system.

(2) Candidates may complete the online FTCCP form at *https://www.flightschoolcandidates.gov* to reduce the burden on the Provider. After the form has been completed by a candidate, it will be forwarded electronically to the Provider for verification that the candidate is a bona fide applicant. Verification by the Provider will be considered submission of the form for purposes of paragraph (a) of this section. To reduce the burden on the candidates, personal information needs only to be updated, rather than reentered, for each subsequent training request.

(c) Candidates must submit fingerprints to the Federal Bureau of Investigation (FBI) as part of the identification process. These fingerprints must be taken by, or under the supervision of, a federal, state, or local law enforcement agency, or by another entity approved by the Director of the Foreign Terrorist Tracking Task Force, in consultation with the FBI's Criminal Justice Information Services Division. Where available, fingerprints may be taken by U.S. government personnel at a United States embassy or consulate. Law enforcement agencies and U.S. diplomatic installations are not required to participate in this process, but their cooperation is strongly encouraged. Any individual taking fingerprints as part of the notification process must comply with the following requirements when taking and processing fingerprints to ensure the integrity of the process:

(1) Candidates must provide two forms of identification at the time of fingerprinting. In the case of aliens, one of the forms of identification must be the individual's passport. In the case of United States citizens or nationals designated by the Under Secretary of Transportation for Security, a valid photo driver's license issued in the United States may be submitted in lieu of a passport;

(2) The fingerprints must be taken under the direct observation of a law enforcement or consular officer, or another specifically authorized individual. Individuals other than law enforcement or consular officers will only be approved on a case-by-case basis by the Director of the Foreign Terrorist Tracking Task Force, in consultation with the FBI's Criminal Justice Information Services Division, upon a showing that they possess the necessary training and will ensure the integrity of the fingerprinting process;

(3) The fingerprints must be processed by means approved by the Director of the Foreign Terrorist Tracking Task Force, in consultation with the FBI's Criminal Justice Information Services Division;

(4) The fingerprint submissions must be forwarded to the FBI in the manner specified by the Director of the Foreign Terrorist Tracking Task Force, in consultation with the FBI's Criminal Justice Information Services Division;

(5) Officials taking fingerprints must ensure that any fingerprints provided to the FBI are not placed within the control of the candidate or the Provider at any time; and

(6) Candidates must pay for all costs associated with taking and processing their fingerprints.

(d) In accordance with Public Law 101–515, as amended, the Director of the FBI is authorized to establish and collect fees to process fingerprint identification records and name checks for certain purposes, including non-criminal justice and licensing purposes. In

addition to the cost to the FBI for conducting its review, other fees may be imposed, including the cost of taking the fingerprints and the cost of processing the fingerprints and submitting them to the FBI for review. Because the total fee may vary by agency, the candidate must check with the entity taking the fingerprints to determine the applicable total fee. This payment must be made at the designated rate for each set of fingerprints submitted.

(e) In some cases, candidates seeking training from Providers abroad may be unable to obtain fingerprints. If a Provider located in a country other than the United States can demonstrate that compliance with the fingerprint requirement is not practicable, a temporary waiver of the requirement may be requested by contacting the Foreign Terrorist Tracking Task Force. The Director of the Foreign Terrorist Tracking Task Force will have the discretion to grant the waiver, deny the waiver, or prescribe a reasonable, alternative manner of complying with the fingerprint requirement for each Provider location.

(f) The 45-day review period by the Department will not start until all the required information has been submitted, including fingerprints.

§ 105.14 Risk assessment for candidates.

(a) It is the responsibility of the Department of Justice to conduct a risk assessment for each candidate. The Department has made an initial determination that providing training to the aliens in the categories set forth in § 105.12(a) of this part presents minimal additional risk to aviation or national security and therefore has established an expedited processing procedure for these aliens. Based on the information contained in each FTCCP form and the corresponding set of fingerprints, the Department will determine whether a candidate not granted expedited processing presents a risk to aviation or national security.

(b) After submission of the FTCCP form by the Provider, the Department will perform a preliminary risk assessment.

(1) If the Department determines that a candidate does not present a risk to aviation or national security as a result of the preliminary risk assessment, the candidate or the Provider will be notified electronically that the Provider may supply the candidate with the appropriate materials and instructions to complete the fingerprinting process described in § 105.13(c) and (d) of this part.

(2) If the Department determines that the candidate presents a risk to aviation or national security, when appropriate, it will notify the Provider electronically that training is prohibited.

(3) For each complete training request submitted by a Provider, the Department will promptly conduct an appropriate risk assessment. Every effort will be made to respond to a training request in the briefest time possible. In routine cases, the Department anticipates granting approval to train within a fraction of the 45-day notification period after receiving a complete, properly submitted request, including fingerprints. In the unlikely event that no notification or authorization by the Department has occurred within 45 days after the proper submission under these regulations of all the required information, the Provider may proceed with the training, upon establishing the candidate's identity in accordance with paragraph (c) of this section.

(c) Providers must ascertain the identity of each candidate. For candidates who are not citizens or nationals of the United States designated by the Under Secretary of Transportation for Security, a Provider must inspect the candidate's passport and visa to verify the candidate's identity before providing training. Candidates who are citizens or nationals of the United States must present the documentation described in § 105.11(a) of this part. If the candidate's identity cannot be verified, then the Provider cannot proceed with training.

(d) If, at any time after training has begun, the Department determines that a candidate subject to this section being trained by a Provider presents a risk to aviation or national security, the Department shall notify the Provider to cease training. A Provider so

notified shall immediately cease providing any training to the person, regardless of whether or in what manner such training commenced or had been authorized. The Provider who submitted the candidate's identifying information will be responsible for ensuring that the training is promptly halted, regardless of whether another Provider is currently training the candidate.

(e) With regard to any determination as to an alien candidate's eligibility for training, when appropriate, the Department will inform the Secretary of State and the Secretary of Homeland Security as to the identity of the alien and the determination made.

Subpart C—Private Security Officer Employment

AUTHORITY: 18 U.S.C. 534; sec. 6402, Pub. L. 108–458 (18 U.S.C. 534 note).

SOURCE: Order No. 2796–2006, 71 FR 1693, Jan. 11, 2006, unless otherwise noted.

§ 105.21 Purpose and authority.

(a) The purpose of this subpart is to regulate the exchange of criminal history record information (''CHRI''), as defined in 28 CFR 20.3(d), and related information authorized by Section 6402 (The Private Security Officer Employment Authorization Act of 2004) (Act) of Public Law 108–458 (The Intelligence Reform and Terrorism Prevention Act of 2004). Section 6402 authorizes a fingerprint-based criminal history check of state and national criminal history records to screen prospective and current private security officers, and section 6402(d)(2) requires the Attorney General to publish regulations to provide for the ''security, confidentiality, accuracy, use, submission, dissemination, destruction of information and audits, and record keeping'' of the CHRI and related information, standards for qualifying an authorized employer, and the imposition of fees.

(b) The regulations in this subpart do not displace state licensing requirements for private security officers. A State retains the right to impose its own licensing requirements upon this industry.

§ 105.22 Definitions.

As used in this subpart:

(a) *Authorized employer* means any person that employs private security officers and is authorized by the regulations in this subpart to request a criminal history record information search of an employee through a state identification bureau. An employer is not authorized within the meaning of these regulations if it has not executed and submitted to the appropriate state agency the certification required in § 105.25(g), if its authority to do business in a State has been suspended or revoked pursuant to state law, or, in those states that regulate private security officers, the employer has been found to be out of compliance with any mandatory standards or requirements established by the appropriate regulatory agency or entity.

(b) *Employee* means both a current employee and an applicant for employment as a private security officer.

(c) *Charged*, with respect to a criminal felony, means being subject to a complaint, indictment, or information.

(d) *Felony* means a crime punishable by imprisonment for more than one year, regardless of the period of imprisonment actually imposed.

(e) *Participating State* means a State that has not elected to opt out of participating in the Act by statutory enactment or gubernatorial order. A State may decline to participate in the background check system authorized by the Act by enacting a law or issuing an order by the Governor (if consistent with state law) providing that the State is declining to participate. The regulations in this subpart that pertain to States apply only to participating states.

(f) *Person* means an individual, partnership, firm, company, corporation or institution that performs security services, whether for a third party for consideration or as an internal, proprietary function.

(g) *Private Security Officer* means an individual other than an employee of a Federal, State, or local government whose primary duty is to perform security services, full or part time, for consideration, whether armed or unarmed and in uniform or plain clothes, except as may be excluded from coverage in

these regulations, except that the term excludes—

(1) Employees whose duties are primarily internal audit or credit functions;

(2) Employees of electronic security system companies acting as technicians or monitors; or

(3) Employees whose duties involve the secure movement of prisoners.

(h) *Security services* means services, whether provided by a third party for consideration, or by employees as an internal, proprietary function, to protect people or property, including activities to: Patrol, guard, or monitor property (including real property as well as tangible or intangible personal property such as records, merchandise, money, and equipment); protect against fire, theft, misappropriation, vandalism, violence, terrorism, and other illegal activity; safeguard persons; control access to real property and prevent trespass; or deter criminal activity on the authorized employer's or another's premises. This definition does not cover services by the employees described in §105.22(f) as excluded from the definition of *private security officer*.

(i) *State Identification Bureau (SIB)* means the state agency designated by the Governor or other appropriate executive official or the state legislature to perform centralized recordkeeping functions for criminal history records and associated services in the States.

§105.23 Procedure for requesting criminal history record check.

These procedures only apply to participating states. An authorized employer may obtain a State and national criminal history record check as authorized by section 6402 of Public Law 105–458 as follows:

(a) An authorized employer is required to execute a certification to the State, developed by the SIB or the relevant state agency for purposes of accepting requests for these background checks, declaring that it is an authorized employer that employs private security officers; that all fingerprints and requests for criminal history background checks are being submitted for private security officers; that it will use the information obtained as a result of the state and national criminal history record checks solely for the purpose of screening its private security officers; and that it will abide by other regulatory obligations. To help ensure that only legitimate use is made of this authority, the certification shall be executed under penalties of perjury, false statement, or other applicable state laws.

(b) An authorized employer must obtain a set of fingerprints and the written consent of its employee to submit those prints for a state and national criminal history record check. An authorized employer must submit the fingerprints and appropriate state and federal fees to the SIB in the manner specified by the SIB.

(c) Upon receipt of an employee's fingerprints, the SIB shall perform a fingerprint-based search of its criminal records. If no relevant criminal record is found, the SIB shall submit the fingerprints to the FBI for a national search.

(d) Upon the conclusion of the national search, the FBI will disseminate the results to the SIB.

(e) Based upon the results of the state check and, if necessary, the national check:

(1) If the State has standards for qualifying a private security officer, the SIB or other designated state agency shall apply those standards to the CHRI and notify the authorized employer of the results of the application of the state standards; or

(2) If the State does not have standards for qualifying a private security officer, the SIB or other designated state agency shall notify an authorized employer as to the fact of whether an applicant has been:

(i) Convicted of a felony;

(ii) Convicted of a lesser offense involving dishonesty or false statement if occurring within the previous ten years;

(iii) Convicted of a lesser offense involving the use or attempted use of physical force against the person of another if occurring within the previous ten years; or

(iv) Charged with a felony during the previous 365 days for which there has been no resolution.

(f) The limitation periods set forth in paragraph (e)(2) of this section shall be determined using the date the employee's fingerprints were submitted. An employee shall be considered charged with a criminal felony for which there has been no resolution during the preceding 365 days if the individual is the subject of a complaint, indictment, or information, issued within 365 days of the date that the fingerprints were taken, for a crime punishable by imprisonment for more than one year. The effect of various forms of post-conviction relief shall be determined by the law of the convicting jurisdiction.

§ 105.24 Employee's rights.

An employee is entitled to:

(a) Obtain a copy from the authorized employer of any information concerning the employee provided under these regulations to the authorized employer by the participating State;

(b) Determine the status of his or her CHRI by contacting the SIB or other state agency providing information to the authorized employer; and

(c) Challenge the CHRI by contacting the agency originating the record or complying with the procedures contained in 28 CFR 16.34.

§ 105.25 Authorized employer's responsibilities.

An authorized employer is responsible for:

(a) Executing and providing to the appropriate state agency the certification to the State required under § 105.23(a) before a State can accept requests on private security guard employees;

(b) Obtaining the written consent of an employee to submit the employee's fingerprints for purposes of a CHRI check as described herein;

(c) Submitting an employee's fingerprints and appropriate state and federal fees to the SIB not later than one year after the date the employee's consent is obtained;

(d) Retaining an employee's written consent to submit his fingerprints for a criminal history record check for a period of no less than three years from the date the consent was last used to request a CHRI check;

(e) Upon request, providing an employee with confidential access to and a copy of the information provided to the employer by the SIB; and

(f) Maintaining the confidentiality and security of the information contained in a participating State's notification by:

(1) Storing the information in a secure container located in a limited access office or space;

(2) Limiting access to the information strictly to personnel involved in the employer's personnel and administration functions; and

(3) Establishing internal rules on the handling and dissemination of such information and training personnel with such access on such rules, on the need to safeguard and control the information, and on the consequences of failing to abide by such rules.

§ 105.26 State agency's responsibilities.

(a) Each State will determine whether it will opt out of participation by statutory enactment or gubernatorial order and communicating such determination to the Attorney General. Failure to inform the Attorney General of the determination will result in a State being considered a participating State.

(b) Each participating State is responsible for:

(1) Determining whether to establish a fee to perform a check of state criminal history records and related fees for administering the Act;

(2) Developing a certification form for execution by authorized employers under § 105.25(a) and receiving authorized employers' certifications;

(3) Receiving the fingerprint submissions and fees from the authorized employer; performing a check of state criminal history records; if necessary, transmitting the fingerprints to the FBI; remitting the FBI fees consistent with established interagency agreements; and receiving the results of the FBI check;

(4) Applying the relevant standards to any CHRI returned by the fingerprint check and notifying the authorized employer of the results of the application of the standards as required under § 105.23(e);

(5) Providing to an employee upon his or her request a copy of CHRI upon which an adverse determination was predicated; and

(6) Maintaining, for a period of no less than three years, auditable records regarding

(i) Maintenance and dissemination of CHRI; and

(ii) The employer's certification.

(c) If relevant CHRI is lacking disposition information, the SIB or responsible agency in a participating State will make reasonable efforts to obtain such information to promote the accuracy of the record and the integrity of the application of the relevant standards. If additional time beyond a State's standard response time is needed to find relevant disposition information, the SIB or responsible agency may advise the authorized employer that additional research is necessary before a final response can be provided. If raised, a participating State should take into account the effect of post-conviction relief.

§ 105.27 Miscellaneous provisions.

(a) *Alternate State availability*. (1) An authorized employer may submit the employee's fingerprints to the SIB of a participating State other than the State of employment—provided it obtains the permission of the accommodating State—if the authorized employer is prevented from submitting an employee's fingerprints because the employee's employment is in:

(i) A State that does not have an applicable Public Law 92–544 statute authorizing state and national fingerprint-based criminal history checks of prospective and current private security officers and has elected to opt out; or

(ii) A participating State that has not yet established a process for receiving fingerprints and processing the checks under the regulations in this subpart.

(2) A participating State agreeing to process checks under this subsection will discontinue doing so if thereafter the State of the employee's employment establishes a process State and national fingerprint-based criminal history checks of prospective and current private security officers.

(b) *FBI fees for national check*. The fee imposed by the FBI to perform a fingerprint-based criminal history record check is that routinely charged for noncriminal justice fingerprint submissions as periodically noticed in the FEDERAL REGISTER.

(c) *Penalties for misuse*. (1) In addition to incarceration for a period not to exceed two years, one who knowingly and intentionally misuses information (including a State's notification) received pursuant to the Act may be subject to a fine pursuant to 18 U.S.C. 3571.

(2) Consistent with State law, a violation of these regulations may also result in the divestiture of ''authorized employer'' status, thereby precluding an employer which provides security services from submitting fingerprints for a State and national criminal history record check.

(d) *Exclusion from coverage*. [Reserved]

PART 115—PRISON RAPE ELIMINATION ACT NATIONAL STANDARDS

Sec.

115.5 General definitions.
115.6 Definitions related to sexual abuse.

Subpart A—Standards for Adult Prisons and Jails

PREVENTION PLANNING

115.11 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.12 Contracting with other entities for the confinement of inmates.
115.13 Supervision and monitoring.
115.14 Youthful inmates.
115.15 Limits to cross-gender viewing and searches.
115.16 Inmates with disabilities and inmates who are limited English proficient.
115.17 Hiring and promotion decisions.
115.18 Upgrades to facilities and technologies.

RESPONSIVE PLANNING

115.21 Evidence protocol and forensic medical examinations.
115.22 Policies to ensure referrals of allegations for investigations.

TRAINING AND EDUCATION

115.31 Employee training.
115.32 Volunteer and contractor training.
115.33 Inmate education.
115.34 Specialized training: Investigations.

115.35 Specialized training: Medical and mental health care.

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

115.41 Screening for risk of victimization and abusiveness.
115.42 Use of screening information.
115.43 Protective custody.

REPORTING

115.51 Inmate reporting.
115.52 Exhaustion of administrative remedies.
115.53 Inmate access to outside confidential support services.
115.54 Third-party reporting.

OFFICIAL RESPONSE FOLLOWING AN INMATE REPORT

115.61 Staff and agency reporting duties.
115.62 Agency protection duties.
115.63 Reporting to other confinement facilities.
115.64 Staff first responder duties.
115.65 Coordinated response.
115.66 Preservation of ability to protect inmates from contact with abusers.
115.67 Agency protection against retaliation.
115.68 Post-allegation protective custody.

INVESTIGATIONS

115.71 Criminal and administrative agency investigations.
115.72 Evidentiary standard for administrative investigations.
115.73 Reporting to inmates.

DISCIPLINE

115.76 Disciplinary sanctions for staff.
115.77 Corrective action for contractors and volunteers.
115.78 Disciplinary sanctions for inmates.

MEDICAL AND MENTAL CARE

115.81 Medical and mental health screenings; history of sexual abuse.
115.82 Access to emergency medical and mental health services.
115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

DATA COLLECTION AND REVIEW

115.86 Sexual abuse incident reviews.
115.87 Data collection.
115.88 Data review for corrective action.
115.89 Data storage, publication, and destruction.

AUDITS

115.93 Audits of standards.

Subpart B—Standards for Lockups

PREVENTION PLANNING

115.111 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.112 Contracting with other entities for the confinement of detainees.
115.113 Supervision and monitoring.
115.114 Juveniles and youthful detainees.
115.115 Limits to cross-gender viewing and searches.
115.116 Detainees with disabilities and detainees who are limited English proficient.
115.117 Hiring and promotion decisions.
115.118 Upgrades to facilities and technologies.

RESPONSIVE PLANNING

115.121 Evidence protocol and forensic medical examinations.
115.122 Policies to ensure referrals of allegations for investigations.

TRAINING AND EDUCATION

115.131 Employee and volunteer training.
115.132 Detainee, contractor, and inmate worker notification of the agency's zero-tolerance policy.
115.133 [Reserved]
115.134 Specialized training: Investigations.
115.135 [Reserved]

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

115.141 Screening for risk of victimization and abusiveness.
115.142–115.43 [Reserved]

REPORTING

115.151 Detainee reporting.
115.152–115.53 [Reserved]
115.154 Third-party reporting.

OFFICIAL RESPONSE FOLLOWING A DETAINEE REPORT

115.161 Staff and agency reporting duties.
115.162 Agency protection duties.
115.163 Reporting to other confinement facilities.
115.164 Staff first responder duties.
115.165 Coordinated response.
115.166 Preservation of ability to protect detainees from contact with abusers.
115.167 Agency protection against retaliation.
115.168 [Reserved]

INVESTIGATIONS

115.171 Criminal and administrative agency investigations.
115.172 Evidentiary standard for administrative investigations.
115.173 [Reserved]

DISCIPLINE

115.176 Disciplinary sanctions for staff.
115.177 Corrective action for contractors and volunteers.
115.178 Referrals for prosecution for detainee-on-detainee sexual abuse.

MEDICAL AND MENTAL CARE

115.181 [Reserved]
115.182 Access to emergency medical services.
115.183 [Reserved]

DATA COLLECTION AND REVIEW

115.186 Sexual abuse incident reviews.
115.187 Data collection.
115.188 Data review for corrective action.
115.189 Data storage, publication, and destruction.

AUDITS

115.193 Audits of standards.

Subpart C—Standards for Community Confinement Facilities

PREVENTION PLANNING

115.211 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.212 Contracting with other entities for the confinement of residents.
115.213 Supervision and monitoring.
115.214 [Reserved]
115.215 Limits to cross-gender viewing and searches.
115.216 Residents with disabilities and residents who are limited English proficient.
115.217 Hiring and promotion decisions.
115.218 Upgrades to facilities and technologies.

RESPONSIVE PLANNING

115.221 Evidence protocol and forensic medical examinations.
115.222 Policies to ensure referrals of allegations for investigations.

TRAINING AND EDUCATION

115.231 Employee training.
115.232 Volunteer and contractor training.
115.233 Resident education.
115.234 Specialized training: Investigations.
115.235 Specialized training: Medical and mental health care.

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

115.241 Screening for risk of victimization and abusiveness.
115.242 Use of screening information.
115.243 [Reserved]

REPORTING

115.251 Resident reporting.
115.252 Exhaustion of administrative remedies.
115.253 Resident access to outside confidential support services.
115.254 Third-party reporting.

OFFICIAL RESPONSE FOLLOWING A RESIDENT REPORT

115.261 Staff and agency reporting duties.
115.262 Agency protection duties.
115.263 Reporting to other confinement facilities.
115.264 Staff first responder duties.
115.265 Coordinated response.
115.266 Preservation of ability to protect residents from contact with abusers.
115.267 Agency protection against retaliation.
115.268 [Reserved]

INVESTIGATIONS

115.271 Criminal and administrative agency investigations.
115.272 Evidentiary standard for administrative investigations.
115.273 Reporting to residents.

DISCIPLINE

115.276 Disciplinary sanctions for staff.
115.277 Corrective action for contractors and volunteers.
115.278 Disciplinary sanctions for residents.

MEDICAL AND MENTAL CARE

115.281 [Reserved]
115.282 Access to emergency medical and mental health services.
115.283 Ongoing medical and mental health care for sexual abuse victims and abusers.

DATA COLLECTION AND REVIEW

115.286 Sexual abuse incident reviews.
115.287 Data collection.
115.288 Data review for corrective action.
115.289 Data storage, publication, and destruction.

AUDITS

115.293 Audits of standards.

Subpart D—Standards for Juvenile Facilities

PREVENTION PLANNING

115.311 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.
115.312 Contracting with other entities for the confinement of residents.
115.313 Supervision and monitoring.
115.314 [Reserved]
115.315 Limits to cross-gender viewing and searches.
115.316 Residents with disabilities and residents who are limited English proficient.
115.317 Hiring and promotion decisions.

115.318 Upgrades to facilities and technologies.

RESPONSIVE PLANNING

115.321 Evidence protocol and forensic medical examinations.
115.322 Policies to ensure referrals of allegations for investigations.

TRAINING AND EDUCATION

115.331 Employee training.
115.332 Volunteer and contractor training.
115.333 Resident education.
115.334 Specialized training: Investigations.
115.335 Specialized training: Medical and mental health care.

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

115.341 Obtaining information from residents.
115.342 Placement of residents in housing, bed, program, education, and work assignments.
115.343 [Reserved]

REPORTING

115.351 Resident reporting.
115.352 Exhaustion of administrative remedies.
115.353 Resident access to outside support services and legal representation.
115.354 Third-party reporting.

OFFICIAL RESPONSE FOLLOWING A RESIDENT REPORT

115.361 Staff and agency reporting duties.
115.362 Agency protection duties.
115.363 Reporting to other confinement facilities.
115.364 Staff first responder duties.
115.365 Coordinated response.
115.366 Preservation of ability to protect residents from contact with abusers.
115.367 Agency protection against retaliation.
115.368 Post-allegation protective custody.

INVESTIGATIONS

115.371 Criminal and administrative agency investigations.
115.372 Evidentiary standard for administrative investigations.
115.373 Reporting to residents.

DISCIPLINE

115.376 Disciplinary sanctions for staff.
115.377 Corrective action for contractors and volunteers.
115.378 Interventions and disciplinary sanctions for residents.

MEDICAL AND MENTAL CARE

115.381 Medical and mental health screenings; history of sexual abuse.
115.382 Access to emergency medical and mental health services.
115.383 Ongoing medical and mental health care for sexual abuse victims and abusers.

DATA COLLECTION AND REVIEW

115.386 Sexual abuse incident reviews.
115.387 Data collection.
115.388 Data review for corrective action.
115.389 Data storage, publication, and destruction.

AUDITS

115.393 Audits of standards.

Subpart E—Auditing and Corrective Action

115.401 Frequency and scope of audits.
115.402 Auditor qualifications.
115.403 Audit contents and findings.
115.404 Audit corrective action plan.
115.405 Audit appeals.

Subpart F—State Compliance

115.501 State determination and certification of full compliance.

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SOURCE: AG Order 3331–2012, 77 FR 37197, June 20, 2012, unless otherwise noted.

§ 115.5 General definitions.

For purposes of this part, the term—

Agency means the unit of a State, local, corporate, or nonprofit authority, or of the Department of Justice, with direct responsibility for the operation of any facility that confines inmates, detainees, or residents, including the implementation of policy as set by the governing, corporate, or nonprofit authority.

Agency head means the principal official of an agency.

Community confinement facility means a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community correctional facility (including residential re-entry centers), other than a juvenile facility, in which individuals reside as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision, while participating in gainful employment, employment search efforts, community service, vocational training, treatment,

educational programs, or similar facility-approved programs during nonresidential hours.

Contractor means a person who provides services on a recurring basis pursuant to a contractual agreement with the agency.

Detainee means any person detained in a lockup, regardless of adjudication status.

Direct staff supervision means that security staff are in the same room with, and within reasonable hearing distance of, the resident or inmate.

Employee means a person who works directly for the agency or facility.

Exigent circumstances means any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security or institutional order of a facility.

Facility means a place, institution, building (or part thereof), set of buildings, structure, or area (whether or not enclosing a building or set of buildings) that is used by an agency for the confinement of individuals.

Facility head means the principal official of a facility.

Full compliance means compliance with all material requirements of each standard except for *de minimis* violations, or discrete and temporary violations during otherwise sustained periods of compliance.

Gender nonconforming means a person whose appearance or manner does not conform to traditional societal gender expectations.

Inmate means any person incarcerated or detained in a prison or jail.

Intersex means a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

Jail means a confinement facility of a Federal, State, or local law enforcement agency whose primary use is to hold persons pending adjudication of criminal charges, persons committed to confinement after adjudication of criminal charges for sentences of one year or less, or persons adjudicated guilty who are awaiting transfer to a correctional facility.

Juvenile means any person under the age of 18, unless under adult court supervision and confined or detained in a prison or jail.

Juvenile facility means a facility primarily used for the confinement of juveniles pursuant to the juvenile justice system or criminal justice system.

Law enforcement staff means employees responsible for the supervision and control of detainees in lockups.

Lockup means a facility that contains holding cells, cell blocks, or other secure enclosures that are:

(1) Under the control of a law enforcement, court, or custodial officer; and

(2) Primarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency.

Medical practitioner means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A ''qualified medical practitioner'' refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

Mental health practitioner means a mental health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A ''qualified mental health practitioner'' refers to such a professional who has also successfully completed specialized training for treating sexual abuse victims.

Pat-down search means a running of the hands over the clothed body of an inmate, detainee, or resident by an employee to determine whether the individual possesses contraband.

Prison means an institution under Federal or State jurisdiction whose primary use is for the confinement of individuals convicted of a serious crime, usually in excess of one year in length, or a felony.

Resident means any person confined or detained in a juvenile facility or in a community confinement facility.

Secure juvenile facility means a juvenile facility in which the movements

and activities of individual residents may be restricted or subject to control through the use of physical barriers or intensive staff supervision. A facility that allows residents access to the community to achieve treatment or correctional objectives, such as through educational or employment programs, typically will not be considered to be a secure juvenile facility.

Security staff means employees primarily responsible for the supervision and control of inmates, detainees, or residents in housing units, recreational areas, dining areas, and other program areas of the facility.

Staff means employees.

Strip search means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia.

Substantiated allegation means an allegation that was investigated and determined to have occurred.

Transgender means a person whose gender identity (*i.e.*, internal sense of feeling male or female) is different from the person's assigned sex at birth.

Unfounded allegation means an allegation that was investigated and determined not to have occurred.

Unsubstantiated allegation means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

Volunteer means an individual who donates time and effort on a recurring basis to enhance the activities and programs of the agency.

Youthful inmate means any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail.

Youthful detainee means any person under the age of 18 who is under adult court supervision and detained in a lockup.

§ 115.6 Definitions related to sexual abuse.

For purposes of this part, the term—

Sexual abuse includes—

(1) Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident; and

(2) Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer.

Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and

(4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation.

Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate, detainee, or resident:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1) through (5) of this definition;

(7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and

(8) Voyeurism by a staff member, contractor, or volunteer.

Sexual harassment includes—

(1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another; and

(2) Repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

Voyeurism by a staff member, contractor, or volunteer means an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.

Subpart A—Standards for Adult Prisons and Jails

PREVENTION PLANNING

§ 115.11 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.

(c) Where an agency operates more than one facility, each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

§ 115.12 Contracting with other entities for the confinement of inmates.

(a) A public agency that contracts for the confinement of its inmates with private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

(b) Any new contract or contract renewal shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards.

§ 115.13 Supervision and monitoring.

(a) The agency shall ensure that each facility it operates shall develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:

(1) Generally accepted detention and correctional practices;

(2) Any judicial findings of inadequacy;

(3) Any findings of inadequacy from Federal investigative agencies;

(4) Any findings of inadequacy from internal or external oversight bodies;

(5) All components of the facility's physical plant (including ''blind-spots'' or areas where staff or inmates may be isolated);

(6) The composition of the inmate population;

(7) The number and placement of supervisory staff;

(8) Institution programs occurring on a particular shift;

(9) Any applicable State or local laws, regulations, or standards;

(10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(11) Any other relevant factors.

(b) In circumstances where the staffing plan is not complied with, the facility shall document and justify all deviations from the plan.

(c) Whenever necessary, but no less frequently than once each year, for each facility the agency operates, in consultation with the PREA coordinator required by § 115.11, the agency shall assess, determine, and document whether adjustments are needed to:

(1) The staffing plan established pursuant to paragraph (a) of this section;

(2) The facility's deployment of video monitoring systems and other monitoring technologies; and

(3) The resources the facility has available to commit to ensure adherence to the staffing plan.

(d) Each agency operating a facility shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts. Each agency shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

§ 115.14 Youthful inmates.

(a) A youthful inmate shall not be placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters.

(b) In areas outside of housing units, agencies shall either:

(1) Maintain sight and sound separation between youthful inmates and adult inmates, or

(2) Provide direct staff supervision when youthful inmates and adult inmates have sight, sound, or physical contact.

(c) Agencies shall make best efforts to avoid placing youthful inmates in isolation to comply with this provision. Absent exigent circumstances, agencies shall not deny youthful inmates daily large-muscle exercise and any legally required special education services to comply with this provision. Youthful inmates shall also have access to other programs and work opportunities to the extent possible.

§ 115.15 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of August 20, 2015, or August 21, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.

(d) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.

(e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

§ 115.16 Inmates with disabilities and inmates who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that inmates with disabilities (including, for example, inmates who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with inmates who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with inmates with disabilities, including inmates who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to inmates who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on inmate interpreters, inmate readers, or other types of inmate assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the inmate's safety, the performance of first-response duties under § 115.64, or the investigation of the inmate's allegations.

§ 115.17 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with inmates.

(c) Before hiring new employees who may have contact with inmates, the agency shall:

(1) Perform a criminal background records check; and

(2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with inmates.

(e) The agency shall either conduct criminal background records checks at

least every five years of current employees and contractors who may have contact with inmates or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall ask all applicants and employees who may have contact with inmates directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

(h) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

§ 115.18 Upgrades to facilities and technologies.

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect inmates from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect inmates from sexual abuse.

RESPONSIVE PLANNING

§ 115.21 Evidence protocol and forensic medical examinations.

(a) To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, ''A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents,'' or similarly comprehensive and authoritative protocols developed after 2011.

(c) The agency shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization, or a qualified agency staff member. Agencies shall document efforts to secure services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.

(e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim

through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of this section.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

(1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in prisons or jails; and

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in prisons or jails.

(h) For the purposes of this section, a qualified agency staff member or a qualified community-based staff member shall be an individual who has been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

§ 115.22 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy on its Web site or, if it does not have one, make the policy available through other means. The agency shall document all such referrals.

(c) If a separate entity is responsible for conducting criminal investigations, such publication shall describe the responsibilities of both the agency and the investigating entity.

(d) Any State entity responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in prisons or jails shall have in place a policy governing the conduct of such investigations.

(e) Any Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in prisons or jails shall have in place a policy governing the conduct of such investigations.

TRAINING AND EDUCATION

§ 115.31 Employee training.

(a) The agency shall train all employees who may have contact with inmates on:

(1) Its zero-tolerance policy for sexual abuse and sexual harassment;

(2) How to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;

(3) Inmates' right to be free from sexual abuse and sexual harassment;

(4) The right of inmates and employees to be free from retaliation for reporting sexual abuse and sexual harassment;

(5) The dynamics of sexual abuse and sexual harassment in confinement;

(6) The common reactions of sexual abuse and sexual harassment victims;

(7) How to detect and respond to signs of threatened and actual sexual abuse;

(8) How to avoid inappropriate relationships with inmates;

(9) How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates; and

(10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) Such training shall be tailored to the gender of the inmates at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male inmates to a facility that houses only female inmates, or vice versa.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the

agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

(d) The agency shall document, through employee signature or electronic verification, that employees understand the training they have received.

§ 115.32 Volunteer and contractor training.

(a) The agency shall ensure that all volunteers and contractors who have contact with inmates have been trained on their responsibilities under the agency's sexual abuse and sexual harassment prevention, detection, and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with inmates, but all volunteers and contractors who have contact with inmates shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report such incidents.

(c) The agency shall maintain documentation confirming that volunteers and contractors understand the training they have received.

§ 115.33 Inmate education.

(a) During the intake process, inmates shall receive information explaining the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.

(b) Within 30 days of intake, the agency shall provide comprehensive education to inmates either in person or through video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding agency policies and procedures for responding to such incidents.

(c) Current inmates who have not received such education shall be educated within one year of the effective date of the PREA standards, and shall receive education upon transfer to a different facility to the extent that the policies and procedures of the inmate's new facility differ from those of the previous facility.

(d) The agency shall provide inmate education in formats accessible to all inmates, including those who are limited English proficient, deaf, visually impaired, or otherwise disabled, as well as to inmates who have limited reading skills.

(e) The agency shall maintain documentation of inmate participation in these education sessions.

(f) In addition to providing such education, the agency shall ensure that key information is continuously and readily available or visible to inmates through posters, inmate handbooks, or other written formats.

§ 115.34 Specialized training: Investigations.

(a) In addition to the general training provided to all employees pursuant to § 115.31, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

(c) The agency shall maintain documentation that agency investigators have completed the required specialized training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in confinement settings shall provide such training to its agents and investigators who conduct such investigations.

§ 115.35 Specialized training: Medical and mental health care.

(a) The agency shall ensure that all full- and part-time medical and mental

health care practitioners who work regularly in its facilities have been trained in:

(1) How to detect and assess signs of sexual abuse and sexual harassment;

(2) How to preserve physical evidence of sexual abuse;

(3) How to respond effectively and professionally to victims of sexual abuse and sexual harassment; and

(4) How and to whom to report allegations or suspicions of sexual abuse and sexual harassment.

(b) If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall maintain documentation that medical and mental health practitioners have received the training referenced in this standard either from the agency or elsewhere.

(d) Medical and mental health care practitioners shall also receive the training mandated for employees under § 115.31 or for contractors and volunteers under § 115.32, depending upon the practitioner's status at the agency.

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

§ 115.41 Screening for risk of victimization and abusiveness.

(a) All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument.

(d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:

(1) Whether the inmate has a mental, physical, or developmental disability;

(2) The age of the inmate;

(3) The physical build of the inmate;

(4) Whether the inmate has previously been incarcerated;

(5) Whether the inmate's criminal history is exclusively nonviolent;

(6) Whether the inmate has prior convictions for sex offenses against an adult or child;

(7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the inmate has previously experienced sexual victimization;

(9) The inmate's own perception of vulnerability; and

(10) Whether the inmate is detained solely for civil immigration purposes.

(e) The initial screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in assessing inmates for risk of being sexually abusive.

(f) Within a set time period, not to exceed 30 days from the inmate's arrival at the facility, the facility will reassess the inmate's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.

(g) An inmate's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate's risk of sexual victimization or abusiveness.

(h) Inmates may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

(i) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the inmate's detriment by staff or other inmates.

§ 115.42 Use of screening information.

(a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

§ 115.43 Protective custody.

(a) Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.

(b) Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:

(1) The opportunities that have been limited;

(2) The duration of the limitation; and

(3) The reasons for such limitations.

(c) The facility shall assign such inmates to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.

(d) If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, the facility shall clearly document:

(1) The basis for the facility's concern for the inmate's safety; and

(2) The reason why no alternative means of separation can be arranged.

(e) Every 30 days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

REPORTING

§ 115.51 Inmate reporting.

(a) The agency shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.

(b) The agency shall also provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, allowing the inmate to remain anonymous upon request. Inmates detained solely for civil immigration purposes shall be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The agency shall provide a method for staff to privately report sexual

abuse and sexual harassment of inmates.

§ 115.52 Exhaustion of administrative remedies.

(a) An agency shall be exempt from this standard if it does not have administrative procedures to address inmate grievances regarding sexual abuse.

(b)(1) The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.

(2) The agency may apply otherwise-applicable time limits to any portion of a grievance that does not allege an incident of sexual abuse.

(3) The agency shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.

(4) Nothing in this section shall restrict the agency's ability to defend against an inmate lawsuit on the ground that the applicable statute of limitations has expired.

(c) The agency shall ensure that—

(1) An inmate who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and

(2) Such grievance is not referred to a staff member who is the subject of the complaint.

(d)(1) The agency shall issue a final agency decision on the merits of any portion of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.

(2) Computation of the 90-day time period shall not include time consumed by inmates in preparing any administrative appeal.

(3) The agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The agency shall notify the inmate in writing of any such extension and provide a date by which a decision will be made.

(4) At any level of the administrative process, including the final level, if the inmate does not receive a response within the time allotted for reply, including any properly noticed extension, the inmate may consider the absence of a response to be a denial at that level.

(e)(1) Third parties, including fellow inmates, staff members, family members, attorneys, and outside advocates, shall be permitted to assist inmates in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of inmates.

(2) If a third party files such a request on behalf of an inmate, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(3) If the inmate declines to have the request processed on his or her behalf, the agency shall document the inmate's decision.

(f)(1) The agency shall establish procedures for the filing of an emergency grievance alleging that an inmate is subject to a substantial risk of imminent sexual abuse.

(2) After receiving an emergency grievance alleging an inmate is subject to a substantial risk of imminent sexual abuse, the agency shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) to a level of review at which immediate corrective action may be taken, shall provide an initial response within 48 hours, and shall issue a final agency decision within 5 calendar days. The initial response and final agency decision shall document the agency's determination whether the inmate is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

(g) The agency may discipline an inmate for filing a grievance related to alleged sexual abuse only where the agency demonstrates that the inmate filed the grievance in bad faith.

§ 115.53 Inmate access to outside confidential support services.

(a) The facility shall provide inmates with access to outside victim advocates for emotional support services related to sexual abuse by giving inmates mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or

national victim advocacy or rape crisis organizations, and, for persons detained solely for civil immigration purposes, immigrant services agencies. The facility shall enable reasonable communication between inmates and these organizations and agencies, in as confidential a manner as possible.

(b) The facility shall inform inmates, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

(c) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide inmates with confidential emotional support services related to sexual abuse. The agency shall maintain copies of agreements or documentation showing attempts to enter into such agreements.

§ 115.54 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of an inmate.

OFFICIAL RESPONSE FOLLOWING AN INMATE REPORT

§ 115.61 Staff and agency reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against inmates or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

(b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions.

(c) Unless otherwise precluded by Federal, State, or local law, medical and mental health practitioners shall be required to report sexual abuse pursuant to paragraph (a) of this section and to inform inmates of the practitioner's duty to report, and the limitations of confidentiality, at the initiation of services.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

(e) The facility shall report all allegations of sexual abuse and sexual harassment, including third-party and anonymous reports, to the facility's designated investigators.

§ 115.62 Agency protection duties.

When an agency learns that an inmate is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the inmate.

§ 115.63 Reporting to other confinement facilities.

(a) Upon receiving an allegation that an inmate was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

(d) The facility head or agency office that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

§ 115.64 Staff first responder duties.

(a) Upon learning of an allegation that an inmate was sexually abused, the first security staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence, and then notify security staff.

§ 115.65 Coordinated response.

The facility shall develop a written institutional plan to coordinate actions taken in response to an incident of sexual abuse, among staff first responders, medical and mental health practitioners, investigators, and facility leadership.

§ 115.66 Preservation of ability to protect inmates from contact with abusers.

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with any inmates pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.72 and 115.76; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.67 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other inmates or staff, and shall designate which staff members or departments are charged with monitoring retaliation.

(b) The agency shall employ multiple protection measures, such as housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct and treatment of inmates or staff who reported the sexual abuse and of inmates who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by inmates or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any inmate disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of inmates, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.68 Post-allegation protective custody.

Any use of segregated housing to protect an inmate who is alleged to have suffered sexual abuse shall be subject to the requirements of § 115.43.

INVESTIGATIONS

§ 115.71 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to § 115.34.

(c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as inmate or staff. No agency shall require an inmate who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(f) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act contributed to the abuse; and

(2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings.

(g) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(h) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(i) The agency shall retain all written reports referenced in paragraphs (f) and (g) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

(j) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(k) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(l) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

§ 115.72 Evidentiary standard for administrative investigations.

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse or sexual harassment are substantiated.

§ 115.73 Reporting to inmates.

(a) Following an investigation into an inmate's allegation that he or she suffered sexual abuse in an agency facility, the agency shall inform the inmate as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.

(b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the inmate.

(c) Following an inmate's allegation that a staff member has committed sexual abuse against the inmate, the agency shall subsequently inform the inmate (unless the agency has determined that the allegation is unfounded) whenever:

(1) The staff member is no longer posted within the inmate's unit;

(2) The staff member is no longer employed at the facility;

(3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or

(4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) Following an inmate's allegation that he or she has been sexually abused by another inmate, the agency shall subsequently inform the alleged victim whenever:

(1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or

(2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.

(f) An agency's obligation to report under this standard shall terminate if the inmate is released from the agency's custody.

DISCIPLINE

§ 115.76 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

§ 115.77 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with inmates and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with inmates, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.78 Disciplinary sanctions for inmates.

(a) Inmates shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the inmate engaged in inmate-on-inmate sexual abuse or following a criminal finding of guilt for inmate-on-inmate sexual abuse.

(b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the inmate's disciplinary history, and the sanctions imposed for comparable offenses by other inmates with similar histories.

(c) The disciplinary process shall consider whether an inmate's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending inmate to participate in such interventions as a condition of access to programming or other benefits.

(e) The agency may discipline an inmate for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred

shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) An agency may, in its discretion, prohibit all sexual activity between inmates and may discipline inmates for such activity. An agency may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

MEDICAL AND MENTAL CARE

§ 115.81 Medical and mental health screenings; history of sexual abuse.

(a) If the screening pursuant to § 115.41 indicates that a prison inmate has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.

(b) If the screening pursuant to § 115.41 indicates that a prison inmate has previously perpetrated sexual abuse, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a mental health practitioner within 14 days of the intake screening.

(c) If the screening pursuant to § 115.41 indicates that a jail inmate has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.

(d) Any information related to sexual victimization or abusiveness that occurred in an institutional setting shall be strictly limited to medical and mental health practitioners and other staff, as necessary, to inform treatment plans and security and management decisions, including housing, bed, work, education, and program assignments, or as otherwise required by Federal, State, or local law.

(e) Medical and mental health practitioners shall obtain informed consent from inmates before reporting information about prior sexual victimization that did not occur in an institutional setting, unless the inmate is under the age of 18.

§ 115.82 Access to emergency medical and mental health services.

(a) Inmate victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.

(b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take preliminary steps to protect the victim pursuant to § 115.62 and shall immediately notify the appropriate medical and mental health practitioners.

(c) Inmate victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.

(d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

§ 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers.

(a) The facility shall offer medical and mental health evaluation and, as appropriate, treatment to all inmates who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

(b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide such victims with medical and mental health services consistent with the community level of care.

(d) Inmate victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

(e) If pregnancy results from the conduct described in paragraph (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.

(f) Inmate victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.

(g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(h) All prisons shall attempt to conduct a mental health evaluation of all known inmate-on-inmate abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

DATA COLLECTION AND REVIEW

§ 115.86 Sexual abuse incident reviews.

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(d) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1) through (d)(5) of this section, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.87 Data collection.

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Survey of Sexual Violence conducted by the Department of Justice.

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents, including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from every private facility with which it contracts for the confinement of its inmates.

(f) Upon request, the agency shall provide all such data from the previous calendar year to the Department of Justice no later than June 30.

§ 115.88 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.87 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including by:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but must indicate the nature of the material redacted.

§ 115.89 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.87 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from facilities under its direct control and private facilities with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.87 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

AUDITS

§ 115.93 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401 through 115.405.

Subpart B—Standards for Lockups

PREVENTION PLANNING

§ 115.111 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its lockups.

§ 115.112 Contracting with other entities for the confinement of detainees.

(a) A law enforcement agency that contracts for the confinement of its lockup detainees in lockups operated by private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

(b) Any new contract or contract renewal shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards.

§ 115.113 Supervision and monitoring.

(a) For each lockup, the agency shall develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect detainees against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, agencies shall take into consideration;

(1) The physical layout of each lockup;

(2) The composition of the detainee population;

(3) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(4) Any other relevant factors.

(b) In circumstances where the staffing plan is not complied with, the lockup shall document and justify all deviations from the plan.

(c) Whenever necessary, but no less frequently than once each year, the lockup shall assess, determine, and document whether adjustments are needed to:

(1) The staffing plan established pursuant to paragraph (a) of this section;

(2) Prevailing staffing patterns;

(3) The lockup's deployment of video monitoring systems and other monitoring technologies; and

(4) The resources the lockup has available to commit to ensure adequate staffing levels.

(d) If vulnerable detainees are identified pursuant to the screening required by § 115.141, security staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

§ 115.114 Juveniles and youthful detainees.

Juveniles and youthful detainees shall be held separately from adult detainees.

§ 115.115 Limits to cross-gender viewing and searches.

(a) The lockup shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) The lockup shall document all cross-gender strip searches and cross-gender visual body cavity searches.

(c) The lockup shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(d) The lockup shall not search or physically examine a transgender or intersex detainee for the sole purpose of determining the detainee's genital status. If the detainee's genital status is unknown, it may be determined during conversations with the detainee, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(e) The agency shall train law enforcement staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex detainees, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

§ 115.116 Detainees with disabilities and detainees who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with detainees who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with detainees with disabilities, including detainees who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An

agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to detainees who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on detainee interpreters, detainee readers, or other types of detainee assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the detainee's safety, the performance of first-response duties under § 115.164, or the investigation of the detainee's allegations.

§ 115.117 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with detainees, and shall not enlist the services of any contractor who may have contact with detainees, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with detainees.

(c) Before hiring new employees who may have contact with detainees, the agency shall:

(1) Perform a criminal background records check; and

(2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with detainees.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with detainees or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall ask all applicants and employees who may have contact with detainees directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

(h) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

§ 115.118 Upgrades to facilities and technologies.

(a) When designing or acquiring any new lockup and in planning any substantial expansion or modification of existing lockups, the agency shall consider the effect of the design, acquisition, expansion, or modification upon

the agency's ability to protect detainees from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect detainees from sexual abuse.

RESPONSIVE PLANNING

§ 115.121 Evidence protocol and forensic medical examinations.

(a) To the extent the agency is responsible for investigating allegations of sexual abuse in its lockups, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, ''A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents,'' or similarly comprehensive and authoritative protocols developed after 2011. As part of the training required in § 115.131, employees and volunteers who may have contact with lockup detainees shall receive basic training regarding how to detect and respond to victims of sexual abuse.

(c) The agency shall offer all victims of sexual abuse access to forensic medical examinations whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) If the detainee is transported for a forensic examination to an outside hospital that offers victim advocacy services, the detainee shall be permitted to use such services to the extent available, consistent with security needs.

(e) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (d) of this section.

(f) The requirements in paragraphs (a) through (e) of this section shall also apply to:

(1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in lockups; and

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in lockups.

§ 115.122 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) If another law enforcement agency is responsible for conducting investigations of allegations of sexual abuse or sexual harassment in its lockups, the agency shall have in place a policy to ensure that such allegations are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy, including a description of responsibilities of both the agency and the investigating entity, on its Web site, or, if it does not have one, make available the policy through other means. The agency shall document all such referrals.

(c) Any State entity responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in lockups shall have in place a policy governing the conduct of such investigations.

(d) Any Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in lockups shall have in place a policy governing the conduct of such investigations.

TRAINING AND EDUCATION

§ 115.131 Employee and volunteer training.

(a) The agency shall train all employees and volunteers who may have contact with lockup detainees to be able to fulfill their responsibilities under agency sexual abuse prevention, detection, and response policies and procedures, including training on:

(1) The agency's zero-tolerance policy and detainees' right to be free from sexual abuse and sexual harassment;

(2) The dynamics of sexual abuse and harassment in confinement settings, including which detainees are most vulnerable in lockup settings;

(3) The right of detainees and employees to be free from retaliation for reporting sexual abuse or harassment;

(4) How to detect and respond to signs of threatened and actual abuse;

(5) How to communicate effectively and professionally with all detainees; and

(6) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) All current employees and volunteers who may have contact with lockup detainees shall be trained within one year of the effective date of the PREA standards, and the agency shall provide annual refresher information to all such employees and volunteers to ensure that they know the agency's current sexual abuse and sexual harassment policies and procedures.

(c) The agency shall document, through employee signature or electronic verification, that employees understand the training they have received.

§ 115.132 Detainee, contractor, and inmate worker notification of the agency's zero-tolerance policy.

(a) During the intake process, employees shall notify all detainees of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment.

(b) The agency shall ensure that, upon entering the lockup, contractors and any inmates who work in the lockup are informed of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment.

§ 115.133 [Reserved]

§ 115.134 Specialized training: Investigations.

(a) In addition to the general training provided to all employees and volunteers pursuant to § 115.131, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

(c) The agency shall maintain documentation that agency investigators have completed the required specialized training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in lockups shall provide such training to their agents and investigators who conduct such investigations.

§ 115.135 [Reserved]

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

§ 115.141 Screening for risk of victimization and abusiveness.

(a) In lockups that are not utilized to house detainees overnight, before placing any detainees together in a holding cell, staff shall consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, shall take necessary steps to mitigate any such danger to the detainee.

(b) In lockups that are utilized to house detainees overnight, all detainees shall be screened to assess their risk of being sexually abused by other detainees or sexually abusive toward other detainees.

(c) In lockups described in paragraph (b) of this section, staff shall ask the detainee about his or her own perception of vulnerability.

(d) The screening process in the lockups described in paragraph (b) of this section shall also consider, to the extent that the information is available, the following criteria to screen detainees for risk of sexual victimization:

(1) Whether the detainee has a mental, physical, or developmental disability;

(2) The age of the detainee;

(3) The physical build and appearance of the detainee;

(4) Whether the detainee has previously been incarcerated; and

(5) The nature of the detainee's alleged offense and criminal history.

§§ 115.142–115.43 [Reserved]

REPORTING

§ 115.151 Detainee reporting.

(a) The agency shall provide multiple ways for detainees to privately report sexual abuse and sexual harassment, retaliation by other detainees or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.

(b) The agency shall also inform detainees of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse and sexual harassment to agency officials, allowing the detainee to remain anonymous upon request.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and promptly document any verbal reports.

(d) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of detainees.

§§ 115.152–115.53 [Reserved]

§ 115.154 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment in its lockups and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of a detainee.

OFFICIAL RESPONSE FOLLOWING A DETAINEE REPORT

§ 115.161 Staff and agency reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in an agency lockup; retaliation against detainees or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

(b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary, as specified in agency policy, to make treatment and investigation decisions.

(c) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

(d) The agency shall report all allegations of sexual abuse, including third-party and anonymous reports, to the agency's designated investigators.

§ 115.162 Agency protection duties.

When an agency learns that a detainee is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the detainee.

§ 115.163 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a detainee was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

(d) The facility head or agency office that receives such notification shall

ensure that the allegation is investigated in accordance with these standards.

§ 115.164 Staff first responder duties.

(a) Upon learning of an allegation that a detainee was sexually abused, the first law enforcement staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a law enforcement staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify law enforcement staff.

§ 115.165 Coordinated response.

(a) The agency shall develop a written institutional plan to coordinate actions taken in response to a lockup incident of sexual abuse, among staff first responders, medical and mental health practitioners, investigators, and agency leadership.

(b) If a victim is transferred from the lockup to a jail, prison, or medical facility, the agency shall, as permitted by law, inform the receiving facility of the incident and the victim's potential need for medical or social services, unless the victim requests otherwise.

§ 115.166 Preservation of ability to protect detainees from contact with abusers.

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with detainees pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.172 and 115.176; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.167 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all detainees and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other detainees or staff, and shall designate which staff members or departments are charged with monitoring retaliation.

(b) The agency shall employ multiple protection measures, such as housing changes or transfers for detainee victims or abusers, removal of alleged staff or detainee abusers from contact with victims, and emotional support services for staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) The agency shall monitor the conduct and treatment of detainees or staff who have reported sexual abuse and of detainees who were reported to have suffered sexual abuse, and shall act promptly to remedy any such retaliation.

(d) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(e) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.168 [Reserved]

INVESTIGATIONS

§ 115.171 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to § 115.134.

(c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as detainee or staff. No agency shall require a detainee who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(f) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act contributed to the abuse; and

(2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings.

(g) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(h) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(i) The agency shall retain all written reports referenced in paragraphs (f) and (g) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

(j) The departure of the alleged abuser or victim from the employment or control of the lockup or agency shall not provide a basis for terminating an investigation.

(k) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(l) When outside agencies investigate sexual abuse, the agency shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

§ 115.172 Evidentiary standard for administrative investigations.

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse or sexual harassment are substantiated.

§ 115.173 [Reserved]

DISCIPLINE

§ 115.176 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual

abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

§ 115.177 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with detainees and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with detainees, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.178 Referrals for prosecution for detainee-on-detainee sexual abuse.

(a) When there is probable cause to believe that a detainee sexually abused another detainee in a lockup, the agency shall refer the matter to the appropriate prosecuting authority.

(b) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall inform the investigating entity of this policy.

(c) Any State entity or Department of Justice component that is responsible for investigating allegations of sexual abuse in lockups shall be subject to this requirement.

MEDICAL AND MENTAL CARE

§ 115.181 [Reserved]

§ 115.182 Access to emergency medical services.

(a) Detainee victims of sexual abuse in lockups shall receive timely, unimpeded access to emergency medical treatment.

(b) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

§ 115.183 [Reserved]

DATA COLLECTION AND REVIEW

§ 115.186 Sexual abuse incident reviews.

(a) The lockup shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors and investigators.

(d) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the lockup;

(3) Examine the area in the lockup where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1) through (d)(5) of this section, and any recommendations for improvement and submit such report to the lockup head and agency PREA coordinator.

(e) The lockup shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.187 Data collection.

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at lockups under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Local Jail Jurisdictions Survey of Sexual Violence conducted by the Department of Justice, or any subsequent form developed by the Department of Justice and designated for lockups.

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents, including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from any private agency with which it contracts for the confinement of its detainees.

(f) Upon request, the agency shall provide all such data from the previous calendar year to the Department of Justice no later than June 30.

§ 115.188 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.187 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each lockup, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a lockup, but must indicate the nature of the material redacted.

§ 115.189 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.187 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from lockups under its direct control and any private agencies with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.187 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

AUDITS

§ 115.193 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401 through 115.405. Audits need not be conducted of individual lockups that are not utilized to house detainees overnight.

Subpart C—Standards for Community Confinement Facilities

PREVENTION PLANNING

§ 115.211 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator, with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its community confinement facilities.

§ 115.212 Contracting with other entities for the confinement of residents.

(a) A public agency that contracts for the confinement of its residents with private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

(b) Any new contract or contract renewal shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards.

(c) Only in emergency circumstances in which all reasonable attempts to find a private agency or other entity in compliance with the PREA standards have failed, may the agency enter into a contract with an entity that fails to comply with these standards. In such a case, the public agency shall document its unsuccessful attempts to find an entity in compliance with the standards.

§ 115.213 Supervision and monitoring.

(a) For each facility, the agency shall develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect residents against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, agencies shall take into consideration:

(1) The physical layout of each facility;

(2) The composition of the resident population;

(3) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(4) Any other relevant factors.

(b) In circumstances where the staffing plan is not complied with, the facility shall document and justify all deviations from the plan.

(c) Whenever necessary, but no less frequently than once each year, the facility shall assess, determine, and document whether adjustments are needed to:

(1) The staffing plan established pursuant to paragraph (a) of this section;

(2) Prevailing staffing patterns;

(3) The facility's deployment of video monitoring systems and other monitoring technologies; and

(4) The resources the facility has available to commit to ensure adequate staffing levels.

§ 115.214 [Reserved]

§ 115.215 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of August 20, 2015, or August 21, 2017 for a facility whose rated capacity does not exceed 50 residents, the facility shall not permit cross-gender pat-down searches of female residents, absent exigent circumstances. Facilities shall not restrict female residents' access to regularly available programming or other outside opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female residents.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or

genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

(e) The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status. If the resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

§ 115.216 Residents with disabilities and residents who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that residents with disabilities (including, for example, residents who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with residents who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with residents with disabilities, including residents who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to residents who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on resident interpreters, resident readers, or other types of resident assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the resident's safety, the performance of first-response duties under § 115.264, or the investigation of the resident's allegations.

§ 115.217 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with residents, and shall not enlist the services of any contractor who may have contact with residents, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any

contractor, who may have contact with residents.

(c) Before hiring new employees who may have contact with residents, the agency shall:

(1) Perform a criminal background records check; and

(2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with residents.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with residents or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall also ask all applicants and employees who may have contact with residents directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

(h) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

§ 115.218 Upgrades to facilities and technologies.

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect residents from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect residents from sexual abuse.

RESPONSIVE PLANNING

§ 115.221 Evidence protocol and forensic medical examinations.

(a) To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, ''A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents,'' or similarly comprehensive and authoritative protocols developed after 2011.

(c) The agency shall offer all victims of sexual abuse access to forensic medical examinations whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization or a qualified agency staff member. Agencies shall document efforts to secure

services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.

(e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of this section.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

(1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in community confinement facilities; and

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in community confinement facilities.

(h) For the purposes of this standard, a qualified agency staff member or a qualified community-based staff member shall be an individual who has been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

§ 115.222 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy on its Web site or, if it does not have one, make the policy available through other means. The agency shall document all such referrals.

(c) If a separate entity is responsible for conducting criminal investigations, such publication shall describe the responsibilities of both the agency and the investigating entity.

(d) Any State entity responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in community confinement facilities shall have in place a policy governing the conduct of such investigations.

(e) Any Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in community confinement facilities shall have in place a policy governing the conduct of such investigations.

TRAINING AND EDUCATION

§ 115.231 Employee training.

(a) The agency shall train all employees who may have contact with residents on:

(1) Its zero-tolerance policy for sexual abuse and sexual harassment;

(2) How to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;

(3) Residents' right to be free from sexual abuse and sexual harassment;

(4) The right of residents and employees to be free from retaliation for reporting sexual abuse and sexual harassment;

(5) The dynamics of sexual abuse and sexual harassment in confinement;

(6) The common reactions of sexual abuse and sexual harassment victims;

(7) How to detect and respond to signs of threatened and actual sexual abuse;

(8) How to avoid inappropriate relationships with residents;

(9) How to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming residents; and

(10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.

(b) Such training shall be tailored to the gender of the residents at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male residents to a facility that houses only female residents, or vice versa.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

(d) The agency shall document, through employee signature or electronic verification, that employees understand the training they have received.

§ 115.232 Volunteer and contractor training.

(a) The agency shall ensure that all volunteers and contractors who have contact with residents have been trained on their responsibilities under the agency's sexual abuse and sexual harassment prevention, detection, and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with residents, but all volunteers and contractors who have contact with residents shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report such incidents.

(c) The agency shall maintain documentation confirming that volunteers and contractors understand the training they have received.

§ 115.233 Resident education.

(a) During the intake process, residents shall receive information explaining the agency's zero-tolerance policy regarding sexual abuse and sexual harassment, how to report incidents or suspicions of sexual abuse or sexual harassment, their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding agency policies and procedures for responding to such incidents.

(b) The agency shall provide refresher information whenever a resident is transferred to a different facility.

(c) The agency shall provide resident education in formats accessible to all residents, including those who are limited English proficient, deaf, visually impaired, or otherwise disabled as well as residents who have limited reading skills.

(d) The agency shall maintain documentation of resident participation in these education sessions.

(e) In addition to providing such education, the agency shall ensure that key information is continuously and readily available or visible to residents through posters, resident handbooks, or other written formats.

§ 115.234 Specialized training: Investigations.

(a) In addition to the general training provided to all employees pursuant to § 115.231, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

(c) The agency shall maintain documentation that agency investigators

have completed the required specialized training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in confinement settings shall provide such training to its agents and investigators who conduct such investigations.

§ 115.235 Specialized training: Medical and mental health care.

(a) The agency shall ensure that all full- and part-time medical and mental health care practitioners who work regularly in its facilities have been trained in:

(1) How to detect and assess signs of sexual abuse and sexual harassment;

(2) How to preserve physical evidence of sexual abuse;

(3) How to respond effectively and professionally to victims of sexual abuse and sexual harassment; and

(4) How and to whom to report allegations or suspicions of sexual abuse and sexual harassment.

(b) If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall maintain documentation that medical and mental health practitioners have received the training referenced in this standard either from the agency or elsewhere.

(d) Medical and mental health care practitioners shall also receive the training mandated for employees under § 115.231 or for contractors and volunteers under § 115.232, depending upon the practitioner's status at the agency.

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

§ 115.241 Screening for risk of victimization and abusiveness.

(a) All residents shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other residents or sexually abusive toward other residents.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument.

(d) The intake screening shall consider, at a minimum, the following criteria to assess residents for risk of sexual victimization:

(1) Whether the resident has a mental, physical, or developmental disability;

(2) The age of the resident;

(3) The physical build of the resident;

(4) Whether the resident has previously been incarcerated;

(5) Whether the resident's criminal history is exclusively nonviolent;

(6) Whether the resident has prior convictions for sex offenses against an adult or child;

(7) Whether the resident is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the resident has previously experienced sexual victimization; and

(9) The resident's own perception of vulnerability.

(e) The intake screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in assessing residents for risk of being sexually abusive.

(f) Within a set time period, not to exceed 30 days from the resident's arrival at the facility, the facility will reassess the resident's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.

(g) A resident's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the resident's risk of sexual victimization or abusiveness.

(h) Residents may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

(i) The agency shall implement appropriate controls on the dissemination within the facility of responses to

questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

§ 115.242 Use of screening information.

(a) The agency shall use information from the risk screening required by § 115.241 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those residents at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each resident.

(c) In deciding whether to assign a transgender or intersex resident to a facility for male or female residents, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the resident's health and safety, and whether the placement would present management or security problems.

(d) A transgender or intersex resident's own views with respect to his or her own safety shall be given serious consideration.

(e) Transgender and intersex residents shall be given the opportunity to shower separately from other residents.

(f) The agency shall not place lesbian, gay, bisexual, transgender, or intersex residents in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such residents.

§ 115.243 [Reserved]

REPORTING

§ 115.251 Resident reporting.

(a) The agency shall provide multiple internal ways for residents to privately report sexual abuse and sexual harassment, retaliation by other residents or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.

(b) The agency shall also inform residents of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency and that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials, allowing the resident to remain anonymous upon request.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of residents.

§ 115.252 Exhaustion of administrative remedies.

(a) An agency shall be exempt from this standard if it does not have administrative procedures to address resident grievances regarding sexual abuse.

(b)(1) The agency shall not impose a time limit on when a resident may submit a grievance regarding an allegation of sexual abuse.

(2) The agency may apply otherwise-applicable time limits on any portion of a grievance that does not allege an incident of sexual abuse.

(3) The agency shall not require a resident to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.

(4) Nothing in this section shall restrict the agency's ability to defend against a lawsuit filed by a resident on the ground that the applicable statute of limitations has expired.

(c) The agency shall ensure that—

(1) A resident who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and

(2) Such grievance is not referred to a staff member who is the subject of the complaint.

(d)(1) The agency shall issue a final agency decision on the merits of any portion of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.

(2) Computation of the 90-day time period shall not include time consumed by residents in preparing any administrative appeal.

(3) The agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The agency shall notify the resident in writing of any such extension and provide a date by which a decision will be made.

(4) At any level of the administrative process, including the final level, if the resident does not receive a response within the time allotted for reply, including any properly noticed extension, the resident may consider the absence of a response to be a denial at that level.

(e)(1) Third parties, including fellow residents, staff members, family members, attorneys, and outside advocates, shall be permitted to assist residents in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of residents.

(2) If a third party files such a request on behalf of a resident, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(3) If the resident declines to have the request processed on his or her behalf, the agency shall document the resident's decision.

(f)(1) The agency shall establish procedures for the filing of an emergency grievance alleging that a resident is subject to a substantial risk of imminent sexual abuse.

(2) After receiving an emergency grievance alleging a resident is subject to a substantial risk of imminent sexual abuse, the agency shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) to a level of review at which immediate corrective action may be taken, shall provide an initial response within 48 hours, and shall issue a final agency decision within 5 calendar days. The initial response and final agency decision shall document the agency's determination whether the resident is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

(g) The agency may discipline a resident for filing a grievance related to alleged sexual abuse only where the agency demonstrates that the resident filed the grievance in bad faith.

§ 115.253 Resident access to outside confidential support services.

(a) The facility shall provide residents with access to outside victim advocates for emotional support services related to sexual abuse by giving residents mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and by enabling reasonable communication between residents and these organizations, in as confidential a manner as possible.

(b) The facility shall inform residents, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

(c) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide residents with confidential emotional support services related to sexual abuse. The agency shall maintain copies of agreements or documentation showing attempts to enter into such agreements.

§ 115.254 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of a resident.

OFFICIAL RESPONSE FOLLOWING A RESIDENT REPORT

§ 115.261 Staff and agency reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against residents or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

(b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions.

(c) Unless otherwise precluded by Federal, State, or local law, medical and mental health practitioners shall be required to report sexual abuse pursuant to paragraph (a) of this section and to inform residents of the practitioner's duty to report, and the limitations of confidentiality, at the initiation of services.

(d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

(e) The facility shall report all allegations of sexual abuse and sexual harassment, including third-party and anonymous reports, to the facility's designated investigators.

§ 115.262 Agency protection duties.

When an agency learns that a resident is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the resident.

§ 115.263 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a resident was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

(d) The facility head or agency office that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

§ 115.264 Staff first responder duties.

(a) Upon learning of an allegation that a resident was sexually abused, the first security staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence and then notify security staff.

§ 115.265 Coordinated response.

The facility shall develop a written institutional plan to coordinate actions taken in response to an incident of sexual abuse, among staff first responders, medical and mental health

practitioners, investigators, and facility leadership.

§ 115.266 Preservation of ability to protect residents from contact with abusers

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with residents pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.272 and 115.276; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.267 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all residents and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other residents or staff and shall designate which staff members or departments are charged with monitoring retaliation.

(b) The agency shall employ multiple protection measures, such as housing changes or transfers for resident victims or abusers, removal of alleged staff or resident abusers from contact with victims, and emotional support services for residents or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct and treatment of residents or staff who reported the sexual abuse and of residents who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by residents or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any resident disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of residents, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.268 [Reserved]

INVESTIGATIONS

§ 115.271 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to § 115.234.

(c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as resident or staff. No agency shall require a resident who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(f) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act contributed to the abuse; and

(2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings.

(g) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(h) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(i) The agency shall retain all written reports referenced in paragraphs (f) and (g) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.

(j) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(k) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(l) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

§ 115.272 Evidentiary standard for administrative investigations.

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse or sexual harassment are substantiated.

§ 115.273 Reporting to residents.

(a) Following an investigation into a resident's allegation of sexual abuse suffered in an agency facility, the agency shall inform the resident as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.

(b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the resident.

(c) Following a resident's allegation that a staff member has committed sexual abuse against the resident, the agency shall subsequently inform the resident (unless the agency has determined that the allegation is unfounded) whenever:

(1) The staff member is no longer posted within the resident's unit;

(2) The staff member is no longer employed at the facility;

(3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or

(4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) Following a resident's allegation that he or she has been sexually abused by another resident, the agency shall subsequently inform the alleged victim whenever:

(1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or

(2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.

(f) An agency's obligation to report under this standard shall terminate if the resident is released from the agency's custody.

DISCIPLINE

§ 115.276 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

§ 115.277 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with residents and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with residents, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.278 Disciplinary sanctions for residents.

(a) Residents shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the resident engaged in resident-on-resident sexual abuse or following a criminal finding of guilt for resident-on-resident sexual abuse.

(b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the resident's disciplinary history, and the sanctions imposed for comparable offenses by other residents with similar histories.

(c) The disciplinary process shall consider whether a resident's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending resident to participate in such interventions as a condition of access to programming or other benefits.

(e) The agency may discipline a resident for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) An agency may, in its discretion, prohibit all sexual activity between residents and may discipline residents for such activity. An agency may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

MEDICAL AND MENTAL CARE

§ 115.281 [Reserved]

§ 115.282 Access to emergency medical and mental health services.

(a) Resident victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.

(b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take preliminary steps to protect the victim pursuant to § 115.262 and shall

immediately notify the appropriate medical and mental health practitioners.

(c) Resident victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.

(d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

§ 115.283 Ongoing medical and mental health care for sexual abuse victims and abusers.

(a) The facility shall offer medical and mental health evaluation and, as appropriate, treatment to all residents who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

(b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide such victims with medical and mental health services consistent with the community level of care.

(d) Resident victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

(e) If pregnancy results from conduct specified in paragraph (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.

(f) Resident victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.

(g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(h) The facility shall attempt to conduct a mental health evaluation of all known resident-on-resident abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

DATA COLLECTION AND REVIEW

§ 115.286 Sexual abuse incident reviews.

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(d) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1) through (d)(5) of this section, and any recommendations for improvement, and submit such report

to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.287 Data collection.

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Survey of Sexual Violence conducted by the Department of Justice.

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from every private facility with which it contracts for the confinement of its residents.

(f) Upon request, the agency shall provide all such data from the previous calendar year to the Department of Justice no later than June 30.

§ 115.288 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.287 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but must indicate the nature of the material redacted.

§ 115.289 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.287 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from facilities under its direct control and private facilities with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.287 for at least 10 years after the date of the initial collection unless Federal, State, or local law requires otherwise.

AUDITS

§ 115.293 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401 through 115.405.

Subpart D—Standards for Juvenile Facilities

PREVENTION PLANNING

§ 115.311 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

(a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.

(b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement,

and oversee agency efforts to comply with the PREA standards in all of its facilities.

(c) Where an agency operates more than one facility, each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

§ 115.312 Contracting with other entities for the confinement of residents.

(a) A public agency that contracts for the confinement of its residents with private agencies or other entities, including other government agencies, shall include in any new contract or contract renewal the entity's obligation to adopt and comply with the PREA standards.

(b) Any new contract or contract renewal shall provide for agency contract monitoring to ensure that the contractor is complying with the PREA standards.

§ 115.313 Supervision and monitoring.

(a) The agency shall ensure that each facility it operates shall develop, implement, and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect residents against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:

(1) Generally accepted juvenile detention and correctional/secure residential practices;

(2) Any judicial findings of inadequacy;

(3) Any findings of inadequacy from Federal investigative agencies;

(4) Any findings of inadequacy from internal or external oversight bodies;

(5) All components of the facility's physical plant (including ''blind spots'' or areas where staff or residents may be isolated);

(6) The composition of the resident population;

(7) The number and placement of supervisory staff;

(8) Institution programs occurring on a particular shift;

(9) Any applicable State or local laws, regulations, or standards;

(10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(11) Any other relevant factors.

(b) The agency shall comply with the staffing plan except during limited and discrete exigent circumstances, and shall fully document deviations from the plan during such circumstances.

(c) Each secure juvenile facility shall maintain staff ratios of a minimum of 1:8 during resident waking hours and 1:16 during resident sleeping hours, except during limited and discrete exigent circumstances, which shall be fully documented. Only security staff shall be included in these ratios. Any facility that, as of the date of publication of this final rule, is not already obligated by law, regulation, or judicial consent decree to maintain the staffing ratios set forth in this paragraph shall have until October 1, 2017, to achieve compliance.

(d) Whenever necessary, but no less frequently than once each year, for each facility the agency operates, in consultation with the PREA coordinator required by § 115.311, the agency shall assess, determine, and document whether adjustments are needed to:

(1) The staffing plan established pursuant to paragraph (a) of this section;

(2) Prevailing staffing patterns;

(3) The facility's deployment of video monitoring systems and other monitoring technologies; and

(4) The resources the facility has available to commit to ensure adherence to the staffing plan.

(e) Each secure facility shall implement a policy and practice of having intermediate-level or higher level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts. Each secure facility shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

§ 115.314 [Reserved]

§ 115.315 Limits to cross-gender viewing and searches.

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) The agency shall not conduct cross-gender pat-down searches except in exigent circumstances.

(c) The facility shall document and justify all cross-gender strip searches, cross-gender visual body cavity searches, and cross-gender pat-down searches.

(d) The facility shall implement policies and procedures that enable residents to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering a resident housing unit. In facilities (such as group homes) that do not contain discrete housing units, staff of the opposite gender shall be required to announce their presence when entering an area where residents are likely to be showering, performing bodily functions, or changing clothing.

(e) The facility shall not search or physically examine a transgender or intersex resident for the sole purpose of determining the resident's genital status. If the resident's genital status is unknown, it may be determined during conversations with the resident, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex residents, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

§ 115.316 Residents with disabilities and residents who are limited English proficient.

(a) The agency shall take appropriate steps to ensure that residents with disabilities (including, for example, residents who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when necessary to ensure effective communication with residents who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with residents with disabilities, including residents who have intellectual disabilities, limited reading skills, or who are blind or have low vision. An agency is not required to take actions that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens, as those terms are used in regulations promulgated under title II of the Americans With Disabilities Act, 28 CFR 35.164.

(b) The agency shall take reasonable steps to ensure meaningful access to all aspects of the agency's efforts to prevent, detect, and respond to sexual abuse and sexual harassment to residents who are limited English proficient, including steps to provide interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(c) The agency shall not rely on resident interpreters, resident readers, or other types of resident assistants except in limited circumstances where an extended delay in obtaining an effective interpreter could compromise the resident's safety, the performance of first-response duties under § 115.364, or

the investigation of the resident's allegations.

§ 115.317 Hiring and promotion decisions.

(a) The agency shall not hire or promote anyone who may have contact with residents, and shall not enlist the services of any contractor who may have contact with residents, who—

(1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);

(2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or

(3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with residents.

(c) Before hiring new employees who may have contact with residents, the agency shall:

(1) Perform a criminal background records check;

(2) Consult any child abuse registry maintained by the State or locality in which the employee would work; and

(3) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check, and consult applicable child abuse registries, before enlisting the services of any contractor who may have contact with residents.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with residents or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall also ask all applicants and employees who may have contact with residents directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees. The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

(h) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

§ 115.318 Upgrades to facilities and technologies.

(a) When designing or acquiring any new facility and in planning any substantial expansion or modification of existing facilities, the agency shall consider the effect of the design, acquisition, expansion, or modification upon the agency's ability to protect residents from sexual abuse.

(b) When installing or updating a video monitoring system, electronic surveillance system, or other monitoring technology, the agency shall consider how such technology may enhance the agency's ability to protect residents from sexual abuse.

RESPONSIVE PLANNING

§ 115.321 Evidence protocol and forensic medical examinations.

(a) To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.

(b) The protocol shall be developmentally appropriate for youth and, as

appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, ''A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents,'' or similarly comprehensive and authoritative protocols developed after 2011.

(c) The agency shall offer all residents who experience sexual abuse access to forensic medical examinations whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization or a qualified agency staff member. Agencies shall document efforts to secure services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.

(e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.

(f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of this section.

(g) The requirements of paragraphs (a) through (f) of this section shall also apply to:

(1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in juvenile facilities; and

(2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in juvenile facilities.

(h) For the purposes of this standard, a qualified agency staff member or a qualified community-based staff member shall be an individual who has been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

§ 115.322 Policies to ensure referrals of allegations for investigations.

(a) The agency shall ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse and sexual harassment.

(b) The agency shall have in place a policy to ensure that allegations of sexual abuse or sexual harassment are referred for investigation to an agency with the legal authority to conduct criminal investigations, unless the allegation does not involve potentially criminal behavior. The agency shall publish such policy on its Web site or, if it does not have one, make the policy available through other means. The agency shall document all such referrals.

(c) If a separate entity is responsible for conducting criminal investigations, such publication shall describe the responsibilities of both the agency and the investigating entity.

(d) Any State entity responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in juvenile facilities shall have in place a policy governing the conduct of such investigations.

(e) Any Department of Justice component responsible for conducting administrative or criminal investigations of sexual abuse or sexual harassment in juvenile facilities shall have in place a policy governing the conduct of such investigations.

TRAINING AND EDUCATION

§ 115.331 Employee training.

(a) The agency shall train all employees who may have contact with residents on:

(1) Its zero-tolerance policy for sexual abuse and sexual harassment;

(2) How to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;

(3) Residents' right to be free from sexual abuse and sexual harassment;

(4) The right of residents and employees to be free from retaliation for reporting sexual abuse and sexual harassment;

(5) The dynamics of sexual abuse and sexual harassment in juvenile facilities;

(6) The common reactions of juvenile victims of sexual abuse and sexual harassment;

(7) How to detect and respond to signs of threatened and actual sexual abuse and how to distinguish between consensual sexual contact and sexual abuse between residents;

(8) How to avoid inappropriate relationships with residents;

(9) How to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming residents; and

(10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities;

(11) Relevant laws regarding the applicable age of consent.

(b) Such training shall be tailored to the unique needs and attributes of residents of juvenile facilities and to the gender of the residents at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male residents to a facility that houses only female residents, or vice versa.

(c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.

(d) The agency shall document, through employee signature or electronic verification, that employees understand the training they have received.

§ 115.332 Volunteer and contractor training.

(a) The agency shall ensure that all volunteers and contractors who have contact with residents have been trained on their responsibilities under the agency's sexual abuse and sexual harassment prevention, detection, and response policies and procedures.

(b) The level and type of training provided to volunteers and contractors shall be based on the services they provide and level of contact they have with residents, but all volunteers and contractors who have contact with residents shall be notified of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and informed how to report such incidents.

(c) The agency shall maintain documentation confirming that volunteers and contractors understand the training they have received.

§ 115.333 Resident education.

(a) During the intake process, residents shall receive information explaining, in an age appropriate fashion, the agency's zero tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.

(b) Within 10 days of intake, the agency shall provide comprehensive age-appropriate education to residents

either in person or through video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding agency policies and procedures for responding to such incidents.

(c) Current residents who have not received such education shall be educated within one year of the effective date of the PREA standards, and shall receive education upon transfer to a different facility to the extent that the policies and procedures of the resident's new facility differ from those of the previous facility.

(d) The agency shall provide resident education in formats accessible to all residents, including those who are limited English proficient, deaf, visually impaired, or otherwise disabled, as well as to residents who have limited reading skills.

(e) The agency shall maintain documentation of resident participation in these education sessions.

(f) In addition to providing such education, the agency shall ensure that key information is continuously and readily available or visible to residents through posters, resident handbooks, or other written formats.

§ 115.334 Specialized training: Investigations.

(a) In addition to the general training provided to all employees pursuant to § 115.331, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.

(b) Specialized training shall include techniques for interviewing juvenile sexual abuse victims, proper use of *Miranda* and *Garrity* warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.

(c) The agency shall maintain documentation that agency investigators have completed the required specialized training in conducting sexual abuse investigations.

(d) Any State entity or Department of Justice component that investigates sexual abuse in juvenile confinement settings shall provide such training to its agents and investigators who conduct such investigations.

§ 115.335 Specialized training: Medical and mental health care.

(a) The agency shall ensure that all full- and part-time medical and mental health care practitioners who work regularly in its facilities have been trained in:

(1) How to detect and assess signs of sexual abuse and sexual harassment;

(2) How to preserve physical evidence of sexual abuse;

(3) How to respond effectively and professionally to juvenile victims of sexual abuse and sexual harassment; and

(4) How and to whom to report allegations or suspicions of sexual abuse and sexual harassment.

(b) If medical staff employed by the agency conduct forensic examinations, such medical staff shall receive the appropriate training to conduct such examinations.

(c) The agency shall maintain documentation that medical and mental health practitioners have received the training referenced in this standard either from the agency or elsewhere.

(d) Medical and mental health care practitioners shall also receive the training mandated for employees under § 115.331 or for contractors and volunteers under § 115.332, depending upon the practitioner's status at the agency.

SCREENING FOR RISK OF SEXUAL VICTIMIZATION AND ABUSIVENESS

§ 115.341 Obtaining information from residents.

(a) Within 72 hours of the resident's arrival at the facility and periodically throughout a resident's confinement, the agency shall obtain and use information about each resident's personal history and behavior to reduce the risk of sexual abuse by or upon a resident.

(b) Such assessments shall be conducted using an objective screening instrument.

(c) At a minimum, the agency shall attempt to ascertain information about:

(1) Prior sexual victimization or abusiveness;

(2) Any gender nonconforming appearance or manner or identification as lesbian, gay, bisexual, transgender, or intersex, and whether the resident may therefore be vulnerable to sexual abuse;

(3) Current charges and offense history;

(4) Age;

(5) Level of emotional and cognitive development;

(6) Physical size and stature;

(7) Mental illness or mental disabilities;

(8) Intellectual or developmental disabilities;

(9) Physical disabilities;

(10) The resident's own perception of vulnerability; and

(11) Any other specific information about individual residents that may indicate heightened needs for supervision, additional safety precautions, or separation from certain other residents.

(d) This information shall be ascertained through conversations with the resident during the intake process and medical and mental health screenings; during classification assessments; and by reviewing court records, case files, facility behavioral records, and other relevant documentation from the resident's files.

(e) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the resident's detriment by staff or other residents.

§ 115.342 Placement of residents in housing, bed, program, education, and work assignments.

(a) The agency shall use all information obtained pursuant to § 115.341 and subsequently to make housing, bed, program, education, and work assignments for residents with the goal of keeping all residents safe and free from sexual abuse.

(b) Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged. During any period of isolation, agencies shall not deny residents daily large-muscle exercise and any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.

(c) Lesbian, gay, bisexual, transgender, or intersex residents shall not be placed in particular housing, bed, or other assignments solely on the basis of such identification or status, nor shall agencies consider lesbian, gay, bisexual, transgender, or intersex identification or status as an indicator of likelihood of being sexually abusive.

(d) In deciding whether to assign a transgender or intersex resident to a facility for male or female residents, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the resident's health and safety, and whether the placement would present management or security problems.

(e) Placement and programming assignments for each transgender or intersex resident shall be reassessed at least twice each year to review any threats to safety experienced by the resident.

(f) A transgender or intersex resident's own views with respect to his or her own safety shall be given serious consideration.

(g) Transgender and intersex residents shall be given the opportunity to shower separately from other residents.

(h) If a resident is isolated pursuant to paragraph (b) of this section, the facility shall clearly document:

(1) The basis for the facility's concern for the resident's safety; and

(2) The reason why no alternative means of separation can be arranged.

(i) Every 30 days, the facility shall afford each resident described in paragraph (h) of this section a review to determine whether there is a continuing need for separation from the general population.

§ 115.343 [Reserved]

REPORTING

§ 115.351 Resident reporting.

(a) The agency shall provide multiple internal ways for residents to privately report sexual abuse and sexual harassment, retaliation by other residents or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.

(b) The agency shall also provide at least one way for residents to report abuse or harassment to a public or private entity or office that is not part of the agency and that is able to receive and immediately forward resident reports of sexual abuse and sexual harassment to agency officials, allowing the resident to remain anonymous upon request. Residents detained solely for civil immigration purposes shall be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.

(c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.

(d) The facility shall provide residents with access to tools necessary to make a written report.

(e) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of residents.

§ 115.352 Exhaustion of administrative remedies.

(a) An agency shall be exempt from this standard if it does not have administrative procedures to address resident grievances regarding sexual abuse.

(b)(1) The agency shall not impose a time limit on when a resident may submit a grievance regarding an allegation of sexual abuse.

(2) The agency may apply otherwise-applicable time limits on any portion of a grievance that does not allege an incident of sexual abuse.

(3) The agency shall not require a resident to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.

(4) Nothing in this section shall restrict the agency's ability to defend against a lawsuit filed by a resident on the ground that the applicable statute of limitations has expired.

(c) The agency shall ensure that—

(1) A resident who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and

(2) Such grievance is not referred to a staff member who is the subject of the complaint.

(d)(1) The agency shall issue a final agency decision on the merits of any portion of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.

(2) Computation of the 90-day time period shall not include time consumed by residents in preparing any administrative appeal.

(3) The agency may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The agency shall notify the resident in writing of any such extension and provide a date by which a decision will be made.

(4) At any level of the administrative process, including the final level, if the resident does not receive a response within the time allotted for reply, including any properly noticed extension, the resident may consider the absence of a response to be a denial at that level.

(e)(1) Third parties, including fellow residents, staff members, family members, attorneys, and outside advocates, shall be permitted to assist residents in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of residents.

(2) If a third party, other than a parent or legal guardian, files such a request on behalf of a resident, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.

(3) If the resident declines to have the request processed on his or her behalf, the agency shall document the resident's decision.

(4) A parent or legal guardian of a juvenile shall be allowed to file a grievance regarding allegations of sexual abuse, including appeals, on behalf of such juvenile. Such a grievance shall not be conditioned upon the juvenile agreeing to have the request filed on his or her behalf.

(f)(1) The agency shall establish procedures for the filing of an emergency grievance alleging that a resident is subject to a substantial risk of imminent sexual abuse.

(2) After receiving an emergency grievance alleging a resident is subject to a substantial risk of imminent sexual abuse, the agency shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) to a level of review at which immediate corrective action may be taken, shall provide an initial response within 48 hours, and shall issue a final agency decision within 5 calendar days. The initial response and final agency decision shall document the agency's determination whether the resident is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

(g) The agency may discipline a resident for filing a grievance related to alleged sexual abuse only where the agency demonstrates that the resident filed the grievance in bad faith.

§ 115.353 Resident access to outside support services and legal representation.

(a) The facility shall provide residents with access to outside victim advocates for emotional support services related to sexual abuse, by providing, posting, or otherwise making accessible mailing addresses and telephone numbers, including toll free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and, for persons detained solely for civil immigration purposes, immigrant services agencies. The facility shall enable reasonable communication between residents and these organizations and agencies, in as confidential a manner as possible.

(b) The facility shall inform residents, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.

(c) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide residents with confidential emotional support services related to sexual abuse. The agency shall maintain copies of agreements or documentation showing attempts to enter into such agreements.

(d) The facility shall also provide residents with reasonable and confidential access to their attorneys or other legal representation and reasonable access to parents or legal guardians.

§ 115.354 Third-party reporting.

The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment and shall distribute publicly information on how to report sexual abuse and sexual harassment on behalf of a resident.

OFFICIAL RESPONSE FOLLOWING A RESIDENT REPORT

§ 115.361 Staff and agency reporting duties.

(a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information they receive regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against residents or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.

(b) The agency shall also require all staff to comply with any applicable mandatory child abuse reporting laws.

(c) Apart from reporting to designated supervisors or officials and designated State or local services agencies, staff shall be prohibited from revealing any information related to a sexual abuse report to anyone other

than to the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions.

(d)(1) Medical and mental health practitioners shall be required to report sexual abuse to designated supervisors and officials pursuant to paragraph (a) of this section, as well as to the designated State or local services agency where required by mandatory reporting laws.

(2) Such practitioners shall be required to inform residents at the initiation of services of their duty to report and the limitations of confidentiality.

(e)(1) Upon receiving any allegation of sexual abuse, the facility head or his or her designee shall promptly report the allegation to the appropriate agency office and to the alleged victim's parents or legal guardians, unless the facility has official documentation showing the parents or legal guardians should not be notified.

(2) If the alleged victim is under the guardianship of the child welfare system, the report shall be made to the alleged victim's caseworker instead of the parents or legal guardians.

(3) If a juvenile court retains jurisdiction over the alleged victim, the facility head or designee shall also report the allegation to the juvenile's attorney or other legal representative of record within 14 days of receiving the allegation.

(f) The facility shall report all allegations of sexual abuse and sexual harassment, including third-party and anonymous reports, to the facility's designated investigators.

§ 115.362 Agency protection duties.

When an agency learns that a resident is subject to a substantial risk of imminent sexual abuse, it shall take immediate action to protect the resident.

§ 115.363 Reporting to other confinement facilities.

(a) Upon receiving an allegation that a resident was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred and shall also notify the appropriate investigative agency.

(b) Such notification shall be provided as soon as possible, but no later than 72 hours after receiving the allegation.

(c) The agency shall document that it has provided such notification.

(d) The facility head or agency office that receives such notification shall ensure that the allegation is investigated in accordance with these standards.

§ 115.364 Staff first responder duties.

(a) Upon learning of an allegation that a resident was sexually abused, the first staff member to respond to the report shall be required to:

(1) Separate the alleged victim and abuser;

(2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;

(3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and

(4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence, and then notify security staff.

§ 115.365 Coordinated response.

The facility shall develop a written institutional plan to coordinate actions taken in response to an incident of sexual abuse among staff first responders, medical and mental health practitioners, investigators, and facility leadership.

§ 115.366 Preservation of ability to protect residents from contact with abusers.

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with residents pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.372 and 115.376; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

§ 115.367 Agency protection against retaliation.

(a) The agency shall establish a policy to protect all residents and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other residents or staff and shall designate which staff members or departments are charged with monitoring retaliation.

(b) The agency shall employ multiple protection measures, such as housing changes or transfers for resident victims or abusers, removal of alleged staff or resident abusers from contact with victims, and emotional support services for residents or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct or treatment of residents or staff who reported the sexual abuse and of residents who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by residents or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any resident disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of residents, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

§ 115.368 Post-allegation protective custody.

Any use of segregated housing to protect a resident who is alleged to have suffered sexual abuse shall be subject to the requirements of § 115.342.

INVESTIGATIONS

§ 115.371 Criminal and administrative agency investigations.

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations involving juvenile victims pursuant to § 115.334.

(c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

(d) The agency shall not terminate an investigation solely because the source of the allegation recants the allegation.

(e) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.

(f) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as resident or staff. No agency shall require a resident who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.

(g) Administrative investigations:

(1) Shall include an effort to determine whether staff actions or failures to act contributed to the abuse; and

(2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings.

(h) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.

(i) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.

(j) The agency shall retain all written reports referenced in paragraphs (g) and (h) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years, unless the abuse was committed by a juvenile resident and applicable law requires a shorter period of retention.

(k) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.

(l) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.

(m) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

§ 115.372 Evidentiary standard for administrative investigations.

The agency shall impose no standard higher than a preponderance of the evidence in determining whether allegations of sexual abuse or sexual harassment are substantiated.

§ 115.373 Reporting to residents.

(a) Following an investigation into a resident's allegation of sexual abuse suffered in an agency facility, the agency shall inform the resident as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.

(b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the resident.

(c) Following a resident's allegation that a staff member has committed sexual abuse against the resident, the agency shall subsequently inform the resident (unless the agency has determined that the allegation is unfounded) whenever:

(1) The staff member is no longer posted within the resident's unit;

(2) The staff member is no longer employed at the facility;

(3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or

(4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.

(d) Following a resident's allegation that he or she has been sexually abused by another resident, the agency shall subsequently inform the alleged victim whenever:

(1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or

(2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.

(e) All such notifications or attempted notifications shall be documented.

(f) An agency's obligation to report under this standard shall terminate if

the resident is released from the agency's custody.

DISCIPLINE

§ 115.376 Disciplinary sanctions for staff.

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

§ 115.377 Corrective action for contractors and volunteers.

(a) Any contractor or volunteer who engages in sexual abuse shall be prohibited from contact with residents and shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to relevant licensing bodies.

(b) The facility shall take appropriate remedial measures, and shall consider whether to prohibit further contact with residents, in the case of any other violation of agency sexual abuse or sexual harassment policies by a contractor or volunteer.

§ 115.378 Interventions and disciplinary sanctions for residents.

(a) A resident may be subject to disciplinary sanctions only pursuant to a formal disciplinary process following an administrative finding that the resident engaged in resident-on-resident sexual abuse or following a criminal finding of guilt for resident-on-resident sexual abuse.

(b) Any disciplinary sanctions shall be commensurate with the nature and circumstances of the abuse committed, the resident's disciplinary history, and the sanctions imposed for comparable offenses by other residents with similar histories. In the event a disciplinary sanction results in the isolation of a resident, agencies shall not deny the resident daily large-muscle exercise or access to any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.

(c) The disciplinary process shall consider whether a resident's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to offer the offending resident participation in such interventions. The agency may require participation in such interventions as a condition of access to any rewards-based behavior management system or other behavior-based incentives, but not as a condition to access to general programming or education.

(e) The agency may discipline a resident for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) An agency may, in its discretion, prohibit all sexual activity between residents and may discipline residents for such activity. An agency may not,

however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

MEDICAL AND MENTAL CARE

§ 115.381 Medical and mental health screenings; history of sexual abuse.

(a) If the screening pursuant to § 115.341 indicates that a resident has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.

(b) If the screening pursuant to § 115.341 indicates that a resident has previously perpetrated sexual abuse, whether it occurred in an institutional setting or in the community, staff shall ensure that the resident is offered a follow-up meeting with a mental health practitioner within 14 days of the intake screening.

(c) Any information related to sexual victimization or abusiveness that occurred in an institutional setting shall be strictly limited to medical and mental health practitioners and other staff, as necessary, to inform treatment plans and security and management decisions, including housing, bed, work, education, and program assignments, or as otherwise required by Federal, State, or local law.

(d) Medical and mental health practitioners shall obtain informed consent from residents before reporting information about prior sexual victimization that did not occur in an institutional setting, unless the resident is under the age of 18.

§ 115.382 Access to emergency medical and mental health services.

(a) Resident victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.

(b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, staff first responders shall take preliminary steps to protect the victim pursuant to § 115.362 and shall immediately notify the appropriate medical and mental health practitioners.

(c) Resident victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.

(d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

§ 115.383 Ongoing medical and mental health care for sexual abuse victims and abusers.

(a) The facility shall offer medical and mental health evaluation and, as appropriate, treatment to all residents who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.

(b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.

(c) The facility shall provide such victims with medical and mental health services consistent with the community level of care.

(d) Resident victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.

(e) If pregnancy results from conduct specified in paragraph (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.

(f) Resident victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.

(g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

(h) The facility shall attempt to conduct a mental health evaluation of all known resident-on-resident abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

DATA COLLECTION AND REVIEW

§ 115.386 Sexual abuse incident reviews.

(a) The facility shall conduct a sexual abuse incident review at the conclusion of every sexual abuse investigation, including where the allegation has not been substantiated, unless the allegation has been determined to be unfounded.

(b) Such review shall ordinarily occur within 30 days of the conclusion of the investigation.

(c) The review team shall include upper-level management officials, with input from line supervisors, investigators, and medical or mental health practitioners.

(d) The review team shall:

(1) Consider whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse;

(2) Consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or, gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility;

(3) Examine the area in the facility where the incident allegedly occurred to assess whether physical barriers in the area may enable abuse;

(4) Assess the adequacy of staffing levels in that area during different shifts;

(5) Assess whether monitoring technology should be deployed or augmented to supplement supervision by staff; and

(6) Prepare a report of its findings, including but not necessarily limited to determinations made pursuant to paragraphs (d)(1) through (d)(5) of this section, and any recommendations for improvement and submit such report to the facility head and PREA compliance manager.

(e) The facility shall implement the recommendations for improvement, or shall document its reasons for not doing so.

§ 115.387 Data collection.

(a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions.

(b) The agency shall aggregate the incident-based sexual abuse data at least annually.

(c) The incident-based data collected shall include, at a minimum, the data necessary to answer all questions from the most recent version of the Survey of Sexual Violence conducted by the Department of Justice.

(d) The agency shall maintain, review, and collect data as needed from all available incident-based documents, including reports, investigation files, and sexual abuse incident reviews.

(e) The agency also shall obtain incident-based and aggregated data from every private facility with which it contracts for the confinement of its residents.

(f) Upon request, the agency shall provide all such data from the previous calendar year to the Department of Justice no later than June 30.

§ 115.388 Data review for corrective action.

(a) The agency shall review data collected and aggregated pursuant to § 115.387 in order to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training, including:

(1) Identifying problem areas;

(2) Taking corrective action on an ongoing basis; and

(3) Preparing an annual report of its findings and corrective actions for each facility, as well as the agency as a whole.

(b) Such report shall include a comparison of the current year's data and corrective actions with those from prior years and shall provide an assessment of the agency's progress in addressing sexual abuse.

(c) The agency's report shall be approved by the agency head and made readily available to the public through its Web site or, if it does not have one, through other means.

(d) The agency may redact specific material from the reports when publication would present a clear and specific threat to the safety and security of a facility, but must indicate the nature of the material redacted.

§ 115.389 Data storage, publication, and destruction.

(a) The agency shall ensure that data collected pursuant to § 115.387 are securely retained.

(b) The agency shall make all aggregated sexual abuse data, from facilities under its direct control and private facilities with which it contracts, readily available to the public at least annually through its Web site or, if it does not have one, through other means.

(c) Before making aggregated sexual abuse data publicly available, the agency shall remove all personal identifiers.

(d) The agency shall maintain sexual abuse data collected pursuant to § 115.387 for at least 10 years after the date of its initial collection unless Federal, State, or local law requires otherwise.

AUDITS

§ 115.393 Audits of standards.

The agency shall conduct audits pursuant to §§ 115.401 through 115.405.

Subpart E—Auditing and Corrective Action

§ 115.401 Frequency and scope of audits.

(a) During the three-year period starting on August 20, 2013, and during each three-year period thereafter, the agency shall ensure that each facility operated by the agency, or by a private organization on behalf of the agency, is audited at least once.

(b) During each one-year period starting on August 20, 2013, the agency shall ensure that at least one-third of each facility type operated by the agency, or by a private organization on behalf of the agency, is audited.

(c) The Department of Justice may send a recommendation to an agency for an expedited audit if the Department has reason to believe that a particular facility may be experiencing problems relating to sexual abuse. The recommendation may also include referrals to resources that may assist the agency with PREA-related issues.

(d) The Department of Justice shall develop and issue an audit instrument that will provide guidance on the conduct of and contents of the audit.

(e) The agency shall bear the burden of demonstrating compliance with the standards.

(f) The auditor shall review all relevant agency-wide policies, procedures, reports, internal and external audits, and accreditations for each facility type.

(g) The audits shall review, at a minimum, a sampling of relevant documents and other records and information for the most recent one-year period.

(h) The auditor shall have access to, and shall observe, all areas of the audited facilities.

(i) The auditor shall be permitted to request and receive copies of any relevant documents (including electronically stored information).

(j) The auditor shall retain and preserve all documentation (including, *e.g.*, video tapes and interview notes) relied upon in making audit determinations. Such documentation shall be provided to the Department of Justice upon request.

(k) The auditor shall interview a representative sample of inmates, residents, and detainees, and of staff, supervisors, and administrators.

(l) The auditor shall review a sampling of any available videotapes and other electronically available data (*e.g.*, Watchtour) that may be relevant to the provisions being audited.

(m) The auditor shall be permitted to conduct private interviews with inmates, residents, and detainees.

(n) Inmates, residents, and detainees shall be permitted to send confidential information or correspondence to the auditor in the same manner as if they were communicating with legal counsel.

(o) Auditors shall attempt to communicate with community-based or victim advocates who may have insight into relevant conditions in the facility.

§ 115.402 Auditor qualifications.

(a) An audit shall be conducted by:

(1) A member of a correctional monitoring body that is not part of, or under the authority of, the agency (but may be part of, or authorized by, the relevant State or local government);

(2) A member of an auditing entity such as an inspector general's or ombudsperson's office that is external to the agency; or

(3) Other outside individuals with relevant experience.

(b) All auditors shall be certified by the Department of Justice. The Department of Justice shall develop and issue procedures regarding the certification process, which shall include training requirements.

(c) No audit may be conducted by an auditor who has received financial compensation from the agency being audited (except for compensation received for conducting prior PREA audits) within the three years prior to the agency's retention of the auditor.

(d) The agency shall not employ, contract with, or otherwise financially compensate the auditor for three years subsequent to the agency's retention of the auditor, with the exception of contracting for subsequent PREA audits.

§ 115.403 Audit contents and findings.

(a) Each audit shall include a certification by the auditor that no conflict of interest exists with respect to his or her ability to conduct an audit of the agency under review.

(b) Audit reports shall state whether agency-wide policies and procedures comply with relevant PREA standards.

(c) For each PREA standard, the auditor shall determine whether the audited facility reaches one of the following findings: Exceeds Standard (substantially exceeds requirement of standard); Meets Standard (substantial compliance; complies in all material ways with the standard for the relevant review period); Does Not Meet Standard (requires corrective action). The audit summary shall indicate, among other things, the number of provisions the facility has achieved at each grade level.

(d) Audit reports shall describe the methodology, sampling sizes, and basis for the auditor's conclusions with regard to each standard provision for each audited facility, and shall include recommendations for any required corrective action.

(e) Auditors shall redact any personally identifiable inmate or staff information from their reports, but shall provide such information to the agency upon request, and may provide such information to the Department of Justice.

(f) The agency shall ensure that the auditor's final report is published on the agency's Web site if it has one, or is otherwise made readily available to the public.

§ 115.404 Audit corrective action plan.

(a) A finding of ''Does Not Meet Standard'' with one or more standards shall trigger a 180-day corrective action period.

(b) The auditor and the agency shall jointly develop a corrective action plan to achieve compliance.

(c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility.

(d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.

(e) If the agency does not achieve compliance with each standard, it may (at its discretion and cost) request a subsequent audit once it believes that is has achieved compliance.

§ 115.405 Audit appeals.

(a) An agency may lodge an appeal with the Department of Justice regarding any specific audit finding that it believes to be incorrect. Such appeal must be lodged within 90 days of the auditor's final determination.

(b) If the Department determines that the agency has stated good cause for a re-evaluation, the agency may commission a re-audit by an auditor

mutually agreed upon by the Department and the agency. The agency shall bear the costs of this re-audit.

(c) The findings of the re-audit shall be considered final.

Subpart F—State Compliance

§ 115.501 State determination and certification of full compliance.

(a) In determining pursuant to 42 U.S.C. 15607(c)(2) whether the State is in full compliance with the PREA standards, the Governor shall consider the results of the most recent agency audits.

(b) The Governor's certification shall apply to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State's executive branch.

PART 200—ALIEN TERRORIST REMOVAL PROCEDURES

AUTHORITY: Pub. L. 105–277, 112 Stat. 2681.

SOURCE: 64 FR 8496, Feb. 19, 1999, unless otherwise noted. Redesignated by Order No. 2662–2003, 68 FR 9846, Feb. 28, 2003.

§ 200.1 Eligibility for Protection under the Convention Against Torture.

A removal order under Title V of the Act shall not be executed in circumstances that would violate Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105–277. Convention-based claims by aliens subject to removal under this Title shall be determined by the Attorney General, in consultation with the Secretary of State.

PARTS 201–299 [RESERVED]

CHAPTER III—FEDERAL PRISON INDUSTRIES, INC., DEPARTMENT OF JUSTICE

Part		*Page*
300	[Reserved]	
301	Inmate accident compensation	591
302	Comments on UNICOR business operations	599
345	Federal Prison Industries (FPI) inmate work programs	599
346–399	[Reserved]	

PART 300 [RESERVED]

PART 301—INMATE ACCIDENT COMPENSATION

Subpart A—General

Sec.
301.101 Purpose and scope.
301.102 Definitions.
301.103 Inmate work assignments.
301.104 Medical attention.
301.105 Investigation and report of injury.
301.106 Repetitious accidents.

Subpart B—Lost-Time Wages

301.201 Applicability.
301.202 Determination of work-relatedness.
301.203 Payment of lost-time wages.
301.204 Continuation of lost-time wages.
301.205 Appeal of determination.

Subpart C—Compensation for Work-Related Physical Impairment or Death

301.301 Compensable and noncompensable injuries.
301.302 Work-related death.
301.303 Time parameters for filing a claim.
301.304 Representation of claimant.
301.305 Initial determination.
301.306 Appeal of determination.
301.307 Notice, time and place of committee action.
301.308 Committee reconsideration.
301.309 In-person hearing before the committee.
301.310 Witnesses.
301.311 Expenses associated with appearance at committee hearing.
301.312 Notice of committee determination.
301.313 Chief Operating Officer review.
301.314 Establishing the amount of award.
301.315 Review of entitlement.
301.316 Subsequent incarceration of compensation recipient.
301.317 Medical treatment following release.
301.318 Civilian compensation laws distinguished.
301.319 Exclusiveness of remedy.

AUTHORITY: 18 U.S.C. 4126, 28 CFR 0.99, and by resolution of the Board of Directors of Federal Prison Industries, Inc.

SOURCE: 55 FR 9296, Mar. 12, 1990, unless otherwise noted.

Subpart A—General

§ 301.101 Purpose and scope.

Pursuant to the authority granted at 18 U.S.C. 4126, the procedures set forth in this part govern the payment of accident compensation, necessitated as the result of work-related injuries, to federal prison inmates or their dependents. Compensation may be awarded via two separate and distinct programs:

(a) Inmate Accident Compensation may be awarded to former federal inmates or their dependents for physical impairment or death resultant from injuries sustained while performing work assignments in Federal Prison Industries, Inc., in institutional work assignments involving the operation or maintenance of a federal correctional facility, or in approved work assignments for other federal entities; or,

(b) Lost-time wages may be awarded to inmates assigned to Federal Prison Industries, Inc., to paid institutional work assignments involving the operation or maintenance of a federal correctional facility, or in approved work assignments for other federal entities for work-related injuries resulting in time lost from the work assignment.

[55 FR 9296, Mar. 12, 1990, as amended at 59 FR 2666, Jan. 18, 1994]

§ 301.102 Definitions.

(a) For purposes of this part, the term *work-related injury* shall be defined to include any injury, including occupational disease or illness, proximately caused by the actual performance of the inmate's work assignment.

(b)(1) For purposes of this part, the term *release* is defined as the removal of an inmate from a Bureau of Prisons correctional facility upon expiration of sentence, parole, final discharge from incarceration of a pretrial inmate, or transfer to a community corrections center or other non-federal facility, at the conclusion of the period of confinement in which the injury occurred.

(2) In the case of an inmate who suffers a work-related injury while housed at a community corrections center, *release* is defined as the removal of the inmate from the community corrections center upon expiration of sentence, parole, or transfer to any non-federal facility, at the conclusion of the period of confinement in which the injury occurred.

(3) In the case of an inmate who suffers a work-related injury while housed at a community corrections center and is subsequently transferred to a Bureau

of Prisons facility, *release* is defined as the removal of the inmate from the Bureau of Prisons facility upon expiration of sentence, parole, or transfer to a community corrections center or other non-federal facility.

(c) For purposes of this part, the term *dependent* is defined as the legally recognized spouse or child of an inmate for whose support the inmate is legally responsible in whole or part.

(d) For purposes of this part, the term *work detail supervisor* may refer to either a Bureau of Prisons or a non-Bureau of Prisons supervisor.

(e) For the purposes of this part, the phrase *housed at* or *based at* a ''Bureau of Prisons institution'' shall refer to an inmate that has a work assignment with a Bureau of Prisons institution or with another federal entity and is incarcerated at a Bureau of Prisons institution. For the purposes of this part, the phrase *based at* or *housed at* a ''community corrections center'' shall refer to an inmate who has a work assignment for a non-Bureau of Prisons federal entity and is incarcerated at a community corrections center.

[55 FR 9296, Mar. 12, 1990, as amended at 59 FR 2666, Jan. 18, 1994]

§ 301.103 Inmate work assignments.

The unit team of each inmate, which ordinarily designates work assignments, or whoever makes work assignments, shall review appropriate medical records, presentence reports, admission summaries, and all other available information prior to the designation of an inmate to a work assignment in an effort to preclude the assignment of an inmate to a work assignment not compatible with the inmate's physical ability or condition.

[55 FR 9296, Mar. 12, 1990, as amended at 59 FR 2667, Jan. 18, 1994]

§ 301.104 Medical attention.

Whenever an inmate worker is injured while in the performance of assigned duty, regardless of the extent of the injury, the inmate shall immediately report the injury to his official work detail supervisor. In the case of injuries on work details for other federal entities, the inmate shall also report the injury as soon as possible to community corrections or institution staff, as appropriate. The work detail supervisor shall immediately secure such first aid, medical, or hospital treatment as may be necessary for the proper treatment of the injured inmate. First aid treatment may be provided by any knowledgeable individual. Medical, surgical, and hospital care shall be rendered under the direction of institution medical staff for all inmates based at Bureau of Prisons institutions. In the case of inmates based at community corrections centers, medical care shall be arranged by the work supervisor or by community corrections center staff in accordance with the medical needs of the inmate. Refusal by an inmate worker to accept such medical, surgical, hospital, or first aid treatment recommended by medical staff or by other medical professionals may result in denial of any claim for compensation for any impairment resulting from the injury.

[59 FR 2667, Jan. 18, 1994]

§ 301.105 Investigation and report of injury.

(a) After initiating necessary action for medical attention, the work detail supervisor shall immediately secure a record of the cause, nature, and exact extent of the injury. The work detail supervisor shall complete a BP–140, Injury Report (Inmate), on all injuries reported by the inmate, as well as injuries observed by staff. In the case of injuries on work details for other federal entities, the work supervisor shall also immediately inform community corrections or institution staff, as appropriate, of the injury. The injury report shall contain a signed statement from the inmate on how the accident occurred. The names and statements of all witnesses (e.g., staff, inmates, or others) shall be included in the report. If the injury resulted from the operation of mechanical equipment, an identifying description or photograph of the machine or instrument causing the injury shall be obtained, to include a description of all safety equipment used by the injured inmate at the time of the injury. Staff shall provide the inmate with a copy of the injury report. Staff shall then forward the original

and remaining copies of the injury report to the Institutional Safety Manager for review. In the case of inmates based at community corrections centers, the work detail supervisor shall provide the inmate with a copy of the injury report and shall forward the original and remaining copies of the injury report to the Community Corrections Manager responsible for the particular community corrections center where the inmate is housed.

(b) The Institution Safety Manager or Community Corrections Manager shall ensure that a medical description of the injury is included on the BP–140 whenever the injury requires medical attention. The Institution Safety Manager or Community Corrections Manager shall also ensure that the appropriate sections of BP–140, Page 2, Injury—Lost-Time Follow-Up Report, are completed and that all reported work injuries are properly documented.

[59 FR 2667, Jan. 18, 1994]

§ 301.106 Repetitious accidents.

If an inmate worker is involved in successive accidents on a particular work site in a comparatively short period of time, regardless of whether injury occurs, and the circumstances of the accidents indicate an awkwardness or ineptitude that, in the opinion of the inmate's work supervisor, implies a danger of further accidents in the task assigned, the inmate shall be assigned to another task more suitable to the inmate's ability.

Subpart B—Lost-Time Wages

§ 301.201 Applicability.

Lost-time wages shall be available only for inmates based at Bureau of Prisons institutions.

[59 FR 2667, Jan. 18, 1994]

§ 301.202 Determination of work-relatedness.

(a) When the institution safety manager receives notice, or has reason to believe, a work-related injury may result in time lost from the work assignment, he or she shall present BP–140, Pages 1 and 2 (with the appropriate sections completed) to the Institution Safety Committee at the Committee's next regularly scheduled meeting. The Safety Committee shall make a determination of the injury's work-relatedness based on the available evidence and testimony. The determination shall be recorded on BP–140, Page 2, a copy of which shall be provided to the inmate.

(b) A determination of work-relatedness for purposes of awarding lost-time wages is not confirmation on the validity of any subsequent claim to receive compensation for work-related physical impairment or death.

[55 FR 9296, Mar. 12, 1990. Redesignated at 59 FR 2667, Jan. 18, 1994]

§ 301.203 Payment of lost-time wages.

(a) An inmate worker may receive lost-time wages for the number of regular work hours absent from work due to injury sustained in the performance of the assigned work.

(b) Lost-time wages are paid for time lost in excess of three consecutively scheduled workdays. The day of injury is considered to be the first workday regardless of the time of injury.

(c) An inmate may receive lost-time wages at the rate of 75% of the standard hourly rate of the inmate's regular work assignment at the time of the injury.

[55 FR 9296, Mar. 12, 1990. Redesignated at 59 FR 2667, Jan. 18, 1994]

§ 301.204 Continuation of lost-time wages.

(a) Once approved, the inmate shall receive lost-time wages until the inmate:

(1) Is released;

(2) Is transferred to another institution for reasons unrelated to the work injury;

(3) Returns to the pre-injury work assignment;

(4) Is reassigned to another work area or program for reasons unrelated to the sustained work injury, or is placed into Disciplinary Segregation; or,

(5) Refuses to return to a regular work assignment or to a lighter duty work assignment after medical certification of fitness for such duty.

(b) An inmate medically certified as fit for return to work shall sustain no monetary loss due to a required change in work assignment. Where there is no

light duty or regular work assignment available at the same rate of pay as the inmate's pre-injury work assignment, the difference shall be paid in lost-time wages. Lost-time wages are paid until a light duty or regular work assignment at the same pay rate as the inmate's pre-injury work assignment is available.

[55 FR 9296, Mar. 12, 1990. Redesignated at 59 FR 2667, Jan. 18, 1994]

§ 301.205 Appeal of determination.

An inmate who disagrees with the decision regarding payment of lost-time wages may appeal that decision exclusively through the Administrative Remedy Procedure. (See 28 CFR part 542.)

[55 FR 9296, Mar. 12, 1990. Redesignated at 59 FR 2667, Jan. 18, 1994]

Subpart C—Compensation for Work-Related Physical Impairment or Death

§ 301.301 Compensable and non-compensable injuries.

(a) No compensation for work-related injuries resulting in physical impairment shall be paid prior to an inmate's release.

(b) Compensation may only be paid for work-related injuries or claims alleging improper medical treatment of a work-related injury. This ordinarily includes only those injuries suffered during the performance of an inmate's regular work assignment. However, injuries suffered during the performance of voluntary work in the operation or maintenance of the institution, when such work has been approved by staff, may also be compensable.

(c) Compensation is not paid for injuries sustained during participation in institutional programs (such as programs of a social, recreational, or community relations nature) or from maintenance of one's own living quarters. Furthermore, compensation shall not be paid for injuries suffered away from the work location (e.g., while the claimant is going to or leaving work, or going to or coming from lunch outside of the work station or area).

(d) Injuries sustained by inmate workers willfully or with intent to injure someone else, or injuries suffered in any activity not related to the actual performance of the work assignment are not compensable, and no claim for compensation for such injuries will be approved. Willful violation of rules and regulations may result in denial of compensation for any resulting injury.

§ 301.302 Work-related death.

A claim for compensation as the result of work-related death may be filed by a dependent of the deceased inmate up to one year after the inmate's work-related death. The claim shall be submitted directly to the Claims Examiner, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

§ 301.303 Time parameters for filing a claim.

(a) No more than 45 days prior to the date of an inmate's release, but no less than 15 days prior to this date, each inmate who feels that a residual physical impairment exists as a result of an industrial, institution, or other work-related injury shall submit a FPI Form 43, Inmate Claim for Compensation on Account of Work Injury. Assistance will be given the inmate to properly prepare the claim, if the inmate wishes to file. In each case a definite statement shall be made by the claimant as to the impairment caused by the alleged injury. The completed claim form shall be submitted to the Institution Safety Manager or Community Corrections Manager for processing.

(b) In the case of an inmate based at a community corrections center who is being transferred to a Bureau of Prisons institution, the Community Corrections Manager shall forward all materials relating to an inmate's work-related injury to the Institution Safety Manager at the particular institution where an inmate is being transferred, for eventual processing by the Safety Manager prior to the inmate's release from that institution.

(c) Each claimant shall submit to a medical examination to determine the degree of physical impairment. Refusal, or failure, to submit to such a medical examination shall result in the

forfeiture of all rights to compensation. In each case of visible impairment, disfigurement, or loss of member, photographs shall be taken to show the actual condition and shall be transmitted with FPI Form 43.

(d) The claim, after completion by the physician conducting the impairment examination, shall be returned to the Institution Safety Manager or Community Corrections Manager for final processing. It shall then be forwarded promptly to the Claims Examiner, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

(e) It is the responsibility of each claimant to advise the Claims Examiner of his or her current address, in writing, at all times during the pendency of a claim for Inmate Accident Compensation.

(f) When circumstances preclude submission in accordance with the provisions of paragraph (a) of this section, a claim may be accepted up to 60 days following release. Additionally, a claim for impairment may be accepted up to one year after release, for good cause shown. In such cases the claim shall be submitted directly to the Claims Examiner, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

[55 FR 9296, Mar. 12, 1990, as amended at 59 FR 2667, Jan. 18, 1994]

§ 301.304 Representation of claimant.

(a) Any person may represent the claimant's interest in any proceeding for determination of a claim under this part, so long as that person is not confined in any federal, state or local correctional facility. Written appointment of a representative, signed by the claimant, must be submitted before the representative's authority to act on behalf of the claimant may be acknowledged.

(b) It is not necessary that a claimant employ an attorney or other person to assert a claim or effect collection of an award. Under no circumstances will the assignment of any award be recognized, nor will attorney fees be paid by Federal Prison Industries, Inc.

§ 301.305 Initial determination.

A claim for inmate accident compensation shall be determined by a Claims Examiner under authority delegated by the Board of Directors of Federal Prison Industries, Inc., pursuant to 28 CFR 0.99. In determining the claim, the Claims Examiner will consider all available evidence. Written notice of the determination, including the reasons therefore, together with notification of the right to appeal the determination, shall be mailed to the claimant at the claimant's last known address, or to the claimant's duly appointed representative.

§ 301.306 Appeal of determination.

(a) An Inmate Accident Compensation Committee (hereafter referred to as the ''Committee'') shall be appointed by the Chief Operating Officer, Federal Prison Industries, Inc., under authority delegated by the Board of Directors of Federal Prison Industries, Inc., pursuant to 28 CFR 0.99. The Committee shall consist of four members and four alternate members, with any three thereof required to form a quorum for decision-making purposes.

(b) Any claimant not satisfied with any decision of the Claims Examiner concerning the amount or right to compensation shall, upon written request made within 30 days after the date of issuance of such determination, or up to 30 days thereafter upon a showing of reasonable cause, be afforded an opportunity for either an in-person hearing before the Committee, or Committee reconsideration of the decision. A claimant may request an in-person hearing or reconsideration by writing to the Inmate Accident Compensation Committee, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

(c) Upon receipt of claimant's request, a determination will be made regarding the timeliness of the filing. If the request is timely filed, or if reasonable cause exists to accept the request filed in an untimely manner, the request shall be accepted. Once accepted, a copy of the information upon which the Claims Examiner's initial determination was based shall be mailed to the claimant at the claimant's last known address, or to claimant's duly

appointed representative, provided the release of such information is not determined to pose a threat to the safety of the claimant, any other inmate, or staff.

§ 301.307 Notice, time and place of committee action.

(a) Committee action shall ordinarily occur within 60 days of the receipt of claimant's request, except as provided in this section. Notice of the date set for Committee action shall be mailed to the claimant at the claimant's last known address, or to claimant's duly appointed representative. All Committee action shall be conducted at the Central Office of the Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

(b) A hearing or reconsideration may be postponed at the option of the Committee, or, if good cause is shown, upon request of the claimant. A claimant may change the request from either hearing to reconsideration or reconsideration to hearing, provided notice of such change is received at least 10 days prior to the previously scheduled action.

§ 301.308 Committee reconsideration.

If the claimant elects to have the Committee reconsider any decision of the Claims Examiner, the claimant may submit documentary evidence which the Committee shall consider in addition to the original record. The Committee must receive evidence no less than 10 days prior to the date of reconsideration, and may request additional documentary evidence from the claimant or any other source.

§ 301.309 In-person hearing before the committee.

(a) The appeal shall be considered to have been abandoned if the claimant fails to appear at the time and place set for the hearing and does not, within 10 days after the time set for that hearing, show good cause for failure to appear.

(b) In conducting the hearing, the Committee is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may conduct the hearing in such manner as to best ascertain the rights and obligations of the claimant and the government. At such hearing, the claimant shall be afforded an opportunity to present evidence in support of the claim under review.

(c) The Committee shall consider all evidence presented by the claimant, and shall, in addition, consider any other evidence as the Committee may determine to be useful in evaluating the claim. Evidence may be presented orally and/or in the form of written statements and exhibits.

(d) A representative appointed in accordance with the provisions of this section may make or give, on behalf of the claimant, any request or notice relative to any proceeding before the Committee. A representative shall be entitled to present or elicit evidence or make allegations as to fact and law in any proceeding affecting the claimant and to request information with respect to the claim. Likewise, any request for additional information, or notice to any claimant of any administrative action, determination, or decision, may be sent to the representative of such claimant, and shall have the same force and effect as if it had been sent to the claimant.

(e) In order to fully evaluate the claim, the Committee may question the claimant and any witness(es) appearing before the Committee on behalf of the claimant or government.

(f) Claimant, or claimant's representative, may question the Committee or any witness(es) appearing before the Committee on behalf of the government, but only on matters determined by the Committee to be relevant to its evaluation of the claim.

(g) The hearing shall be recorded, and a copy of the recording or, at the discretion of the Committee, a transcript thereof shall be made available to the claimant upon request, provided such request is made not later than 90 days following the date of the hearing.

§ 301.310 Witnesses.

(a) If a claimant wishes to present witnesses at the hearing, the claimant must provide the Committee, no less than 10 days before the scheduled hearing date, the name and address of each proposed witness, along with an outline

of each witness' testimony. The Committee may limit the number of witnesses who may appear at a hearing, however, the Committee has no authority to compel the attendance of any witness.

(b) Any person confined in a Federal, State, or local penal or correctional institution at the time of the hearing may not appear as a witness, but that person's testimony may be submitted in the form of a written statement.

§ 301.311 Expenses associated with appearance at committee hearing.

Federal Prison Industries, Inc., may not assume responsibility for any expenses incurred by the claimant, claimant's representative, or any witness appearing on behalf of the claimant in connection with attendance at the hearing, as well as any other costs relating to any representative, witnesses, or evidence associated with a hearing before the Committee.

§ 301.312 Notice of committee determination.

The Committee shall mail written notice of its decision to affirm, reverse, or amend the Claims Examiner's initial determination, with the reasons for its decision, to the claimant at the claimant's last known address, or to claimant's duly appointed representative, no later than 30 days after the date of the hearing unless the Committee needs to make a further investigation as a result of information received at the hearing. If the Committee conducts further investigation subsequent to the hearing, the decision notice shall be mailed no later than 30 days after the conclusion of the Committee's investigation.

§ 301.313 Chief Operating Officer review.

Any claimant not satisfied with the Committee's reconsidered decision or decision after a hearing may appeal such decision to the Chief Operating Officer, Federal Prison Industries, Inc., 320 First Street NW., Washington, DC 20534. A written request for such an appeal must be received no later than 90 days after the date of notice of the Committee's decision. The Chief Operating Officer shall review the record and affirm, reverse or amend the Committee's decision no later than 90 days after receipt of claimant's notice of appeal. Written notice of the Chief Operating Officer's decision shall be mailed to the claimant's last known address, or to the claimant's representative.

§ 301.314 Establishing the amount of award.

(a) If a claim for Inmate Accident Compensation is approved, the amount of compensation shall be based upon the degree of physical impairment existent at the time of the claimant's release regardless of when during the claimant's period of confinement the injury was sustained. No claim for compensation will be approved if full recovery occurs while the inmate is in custody and no impairment remains at the time of release.

(b) In determining the amount of accident compensation to be paid, the permanency and severity of the injury in terms of functional impairment shall be considered. The provisions of the Federal Employees' Compensation Act (FECA) (5 U.S.C. 8101, *et seq.*) shall be followed when practicable. The FECA establishes a set number of weeks of compensation applicable for injuries to specific body members or organs (section 8107).

(c) All awards of Inmate Accident Compensation shall be based upon the minimum wage (as prescribed by the Fair Labor Standards Act).

(1) For body members or organs covered under section 8107, the minimum wage applicable at the time of the award shall be used as the basis for determining the amount of compensation. Awards regarding injury to body members or organs covered under section 8107 shall be paid in a lump sum. Acceptance of such an award shall constitute full and final settlement of the claim for compensation.

(2) For body members or organs not covered under section 8107, awards will be paid on a monthly basis because such awards are subject to periodic review of entitlement. The minimum wage applicable at the time of each monthly payment shall be used in determining the amount of each monthly payment. Monthly payments are ordinarily mailed the first day of the

month following the month in which the award is effective.

§ 301.315 Review of entitlement.

(a) Each monthly compensation recipient shall be required, upon request of the Claims Examiner, to submit to a medical examination, by a physician specified or approved by the Claims Examiner, to determine the current status of his physical impairment. Any reduction in the degree of physical impairment revealed by this examination shall result in a commensurate reduction in the amount of monthly compensation provided. Failure to submit to this physical examination shall be deemed refusal, and shall ordinarily result in denial of future compensation. The costs associated with this examination shall be borne by Federal Prison Industries, Inc.

(b) Inasmuch as compensation awards are based upon the minimum wage, any income received by a compensation recipient which exceeds the annual income available at the minimum wage (based upon a 40 hour work week), including Social Security or veterans benefits received as the result of the work-related injury for which Inmate Accident Compensation has been awarded, shall be deemed excessive. The amount of compensation payable to a claimant with an income deemed excessive shall be reduced at the rate of one dollar for each two dollars of earned and benefit income which exceeds the annual income available at minimum wage. Each monthly compensation recipient shall be required to provide a statement of earnings on an annual basis, or as otherwise requested. Failure to provide this statement shall result in the suspension or denial of all Inmate Accident Compensation benefits until such time as satisfactory evidence of continued eligibility is provided.

§ 301.316 Subsequent incarceration of compensation recipient.

If a claimant, who has been awarded compensation on a monthly basis, is or becomes incarcerated at any federal, state, or local correctional facility, monthly compensation payments payable to the claimant shall ordinarily be suspended until such time as the claimant is released from the correctional facility.

[59 FR 2667, Jan. 18, 1994]

§ 301.317 Medical treatment following release.

Federal Prison lndustries, Inc., may not pay the cost of medical, hospital treatment, or any other related expense incurred after release from confinement unless such cost is authorized by the Claims Examiner in advance, or the Claims Examiner determines that circumstances warrant the waiver of this requirement. Generally, the payment of such costs is limited to impairment evaluations, or treatments intended to reduce the degree of physical impairment, conducted at the direction of the Claims Examiner. The amount of a payment for medical treatment is limited to reasonable expenses incurred, such as those amounts authorized under the applicable fee schedule established pursuant to 42 U.S.C. 1395w–4 for the Department of Health and Human Services Medicare program.

[55 FR 9296, Mar. 12, 1990, as amended at 59 FR 2667, Jan. 18, 1994]

§ 301.318 Civilian compensation laws distinguished.

The Inmate Accident Compensation system is not obligated to comply with the provisions of any other system of worker's compensation except where stated in this part. Awards made under the provisions of the Inmate Accident Compensation procedure differ from awards made under civilian workmen's compensation laws in that hospitalization is usually completed prior to the inmate's release from the institution and, except for a three-day waiting period, the inmate receives wages while absent from work. Other factors necessarily must be considered that do not enter into the administration of civilian workmen's compensation laws. As in the case of federal employees who allege they have sustained work-related injuries, the burden of proof lies with the claimant to establish that the claimed impairment is causally related to the claimant's work assignment.

§ 301.319 Exclusiveness of remedy.

Inmates who are subject to the provisions of these Inmate Accident Compensation regulations are barred from recovery under the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*). Recovery under the Inmate Accident Compensation procedure was declared by the U.S. Supreme Court to be the exclusive remedy in the case of work-related injury. *U.S.* v. *Demko*, 385 U.S. 149 (1966).

[55 FR 9296, Mar. 12, 1990, as amended at 59 FR 2667, Jan. 18, 1994]

PART 302—COMMENTS ON UNICOR BUSINESS OPERATIONS

AUTHORITY: 18 U.S.C. 4126, and by resolution of the Board of Directors of Federal Prison Industries, Inc.

§ 302.1 Public and private sector comment procedures.

(a) Any interested party having any comment concerning the business operations of Federal Prison Industries, Inc. (UNICOR) may write to the Chief Operating Officer of UNICOR, or to the Chairman of the Board of Directors of UNICOR, and bring such matters to the attention of either or both officials. Where appropriate, a response shall promptly be made. The Board shall be kept advised of all comments and responses.

(b) Address correspondence as follows:

(1) Chief Operating Officer, Federal Prison Industries, Inc., 320 First Street, NW., Washington, DC 20534, Attn: Comment Procedures; or

(2) Board of Directors, Federal Prison Industries, Inc., 320 First Street, NW., Washington, DC 20534, Attn: Comment Procedures.

(c) This section does not apply to inmate complaints which are properly raised through the procedures provided in the Bureau of Prisons' rule on Administrative Remedy (28 CFR part 42).

[55 FR 30668, July 26, 1990, as amended at 69 FR 1524, Jan. 9, 2004]

PART 345—FEDERAL PRISON INDUSTRIES (FPI) INMATE WORK PROGRAMS

Subpart A—Purpose and Scope

Sec.
345.10 Purpose and scope.

Subpart B—Definitions

345.11 Definitions.

Subpart C—Position Classification

345.20 Position classification.

Subpart D—Recruitment and Hiring Practices

345.31 Recruitment.
345.32 Hiring.
345.33 Waiting list hiring exceptions.
345.34 Refusal to employ.
345.35 Assignments to FPI.

Subpart E—Inmate Worker Standards and Performance Appraisal

345.40 General.
345.41 Performance appraisal for inmate workers.
345.42 Inmate worker dismissal.

Subpart F—Inmate Pay and Benefits

345.50 General.
345.51 Inmate pay.
345.52 Premium pay.
345.53 Piecework rates.
345.54 Overtime compensation.
345.55 Longevity pay.
345.56 Vacation pay.
345.57 Administrative pay.
345.58 Holiday pay.
345.59 Inmate performance pay.
345.60 Training pay.
345.61 Inmate earnings statement.
345.62 Inmate accident compensation.
345.63 Funds due deceased inmates.
345.64 Referral of releasable medical data to FPI staff.
345.65 Inmate medical work limitation.
345.66 Claims limitation.
345.67 Retention of benefits.

Subpart G—Awards Program

345.70 General.
345.71 Official commendations.
345.72 Cash bonus or cash award.
345.73 Procedures for granting awards for suggestions or inventions.
345.74 Awards for special achievements for inmate workers.

Subpart H—FPI Inmate Training and Scholarship Programs

345.80 General.
345.81 Pre-industrial training.
345.82 Apprenticeship training.
345.83 Job safety training.
345.84 The FPI scholarship fund.

AUTHORITY: 18 U.S.C. 4126, 28 CFR 0.99, and by resolution of the Board of Directors of Federal Prison Industries, Inc.

SOURCE: 60 FR 15827, Mar. 27, 1995, unless otherwise noted.

Subpart A—Purpose and Scope

§ 345.10 Purpose and scope.

It is the policy of the Bureau of Prisons to provide work to all inmates (including inmates with a disability who, with or without reasonable accommodations, can perform the essential tasks of the work assignment) confined in a federal institution. Federal Prison Industries, Inc. (FPI) was established as a program to provide meaningful work for inmates. This work is designed to allow inmates the opportunity to acquire the knowledge, skills, and work habits which will be useful when released from the institution. There is no statutory requirement that inmates be paid for work in an industrial assignment. 18 U.S.C. 4126, however, provides for discretionary compensation to inmates working in Industries. Under this authority, inmates of the same grade jobs, regardless of the basis of pay (hourly, group piece, or individual piece rates) shall receive approximately the same compensation. All pay rates under this part are established at the discretion of Federal Prison Industries, Inc. Any alteration or termination of the rates shall require the approval of the Federal Prison Industries' Board of Directors. While the Warden is responsible for the local administration of Inmate Industrial Payroll regulations, no pay system is initiated or changed without prior approval of the Assistant Director, Industries, Education and Vocational Training (Assistant Director).

Subpart B—Definitions

§ 345.11 Definitions.

(a) *Federal Prison Industries, Inc. (FPI)*—A government corporation organizationally within the Bureau of Prisons whose mission is to provide work simulation programs and training opportunities for inmates confined in Federal correctional facilities. The commercial or ''trade'' name of Federal Prison Industries, Inc. is UNICOR. Most factories or shops of Federal Prison Industries, Inc. are commonly referred to as ''UNICOR'' or as ''Industries''. Where these terms are used, they refer to FPI production locations and to the corporation as a whole. UNICOR, FPI, and Industries are used interchangeably in this manner. For these purposes, Federal Prison Industries, Inc. will hereinafter be referred to as FPI.

(b) *Superintendent of Industries (SOI)*—The Superintendent of Industries, also referred to as Associate Warden/Industries and Education, is responsible for the efficient management and operation of an FPI factory. Hereinafter, referred to as SOI.

(c) *FPI work status*—Assignment to an Industries work detail.

(1) An inmate is in FPI work status if on the job, on sick call during the inmate's assigned hours, on furlough, on vacation, for the first thirty days on writ, for the first 30 days in administrative detention, or for the first 30 days on medical idle for FPI work-related injury so long as the injury did not result from an intentional violation by the inmate of work safety standards.

(2) *Full-time work status.* A work schedule for an inmate consisting of 90% or more of the normal FPI factory work week.

(3) *Part-time work status.* A work schedule of less than 90% of the normal FPI factory work week.

(d) *Unit Team*—Bureau of Prisons staff responsible for the management of inmates and the delivery of programs and services. The Unit Team may consist of a unit manager, case manager, correctional counselor, unit secretary, unit officer, education representative, and psychologist.

(e) *Unit Discipline Committee (UDC)*—The term *Unit Discipline Committee* refers to one or more institution staff members delegated by the Warden with the authority and duty to hold an initial hearing upon completion of the investigation concerning alleged charge(s) of inmate misconduct (see 28 CFR 541.15). The Warden shall authorize these staff members to impose minor sanctions for violation of prohibited act(s).

(f) *Discipline hearing officer (DHO)*—This term refers to an independent discipline hearing officer who is responsible for conducting Institution Discipline Hearings and who imposes appropriate sanctions for incidents of inmate misconduct referred for disposition following the hearing required by 28 CFR 541.15 before the UDC.

(g) *Pretrial inmate*—The definition of pretrial inmate in 28 CFR 551.101(a) is applicable to this part.

[60 FR 15827, Mar. 27, 1995, as amended at 61 FR 59168, Nov. 20, 1996; 64 FR 32169, June 15, 1999]

Subpart C—Position Classification

§ 345.20 Position classification.

(a) Inmate worker positions must be assigned an appropriate level of pay. All inmate workers shall be informed of the objectives and principles of pay classification as a part of the routine orientation of new FPI inmate workers.

(b) The Warden and SOI have the responsibility for position classification at each location.

Subpart D—Recruitment and Hiring Practices

§ 345.31 Recruitment.

Inmate workers for FPI locations may be recruited through admission and orientation lectures or through direct recruiting.

§ 345.32 Hiring.

(a) Inmate workers are ordinarily hired through waiting lists. Except as noted in § 345.33, inmates are to be placed on the waiting lists in order of receipt of applications for work with Industries, and are to be hired in the same sequence.

(b) Waiting lists are to be maintained and kept available for scrutiny by auditors and other staff with a need to know. SOI's are encouraged to maintain a waiting list for each FPI factory.

§ 345.33 Waiting list hiring exceptions.

(a) *Needed skills*. An inmate may be hired ahead of other inmates on the waiting list if the inmate possesses needed skills and the SOI documents the reasons for the action in the position classification files.

(b) *Prior FPI work assignment*. An inmate with prior FPI work experience during the inmate's current commitment and with no break in custody will ordinarily be placed within the top ten percent of the waiting lists unless the inmate was transferred for disciplinary reasons, was placed in segregation, or voluntarily left the FPI work assignment for non-program reasons (i.e. for some reason other than formal education, vocational training, drug abuse or similar formal programs). For example, an inmate transferred administratively for nondisciplinary reasons, and who has documented credit as a prior worker, is covered under the provisions of this paragraph.

(c) *Industry closing and relocation*. When an FPI factory closes in a location with two or more FPI factories, an inmate worker affected may be transferred to remaining FPI factories ahead of the top portion of the inmates on the waiting lists, so there is no break in active duty with FPI. Such actions are also in order where the work force of an industry is reduced to meet institution or FPI needs. An inmate transferred under the provisions of this part will have the same benefits as any intra-industry transfer.

(d) *Disciplinary transfers*. An inmate who is a disciplinary transfer from the last institution designated and who wishes re-assignment in FPI at the receiving institution may be hired on a case-by-case basis at the discretion of the SOI, who should consider the security level and reasons for the misconduct. Such an inmate, despite prior experience, is not due special placement on the waiting list, is not given

advance hiring preference, and does not receive consideration for accelerated promotion back to the grade held at time of transfer.

(e) *Special needs*. For special needs, such as Inmate Financial Responsibility assignment to assist in paying a significant financial obligation or for release preparation, the unit team may recommend an inmate for priority placement on the waiting list. Such placement must be documented and include the reason for the exception.

§ 345.34 Refusal to employ.

(a) The SOI has authority to refuse an FPI assignment to an inmate who, in the judgment of the SOI, would constitute a serious threat to the orderly and safe operation of the FPI factory. A refusal to assign must be documented by a memorandum to the unit team listing reasons for the refusal, with a copy to the position classification files in FPI. Typically, the reasons should include other earlier (ordinarily within the past twelve months) documented violations of the FPI inmate worker standards or institution disciplinary regulations.

(b) The refusal to assign is to be rescinded when, in the judgment of the SOI, the worker no longer constitutes a serious threat to the FPI industrial operation.

§ 345.35 Assignments to FPI.

(a) An inmate or detainee may be considered for assignment with FPI unless the inmate is a pretrial inmate or is currently under an order of deportation, exclusion, or removal. However, an inmate or detainee who is currently under an order of deportation, exclusion, or removal may be considered for assignment with FPI if the Attorney General has determined that the inmate or detainee cannot be removed from the United States because the designated country of removal will not accept his/her return. Any request by an inmate for consideration must be made through the unit team. FPI does not discriminate on the bases of race, color, religion, ethnic origin, age, or disability.

(b) The SOI ordinarily makes assignments based on the recommendation of the unit team.

(1) New workers are ordinarily assigned at pay grade five. All first-time inmate workers shall enter at pay grade five and may be required to successfully complete a course in pre-industrial training or on-the-job training (as available) before promotion to pay grade four.

(2) An inmate who has not successfully completed pre-industrial or on-the-job training remains at pay grade five for at least 30 days.

(3) An inmate hired after having resigned voluntarily from FPI may be excused from pre-industrial training and may be hired at a pay grade based on previous training and experience.

[60 FR 15827, Mar. 27, 1995, as amended at 64 FR 32169, June 15, 1999]

Subpart E—Inmate Worker Standards and Performance Appraisal

§ 345.40 General.

This subpart authorizes the establishment of minimum work standards for inmate workers assigned to the Industries program at all field locations. The SOI may reproduce these standards and may also develop additional local guidelines to augment these standards and to adapt them to local needs and conditions. Local Industries shall place these standards and any additional local guidelines on display at appropriate locations within the industrial sites. Inmates shall be provided with a copy of these standards and local guidelines, and shall sign receipts acknowledging they have received and understand them before beginning work in the Industries program. In the case of a disabled inmate, alternate media or means of communicating this information and indicating the inmate's receipt may be provided, if necessary as a reasonable accommodation.

(a) At a minimum, each industrial location is to have work standards for each of the following areas:

(1) Safety—ensuring the promotion of workplace safety and the avoidance of activities that could result in injury to self or others.

(2) Quality assurance—ensuring that work is done as directed by the supervisor in an attentive manner so as to minimize the chance of error.

(3) Personal conduct and hygiene—ensuring the promotion of harmony and sanitary conditions in the workplace through observation of good hygiene and full cooperation with other inmate workers, work supervisors, and training staff.

(4) Punctuality and productivity—ensuring the productive and efficient use of time while the inmate is on work assignment or in training.

(b) *Compliance with work standards.* Each inmate assigned to FPI shall comply with all work standards pertaining to his or her work assignment. Adherence to the standards should be considered in evaluating the inmate's work performance and documented in individual hiring, retention, and promotion/demotion situations.

§ 345.41 Performance appraisal for inmate workers.

Work supervisors should complete a performance appraisal form for each inmate semi-annually, by March 31 and September 30, or upon termination or transfer from the industrial work assignment. Copies shall be sent to the unit team. Inmate workers should discuss their appraisals with their supervisors at a mutually agreeable time in order to improve their performance. Satisfactory and unsatisfactory performance ratings shall be based on the standards in § 345.40(a).

(a) The SOI is to ensure that evaluations are done and are submitted to unit teams in a timely manner.

(b) The SOI or a designee may promote an inmate to a higher grade level if an opening exists when the inmate's skills, abilities, qualifications, and work performance are sufficiently developed to enable the inmate to carry out a more complex FPI factory assignment successfully, when the inmate has met the institution's time-in-grade (unless waived by the SOI), and when the inmate has abided by the inmate worker standards. Conversely, the SOI or SOI designee may demote an inmate worker for failing to abide by the inmate worker standards. Such demotions shall be fully documented.

§ 345.42 Inmate worker dismissal.

The SOI may remove an inmate from Industries work status in cooperation with the unit team.

(a) The SOI may remove an inmate from FPI work status according to the conditions outlined in the pay and benefits section of this policy and in cooperation with the unit team.

(b) An inmate may be removed from FPI work status for failure to comply with any court-mandated financial responsibility. (See 28 CFR 545.11(d)).

(c) An inmate found to have committed a prohibited act (whether or not it is FPI related) resulting in segregation or disciplinary transfer is also to be dismissed from Industries based on an unsatisfactory performance rating for failure to be at work.

(d) Any inmate or detainee who is a pretrial inmate or who is currently under an order of deportation, exclusion, or removal shall be removed from any FPI work assignment and reassigned to a non-FPI work assignment for which the inmate is eligible. However, an inmate or detainee who is currently under an order of deportation, exclusion, or removal may be retained in the FPI assignment if the Attorney General has determined that the inmate or detainee cannot be removed from the United States because the designated country of removal will not accept his/her return.

[60 FR 15827, Mar. 27, 1995, as amended at 64 FR 32170, June 15, 1999]

Subpart F—Inmate Pay and Benefits

§ 345.50 General.

Title 18 U. S. Code section 4126 authorizes FPI to compensate inmates under rules and regulations promulgated by the Attorney General. It is the policy of FPI to provide compensation to FPI inmate workers through various conditions of pay and benefits, except as otherwise provided in these regulations.

§ 345.51 Inmate pay.

(a) *Grade levels.* Inmate workers in FPI locations receive pay at five levels ranging from 5th grade pay (lowest) to 1st grade pay (highest).

(b) *Eligibility*. (1) An inmate shall accrue vacation time, longevity service credit, and shall receive holiday pay for the period of time the inmate is officially assigned to the Industries work detail. For limitations on claims, refer to § 345.66.

(2) Inmate workers may be eligible for premium pay as specified in § 345.52. Eligibility for other pay and benefits are described separately in this subpart.

(3) FPI pay and benefits are lost in cases of disciplinary transfer and segregation.

(4) An inmate returned to the institution due to program failure at a Community Corrections Center or while on parole or escape is not entitled to credit for time spent in Industries prior to said program failure. This rule also applies to any other program failure which results in a break in confinement status.

§ 345.52 Premium pay.

Payment of premium pay to selected inmates is authorized. The total number of qualifying inmates may not exceed 15% of first grade inmates at a location.

(a) *Eligibility*. Inmates in first grade pay status may be considered for premium pay.

(b) *The selection process*. Candidates for premium pay must be nominated by a foreman on the FPI staff, and recommended on the basis of specific posted criteria by a selection committee assigned by the SOI.

(1) The SOI, as the chief selecting official, must sign approval for all premium pay inmate selections. This authority may not be delegated below the level of Acting SOI.

(2) The selected candidate(s) are notified by the FPI Manager or by a posted list on the FPI bulletin board. A record of the selection and who was on the selection board is kept for documentation purposes. An inmate nominated to be a premium pay inmate may refuse the appointment without prejudice.

(c) [Reserved]

(d) *Pay rate*. Premium pay inmates receive a specified amount over and above all other pay and benefits to which they may be entitled (e.g., longevity pay, overtime, piecework rates, etc.). Premium pay is also paid for vacation, holiday, and administrative hours.

(e) *Duties of premium pay inmates*. Premium pay is a means of recognizing the value of those traits supportive of morale and good institutional adjustment. It is not a form of bonus or incentive pay for highly productive inmates.

(f) *Transfer status of premium pay inmates*. Premium pay status may not be transferred from institution to institution with the inmate worker. Premium pay status must be earned at each location.

(g) *Removals from premium pay status*. Removal from premium pay status may occur for failure to demonstrate the premium pay selection traits or for failure to abide by the inmate worker standards set forth in this policy. All removals from premium pay status shall be documented on the inmate's evaluation form. The following conditions also may result in removal from premium pay status:

(1) Any premium pay inmate found to have committed any level 100 or 200 series offense by the DHO is automatically removed from premium pay status whether or not the offense was FPI-related.

(2) Inmates absent from work for more than 30 consecutive calendar days may be removed from premium pay status by the SOI.

§ 345.53 Piecework rates.

Piecework rates are incentives for workers to strive for higher pay and production benefiting both the worker and FPI. Piecework rates may be of two major types: individual piecework (in which an individual's pay goes up or down depending upon his/her own output) or Group Wage Fund (in which all members of a group strive for higher rates or production output as a unit, and all share in a pool of funds distributed among work group members equally).

§ 345.54 Overtime compensation.

An inmate worker is entitled to overtime pay at a rate of two times the hourly or unit rate for hourly, individual, and group piecework rate workers, when the total hours worked (including administrative pay) exceed the

FPI factory's regularly scheduled workday. Hours worked on days other than the scheduled work week (e.g., Saturday) shall be compensated at the overtime rate.

§ 345.55 Longevity pay.

(a) Except as provided in paragraph (b) of this section, an inmate earns longevity pay raises after 18 months spent in FPI work status regardless of whether or not the work was continuous. The service may have occurred in one or more FPI factories or shops. An inmate qualifies for longevity pay raises as provided in the table below:

Length of Service With FPI
After 18 months of service and payable in the 19th month
After 30 months of service and payable in the 31st month
After 42 months of service and payable in the 43rd month
After 60 months of service and payable in the 61st month
After 84 months of service (& more) and payable in the 85th month

Longevity pay allowances shall be added after the wages for each actual hour in pay status have been properly computed.

(b) *Exceptions.* (1) FPI work status during service of a previous sentence with a subsequent break in custody may not be considered in determining longevity pay.

(2) An inmate in segregation or who is given a disciplinary transfer loses any longevity status previously achieved.

(3) An inmate who voluntarily transfers to a non-FPI work assignment loses any longevity status previously achieved. An inmate who leaves FPI to enter education, vocational training, or drug abuse treatment programs, however, generally retains longevity and pay grade status upon return to FPI, unless the inmate withdraws from those programs without a good faith effort to complete them. The decision on whether there was a good faith effort is to be made by the SOI in concert with the staff member in charge of the program.

§ 345.56 Vacation pay.

Inmate workers are granted FPI vacation pay by the SOI when their continued good work performance justifies such pay, based on such criteria as quality of work, attendance and punctuality, attentiveness, and adherence to industry operating regulations. The inmate must submit a written request for vacation time, ordinarily two weeks in advance of the requested vacation time. The work supervisor must recommend to the SOI the vacation time to be taken or paid. Eligibility for vacation pay must be verified by the Business Office prior to approval by the SOI. The SOI may declare an inmate ineligible for vacation credit because of an inmate's unsatisfactory work performance during the month in which such credit was to occur.

(a) An inmate may take accrued vacation time for visits, participation in institution programs or for other good reasons at the discretion of the SOI. Industrial managers should make every reasonable attempt to schedule an inmate worker's vacations so as not to conflict with the workforce requirements of FPI factory production schedules and Inmate Systems Management requirements.

(b) An inmate temporarily assigned to the Industrial detail, e.g., on construction details, also earns vacation credit which he or she must take or be paid for at the end of the temporary assignment.

(c) An inmate must take and/or be paid for vacation credit within sixty days after each annual eligibility date of the inmate's most recent date of assignment to FPI. An inmate who elects not to take vacation time must indicate this in writing. That inmate shall receive pay for the annual vacation credit in a lump sum on the regular monthly payroll. This amount is ordinarily paid within sixty days after the annual eligibility date of the inmate's most recent date of assignment to FPI. An inmate whose employment is terminated by release, reassignment, transfer, or other reasons, and who has unused vacation credit shall be paid for this credit on the monthly payroll.

§ 345.57 Administrative pay.

An inmate excused from a job assignment may receive administrative pay for such circumstances as a general recall for an institution, power outages,

blood donations, or other situations at the discretion of the SOI. Such pay may not exceed an aggregate of three hours per month.

§ 345.58 Holiday pay.

An inmate worker in FPI work status shall receive pay at the standard hourly rate, plus longevity where applicable, for all Federal holidays provided the inmate is in work status on the day before and the day after the holiday occurs. Full-time workers receive one full day's pay. Part-time workers receive one-half day's pay.

§ 345.59 Inmate performance pay.

Inmate workers for FPI may also receive Inmate Performance Pay for participation in programs where this award is made. However, inmate workers may not receive both Industries Pay and Performance Pay for the same program activity. For example, an inmate assigned to a pre-industrial class may not receive FPI pay as well as inmate performance pay for participation in the class.

§ 345.60 Training pay.

Inmates directed by the SOI to take a particular type of training in connection with a FPI job are to receive FPI pay if the training time occurs during routine FPI factory hours of operation. This does not include ABE/GED or pre-industrial training.

§ 345.61 Inmate earnings statement.

Each inmate worker in FPI shall be given a monthly earnings statement while actively working for FPI.

§ 345.62 Inmate accident compensation.

An inmate worker shall be paid lost-time wages while hospitalized or confined to quarters due to work-related injuries (including occupational disease or illnesses directly caused by the worker's job assignments) as specified by the Inmate Accident Compensation Program (28 CFR part 301).

§ 345.63 Funds due deceased inmates.

Funds due a deceased inmate for work performed for FPI are payable to a legal representative of the inmate's estate or in accordance with the law of descent and distribution of the state of domicile.

§ 345.64 Referral of releasable medical data to FPI staff.

The SOI is responsible for ensuring that appropriate releasable information pertaining to an inmate's medical limitation (e.g., back injury) is made available to the FPI staff member who directly supervises the assignment.

§ 345.65 Inmate medical work limitation.

In addition to any prior illnesses or injuries, medical limitations also include any illness or injury sustained by an inmate which necessitates removing the ill worker from an FPI work assignment. If an inmate worker is injured more than once in a comparatively short time, and the circumstances of the injury suggest an awkwardness or ineptitude which in turn indicates that further danger exists, the inmate may be removed to another FPI detail or to a non-FPI detail.

§ 345.66 Claims limitation.

Claims relating to pay and/or benefits must occur within one calendar year of the period of time for which the claim is made. Inmate claims submitted more than one year after the time in question require the approval of the Assistant Director before an inmate may receive such pay and/or benefit.

§ 345.67 Retention of benefits.

(a) *Job retention.* Ordinarily, when an inmate is absent from the job for a significant period of time, the SOI will fill that position with another inmate, and the first inmate will have no entitlement to continued FPI employment.

(1) For up to the first 30 days when an inmate is in medical idle status, that inmate will retain FPI pay grade status, with suspension of actual pay, and will be able to return to FPI when medically able, provided the absence was not because of a FPI work-related injury resulting from the inmate's violation of safety standards. If the medical idle lasts longer than 30 days, was not caused by a violation of safety standards, and the unit team approves the inmate's return to FPI, the SOI

shall place that inmate within the top ten percent of the FPI waiting list.

(2) Likewise, for up to the first 30 days when an inmate is in Administrative Detention, that inmate may retain FPI pay grade status, with actual pay suspended, and will be able to return to FPI, provided the inmate is not found to have committed a prohibited act. If Administrative Detention lasts longer than 30 days, and the inmate is not found to have committed a prohibited act, and the unit team approves the inmate's return to FPI, the SOI shall place that inmate within the top ten percent of the FPI waiting list.

(3) An inmate in Administrative Detention, and found to have committed a prohibited act, may return to FPI work status at the discretion of the SOI.

(4) If an inmate is injured and absent from the job because of a violation of FPI safety standards, the SOI may reassign the inmate within FPI or recommend that the unit team reassign the inmate to a non-FPI work assignment.

(5) If an inmate is transferred from one institution to another for administrative (not disciplinary) reasons, and the unit team approves the inmate's return to FPI, the SOI shall place that inmate within the top ten percent of the FPI waiting list.

(b) *Longevity and vacation credit.* Ordinarily, when an inmate's FPI employment is interrupted, the inmate loses all accumulated longevity and vacation credit with the following exceptions:

(1) The inmate retains longevity and vacation credit when placed in medical idle status, provided the medical idle is not because of a FPI work-related injury resulting from the inmate's violation of safety standards. If the medical idle results from a FPI work-related injury where the inmate was not at fault, the inmate also continues to earn longevity and vacation credit.

(2) Likewise, the inmate retains, and continues earning for up to 30 days, longevity and vacation credit if placed in Administrative Detention, provided the inmate is not found to have committed a prohibited act.

(3) The inmate retains, but does not continue earning, longevity and vacation credit when transferring from one institution to another for administrative (not disciplinary) reasons, when absent from the institution on writ, or when placed in administrative detention and found to have committed a prohibited act.

(c) *Pay grade retention.* Ordinarily, when an inmate's FPI employment is interrupted, that inmate is not entitled to retain his or her pay grade, with the following exceptions.

(1) An inmate retains pay grade status, with actual pay suspended, for up to 30 days in Administrative Detention. However, the inmate is not reimbursed for the time spent in detention.

(2) Likewise, an inmate retains pay grade status for up to 30 days while absent from the institution on writ, with actual pay suspended. The SOI may approve pay grade retention when an inmate is on writ for longer than 30 days on a case-by-case basis.

(3) If an inmate is absent because of a FPI work-related injury where the inmate was not at fault, the inmate retains his or her pay grade, with actual pay suspended.

Subpart G—Awards Program

§ 345.70 General.

FPI provides incentive awards of various types to inmate workers for special achievements in their work, scholarship, suggestions, for inventions which improve industry processes or safety or which conserve energy or materials consumed in FPI operations, and for outstanding levels of self-development.

§ 345.71 Official commendations.

An inmate worker may receive an official written commendation for any suggestion or invention adopted by FPI, or for any special achievement, as determined by the SOI, related to the inmate's industrial work assignment. A copy of the commendation is to be placed in the inmate's central file.

§ 345.72 Cash bonus or cash award.

An inmate worker may receive a cash bonus or cash award for any suggestion or invention which is adopted by FPI and produces a net savings to FPI of at least $250.00. Cash awards shall be one

percent of the net estimated savings during the first year, with the minimum award being $25.00, and the maximum award being $1,000.00.

§ 345.73 Procedures for granting awards for suggestions or inventions.

Inmate suggestions for improvements in operations or safety, or for conservation of energy or material, must be submitted in writing.

(a) The inmate's immediate supervisor shall review the suggestion and forward it with comments and award recommendation to the SOI.

(b) The SOI shall ensure that all inmate suggestions and/or inventions formally submitted are considered for incentive awards by a committee comprised of Industries personnel designated by the SOI.

(1) The committee is authorized to award a cash award of up to $100.00 or an equivalent gift not to exceed $100.00 in value to an inmate whose suggestion has been adopted. A recommendation for an award in excess of $100.00 shall be forwarded to the Assistant Director for a final decision.

(2) The committee shall forward all recommendations for awards for inventions through the SOI to the Warden. The Warden may choose to add his or her comments before forwarding to the Assistant Director for a final decision.

(3) Incentive awards are the exclusive methods for recognizing inmates for suggestions or inventions.

§ 345.74 Awards for special achievements for inmate workers.

While recognition of inmate worker special achievements may originate from any FPI staff member, the achievement ordinarily will be submitted in writing by the inmate's immediate supervisor.

(a) The SOI shall appoint a local institution committee to consider inmates for special achievement awards.

(b) The committee shall forward its recommendations to the SOI, who is authorized to approve individual awards (cash or gifts) not to exceed $100 in value. A recommendation for an award in excess of $100 (cash or gifts) shall be forwarded, with the Superintendent's recommendation and the justification for it, through the Warden to the Assistant Director. The Warden may submit comments on the recommendation.

Subpart H—FPI Inmate Training and Scholarship Programs

§ 345.80 General.

As earnings permit, FPI provides appropriate training for inmates which is directly related to the inmate worker's job assignment. Additionally, FPI administers a scholarship program to provide inmates with an opportunity to begin, or to continue with business and industry courses or vocational training.

(a) An applicant for FPI-funded training programs should be evaluated to determine sufficient interest and preparation to successfully complete the course content. The evaluation may be done by the Education Department, unit team, or other qualified personnel.

(b) An inmate selected to participate in FPI-funded training programs ordinarily must have enough sentence time remaining to serve to complete the training.

§ 345.81 Pre-industrial training.

FPI encourages the development and use of pre-industrial training programs. Such training ordinarily provides benefits to the inmate and to the FPI factory. Pre-industrial training also provides an additional management tool for replacing inmate idleness with constructive activity. Accordingly, each FPI factory location may provide a pre-industrial training program.

(a) Pre-industrial program trainees shall ordinarily begin at the entry level pay grade (grade 5). Positions for pre-industrial training programs are filled in the same manner as other grade five positions.

(b) Pre-industrial training is not a prerequisite for work placement if the inmate already possesses the needed skill.

(c) If pre-industrial training is available and the worker has not completed both the skill training and orientation phases of pre-industrial training, the

inmate should be put into the first available training class.

(d) When pre-industrial training is not available, new FPI assignees will receive on-the-job training in pre-industrial pay status for a period of at least 30 days before being promoted into available fourth grade jobs.

§ 345.82 Apprenticeship training.

FPI provides inmate workers with an opportunity to participate in apprenticeship training programs to the extent practicable. Such programs help prepare workers for post-release employment in a variety of trades. Apprentices are given related trades classroom instruction in addition to the skill training during work hours, where necessary.

§ 345.83 Job safety training.

FPI provides inmates with regular job safety training which is developed and scheduled in coordination with the institution Safety Manager. Participation in the training shall be documented in a safety training record signed by the inmate.

§ 345.84 The FPI scholarship fund.

FPI shall award post-secondary school scholarships to selected, qualified inmate workers. These scholarships provide an inmate with the opportunity to begin or continue with business and industry courses or vocational training as approved and deemed appropriate by the Supervisor of Education.

(a) *Eligibility requirements.* The SOI and the Supervisor of Education at each institution shall develop application procedures to include, at a minimum, the following criteria:

(1) The inmate shall be a full-time FPI worker.

(2) The inmate has a favorable recommendation for participation from his or her work supervisor.

(3) The inmate meets all relevant institution requirements for participation (e.g. disciplinary record, custody level).

(4) The inmate is accepted by the institution of higher learning offering the course or program which is requested.

(5) The inmate must maintain a verifiable average of ''C'' or better to continue program eligibility.

(6) Before beginning the course of study, the inmate must sign an agreement to provide the SOI with an unaltered, original copy of his or her grades.

(b) *Scholarship selection procedures.* FPI scholarship awards shall be made by a three member Selection Committee comprised of the SOI, the Supervisor of Education, and one other person designated by the SOI.

(c) *Scholarship program operation.* (1) Ordinarily, one scholarship may be awarded per school period for every fifty workers assigned. At least one scholarship may be awarded at each institution location, regardless of the number of inmates assigned.

(2) Individual scholarships ordinarily should not exceed the cost of tuition and books for one course. Where several courses may be taken for the same cost as one, the inmate worker may be allowed to take more than one course.

(3) Scholarship monies are to be paid only to the institution providing instruction, or to the Education Department for transfer of funds to the college, university, or technical institution providing instruction.

(4) An inmate may not receive more than one scholarship per school period.

(5) An inmate must maintain at least a ''C'' average to be continued as eligible for further assistance. An inmate earning less than ''C'' must wait one school period of eligibility before reapplying for further assistance. Where a course grade is based on a ''pass/fail'' system, the course must be ''passed'' to be eligible for further assistance.

(6) An inmate awarded a correspondence course must successfully complete the course during a school year (e.g., 2 semesters, 3 quarters).

(7) An inmate receiving scholarship aid must have approval from the SOI and the Supervisor of Education before withdrawing from classes for good reason. An inmate withdrawing or ''dropping'' courses without permission shall wait one school year before applying for further scholarship assistance. An inmate may withdraw from courses without penalty for medical or non-disciplinary administrative reasons such

as transfer, writ, release, etc., without first securing permission, although withdrawals for medical reasons must be certified in writing by the Hospital Administrator.

PARTS 346–399 [RESERVED]

CHAPTER V—BUREAU OF PRISONS, DEPARTMENT OF JUSTICE

SUBCHAPTER A—GENERAL MANAGEMENT AND ADMINISTRATION

Part		*Page*
500	General definitions	613
501	Scope of rules	613
503	Bureau of Prisons Central Office, regional offices, institutions, and staff training centers	616
505	Cost of incarceration fee	616
506	Inmate commissary account	617
511	General management policy	618
512	Research	620
513	Access to records	625

SUBCHAPTER B—INMATE ADMISSION, CLASSIFICATION, AND TRANSFER

522	Admission to institution	632
523	Computation of sentence	633
524	Classification of inmates	639
527	Transfers	645

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

540	Contact with persons in the community	650
541	Inmate discipline and special housing units	668
542	Administrative remedy	689
543	Legal matters	693
544	Education	698
545	Work and compensation	706
547	Food service	712
548	Religious programs	712
549	Medical services	715
550	Drug programs	725
551	Miscellaneous	730
552	Custody	741
553	Inmate property	747

SUBCHAPTER D—COMMUNITY PROGRAMS AND RELEASE

570	Community programs	752

Part		*Page*
571	Release from custody	757
572	Parole	764
573–599	[Reserved]	

SUBCHAPTER A—GENERAL MANAGEMENT AND ADMINISTRATION

PART 500—GENERAL DEFINITIONS

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

§ 500.1 Definitions.

As used in this chapter,

(a) The *Warden* means the chief executive officer of a U.S. Penitentiary, Federal Correctional Institution, Medical Center for Federal Prisoners, Federal Prison Camp, Federal Detention Center, Metropolitan Correctional Center, or any federal penal or correctional institution or facility. *Warden* also includes any staff member with authority explicitly delegated by any chief executive officer.

(b) *Staff* means any employee of the Bureau of Prisons or Federal Prison Industries, Inc.

(c) *Inmate* means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise.

(d) *Institution* means a U.S. Penitentiary, a Federal Correctional Institution, a Federal Prison Camp, a Federal Detention Center, a Metropolitan Correctional Center, a Metropolitan Detention Center, a U.S. Medical Center for Federal Prisoners, a Federal Medical Center, or a Federal Transportation Center.

(e) *Shall* means an obligation is imposed.

(f) *May* means a discretionary right, privilege, or power is conferred.

(g) *May not* means a prohibition is imposed.

(h) *Contraband* is material prohibited by law, or by regulation, or material which can reasonably be expected to cause physical injury or adversely affect the security, safety, or good order of the institution.

(i) *Qualified health personnel* includes physicians, dentists, and other professional and technical workers who engage in activities within their respective levels of health care training or experience which support, complement, or supplement the administration of health care.

[44 FR 38244, June 29, 1979, as amended at 48 FR 48969, Oct. 21, 1983; 56 FR 31530, July 10, 1991; 63 FR 55775, Oct. 16, 1998; 66 FR 55065, Oct. 31, 2001]

PART 501—SCOPE OF RULES

Sec.
501.1 Bureau of Prisons emergencies.
501.2 National security cases.
501.3 Prevention of acts of violence and terrorism.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

§ 501.1 Bureau of Prisons emergencies.

(a) *Suspension of rules during an emergency*. The Director of the Bureau of Prisons (Bureau) may suspend operation of the rules in this chapter as necessary to handle an institutional emergency or an emergency affecting the Bureau. When there is an institutional emergency which the Director or Warden considers a threat to human life or safety, the Director or Warden may suspend the operation of the rules in this chapter as necessary to handle the emergency.

(b) *Responsibilities of the Warden*—(1) *Notifying the Director*. If the Warden suspends operation of the rules, the Warden must, within 24 hours of the suspension or as soon as practicable, notify the Director by providing written documentation which:

(i) Describes the institutional emergency that threatens human life or safety;

(ii) Sets forth reasons why suspension of the rules is necessary to handle the institutional emergency;

(iii) Estimates how long suspension of the rules will last; and

(iv) Describes criteria which would allow normal rules application to resume.

(2) *Submitting certification to Director of continuing emergency.* 30 days after the Warden suspends operation of the rules, and every 30 days thereafter, the Warden must submit to the Director written certification that an institutional emergency threatening human life or safety and warranting suspension of the rules continues to exist. If the Warden does not submit this certification to the Director, or if the Director so orders at any time, the suspension of the rules will cease.

[70 FR 29191, May 20, 2005]

§ 501.2 National security cases.

(a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to prevent disclosure of classified information upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to prevent the disclosure of classified information. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's statement as to the basis may be limited in the interest of prison security or safety or national security. The inmate shall sign for and receive a copy of the notification.

(c) Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for a period of time as determined by the Director, Bureau of Prisons, up to one year. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in increments not to exceed one year, but only if the Attorney General receives from the head of a member agency of the United States intelligence community an additional written certification that, based on the information available to the agency, there is a danger that the inmate will disclose classified information and that the unauthorized disclosure of such information would pose a threat to the national security. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(d) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

(e) Other appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required may exercise the same authorities under this section as the Director of the Bureau of Prisons and the Warden.

[62 FR 33732, June 20, 1997, as amended at 66 FR 55065, Oct. 31, 2001]

§ 501.3 Prevention of acts of violence and terrorism.

(a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury. These procedures may be implemented upon written notification to the Director, Bureau of Prisons, by the Attorney General or, at the Attorney General's direction, by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that there is a

substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism. The inmate shall sign for and receive a copy of the notification.

(c) Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for up to 120 days or, with the approval of the Attorney General, a longer period of time not to exceed one year. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in increments not to exceed one year, upon receipt by the Director of an additional written notification from the Attorney General, or, at the Attorney General's direction, from the head of a federal law enforcement agency or the head of a member agency of the United States intelligence community, that there continues to be a substantial risk that the inmate's communications or contacts with other persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(d) In any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall, in addition to the special administrative measures imposed under paragraph (a) of this section, provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.

(1) The certification by the Attorney General under this paragraph (d) shall be in addition to any findings or determinations relating to the need for the imposition of other special administrative measures as provided in paragraph (a) of this section, but may be incorporated into the same document.

(2) Except in the case of prior court authorization, the Director, Bureau of Prisons, shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review under this paragraph (d). The notice shall explain:

(i) That, notwithstanding the provisions of part 540 of this chapter or other rules, all communications between the inmate and attorneys may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism;

(ii) That communications between the inmate and attorneys or their agents are not protected by the attorney-client privilege if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

(3) The Director, Bureau of Prisons, with the approval of the Assistant Attorney General for the Criminal Division, shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials (including, but not limited to, recordings of privileged communications) are not retained during the course of the monitoring. To protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a privilege team shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures designed to minimize the intrusion into privileged material or conversations. Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge.

(e) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

(f) Other appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required may exercise the same authorities under this section as the Director of the Bureau of Prisons and the Warden.

[62 FR 33732, June 20, 1997, as amended at 66 FR 55065, Oct. 31, 2001]

PART 503—BUREAU OF PRISONS CENTRAL OFFICE, REGIONAL OFFICES, INSTITUTIONS AND STAFF TRAINING CENTERS

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4003, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

SOURCE: 70 FR 67091, Nov. 4, 2005, unless otherwise noted.

§ 503.1 Structure of the Bureau of Prisons.

The Bureau of Prisons consists of a Central Office, located at 320 First Street, NW., Washington, DC 20534, a Staff Training Center, and six Regional Offices (Northeast, Mid-Atlantic, Southeast, North Central, South Central, and Western). For further information, please contact the Central Office at the address referenced, or visit *www.bop.gov* for a complete list of contact information for Bureau Regional Offices and facilities.

PART 505—COST OF INCARCERATION FEE

Sec.

505.1 Purpose and scope.
505.2 Annual determination of average cost of incarceration.
505.3 Inmates exempted from fee assessment.
505.4 Calculation of assessment by unit staff.
505.5 Waiver of fee by Warden.
505.6 Procedures for payment.
505.7 Procedures for final disposition.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 31 U.S.C. 3717; Pub. L. 102–395, 106 Stat. 1842 (18 U.S.C. 4001 note); 28 CFR 0.95–0.99.

SOURCE: 64 FR 43881, Aug. 11, 1999, unless otherwise noted.

§ 505.1 Purpose and scope.

This part establishes procedures for the assessment and collection of a fee to cover the cost of incarceration. The Director of the Bureau of Prisons has been delegated the authority of the Attorney General (see 28 CFR 0.96c) to assess and collect a fee imposed by the Bureau in the event the court neither imposes nor waives a fine pursuant to the Sentencing Guidelines 5E1.2(d). For purposes of this part, revocation of parole or supervised release is to be treated as a separate period of incarceration for which a fee may be imposed.

§ 505.2 Annual determination of average cost of incarceration.

Pursuant to 28 CFR 0.96c, the Bureau of Prisons staff is responsible for calculating the annual average cost of incarceration. This calculation is reviewed annually and the revised figure is published as a notice in the FEDERAL REGISTER.

§ 505.3 Inmates exempted from fee assessment.

Inmates who began service of sentence before January 1, 1995, or who have had a fine either imposed or expressly waived by the United States District Court, pursuant to Section 5E1.2 (e) of the United States Sentencing Guidelines, or any successor provisions, are exempt from fee assessment otherwise required by this part.

§ 505.4 Calculation of assessment by unit staff.

Bureau of Prisons Unit Team staff are responsible for computing the amount of the fee to be paid by each inmate who has not been exempted from fee assessment. The inmate will only be assessed an amount once for the cost of incarceration for each separate period of incarceration.

(a) Unit Team staff are to rely exclusively on the information contained in the Presentence Investigation Report and findings and orders of the sentencing court in order to determine the extent of an inmate's assets, liabilities and dependents.

(b) The fee is assessed in accordance with the following formula: If an inmate's assets are equal to or less than the poverty level, as established by the United States Department of Health and Human Services and published annually in the FEDERAL REGISTER, no fee is to be imposed. If an inmate's assets are above the poverty level, Unit Team staff are to impose a fee equal to the inmate's assets above the poverty level up to the average cost to the Bureau of Prisons of confining an inmate for one year.

(c) If the amount of time that the inmate is in custody is less than 334 days (including pretrial custody time), the maximum fee to be imposed is to be computed by prorating the fee on a monthly basis.

§ 505.5 Waiver of fee by Warden.

The Warden may reduce or waive the fee if the inmate establishes that:

(a) He or she is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fee, or

(b) Imposition of a fee would unduly burden the inmate's dependents.

§ 505.6 Procedures for payment.

Fees imposed pursuant to this part are due and payable after notice of the Unit Team actions. When the inmate participates in the inmate financial responsibility program (see 28 CFR part 545, subpart B), fees are to be included under the category ''other federal government obligations'' and are to be paid before other financial obligations included in that same category. Fees may be subject to interest charges.

§ 505.7 Procedures for final disposition.

Before the inmate completes his or her sentence, Unit Team staff must review the status of the inmate's fee. Any unpaid amount will be referred for collection in accordance with Federal Claims Collection Standards (4 CFR Chapter II).

PART 506—INMATE COMMISSARY ACCOUNT

Sec.

506.1 What is the purpose of individual inmate commissary accounts?
506.2 How may family, friends, or other sources deposit funds into an inmate commissary account?

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 31 U.S.C. 1321.

SOURCE: 69 FR 40317, July 2, 2004, unless otherwise noted.

§ 506.1 What is the purpose of individual inmate commissary accounts?

The purpose of individual inmate commissary accounts is to allow the Bureau to maintain inmates' monies while they are incarcerated. Family,

friends, or other sources may deposit funds into these accounts.

§ 506.2 How may family, friends, or other sources deposit funds into an inmate commissary account?

(a) *Family and friends* must mail deposits to the centralized inmate commissary account at the address we provide.

(1) The deposit envelope must not contain any enclosures intended for delivery to the inmate. We may dispose of any enclosure.

(2) The deposit must be in the form of a money order made out to the inmate's full name and complete register number. We will return checks to the sender provided the check contains an adequate return address.

(b) *Other sources*, (such as tax refunds, dividends from stocks, or state benefits) must be forwarded for deposit to the centralized inmate commissary account.

PART 511—GENERAL MANAGEMENT POLICY

Subpart A [Reserved]

Subpart B—Searching and Detaining or Arresting Persons Other Than Inmates

Sec.
511.10 Purpose and scope.
511.11 Prohibited activities.
511.12 Prohibited objects.
511.13 Searches before entering, or while inside, a Bureau facility or Bureau grounds.
511.14 Notification of possible search.
511.15 When searches will be conducted.
511.16 How searches will be conducted.
511.17 When a non-inmate will be denied entry to or required to leave a Bureau facility or Bureau grounds.
511.18 When Bureau staff can arrest and detain a non-inmate.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 751, 752, 1791, 1792, 1793, 3050, 3621, 3622, 3624, 4001, 4012, 4042, 4081, 4082 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

SOURCE: 49 FR 44057, Nov. 1, 1984, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Searching and Detaining or Arresting Non-Inmates

SOURCE: 72 FR 31180, June 6, 2007, unless otherwise noted.

§ 511.10 Purpose and scope.

(a) This subpart facilitates our legal obligations to ensure the safety, security, and orderly operation of Bureau of Prisons (Bureau) facilities, and protect the public. These goals are furthered by carefully managing non-inmates, the objects they bring, and their activities, while inside a Bureau facility or upon the grounds of any Bureau facility (Bureau grounds).

(b) *Purpose*. This subpart covers:

(1) Searching non-inmates and their belongings (for example, bags, boxes, vehicles, containers in vehicles, jackets or coats, etc.) to prevent prohibited objects from entering a Bureau facility or Bureau grounds;

(2) Authorizing, denying, and/or terminating a non-inmate's presence inside a Bureau facility or upon Bureau grounds; and

(3) Authorizing Bureau staff to remove from inside a Bureau facility or upon Bureau grounds, and possibly arrest and detain, non-inmates suspected of engaging in prohibited activity.

(c) *Scope/Application*. This subpart applies to all persons who wish to enter, or are present inside a Bureau facility or upon Bureau grounds, other than inmates in Bureau custody. This subpart applies at all Bureau facilities and Bureau grounds, including administrative offices.

§ 511.11 Prohibited activities.

(a) ''Prohibited activities'' include any activities that could jeopardize the Bureau's ability to ensure the safety, security, and orderly operation of Bureau facilities, and protect the public, whether or not such activities are criminal in nature.

(b) Examples of ''prohibited activities'' include, but are not limited to: Introducing, or attempting to introduce, prohibited objects into a Bureau facility or upon Bureau grounds; assisting an escape; and any other conduct that violates criminal laws or is prohibited by federal regulations or Bureau policies.

§511.12 Prohibited objects.

(a) ''Prohibited objects,'' as defined in 18 U.S.C. 1791(d)(1), include any objects that could jeopardize the Bureau's ability to ensure the safety, security, and orderly operation of Bureau facilities, and protect the public.

(b) Examples of ''prohibited objects'' include, but are not limited to, the following items and their related paraphernalia: Weapons; explosives; drugs; intoxicants; currency; cameras of any type; recording equipment; telephones; radios; pagers; electronic devices; and any other objects that violate criminal laws or are prohibited by Federal regulations or Bureau policies.

§511.13 Searches before entering, or while inside, a Bureau facility or Bureau grounds.

Bureau staff may search you and your belongings (for example, bags, boxes, vehicles, containers in vehicles, jackets or coats, etc.) before entering, or while inside, any Bureau facilities or Bureau grounds, to keep out prohibited objects.

§511.14 Notification of possible search.

We display conspicuous notices at the entrance to all Bureau facilities, informing all non-inmates that they, and their belongings, are subject to search before entering, or while inside, Bureau facilities or grounds. Furthermore, these regulations and Bureau national and local policies provide additional notice that you and your belongings may be searched before entering, or while inside, Bureau facilities or grounds. By entering or attempting to enter a Bureau facility or Bureau grounds, non-inmates consent to being searched in accordance with these regulations and Bureau policy.

§511.15 When searches will be conducted.

You and your belongings may be searched, either randomly or based on reasonable suspicion, before entering, or while inside, a Bureau facility or Bureau grounds, as follows:

(a) *Random Searches*. This type of search may occur at any time, and is not based on any particular suspicion that a non-inmate is attempting to bring a prohibited object into a Bureau facility or Bureau grounds.

(1) Random searches must be impartial and not discriminate among non-inmates on the basis of age, race, religion, national origin, or sex.

(2) Non-inmates will be given the option of either consenting to random searches as a condition of entry, or refusing such searches and leaving Bureau grounds. However, if a non-inmate refuses to submit to a random search and expresses an intent to leave Bureau grounds, he or she may still be required to be searched if ''reasonable suspicion'' exists as described in paragraph (b) of this section.

(b) *Reasonable Suspicion Searches*. Notwithstanding staff authority to conduct random searches, staff may also conduct *reasonable suspicion* searches to ensure the safety, security, and orderly operation of Bureau facilities, and protect the public. ''Reasonable suspicion'' exists if a staff member knows of facts and circumstances that warrant rational inferences by a person with correctional experience that a non-inmate may be engaged in, attempting, or about to engage in, criminal or other prohibited activity.

§511.16 How searches will be conducted.

You may be searched by any of the following methods before entering, or while inside, a Bureau facility or Bureau grounds:

(a) *Electronically*. (1) You and your belongings may be electronically searched for the presence of contraband, either randomly or upon reasonable suspicion.

(2) Examples of electronic searches include, but are not limited to, metal detectors and ion spectrometry devices.

(b) *Pat Search*. (1) You and your belongings may be pat searched either randomly or upon reasonable suspicion.

(2) A pat search of your person or belongings involves a staff member pressing his/her hands on your outer clothing, or the outer surface of your belongings, to determine whether prohibited objects are present.

(3) Whenever possible, pat searches of your person will be performed by staff members of the same sex. Pat searches

may be conducted by staff members of the opposite sex only in emergency situations with the Warden's authorization.

(c) *Visual Search*. You and your belongings may be visually searched as follows:

(1) *Person*. (i) A visual search of your person involves removing all articles of clothing, including religious headwear, to allow a visual (non-tactile) inspection of your body surfaces and cavities.

(ii) Visual searches of your person must always be authorized by the Warden or his/her designee and based on reasonable suspicion; random visual searches are prohibited.

(iii) When authorized, visual searches will be performed discreetly, in a private area away from others, and by staff members of the same sex as the non-inmate being searched. Visual searches may be conducted by staff members of the opposite sex in emergency situations with the Warden's authorization.

(iv) Body cavity (tactile) searches of non-inmates are prohibited.

(2) *Belongings*. A visual search of your belongings involves opening and exposing all contents for visual and manual inspection, and may be done either as part of a random search or with reasonable suspicion.

(d) *Drug Testing*. (1) You may be tested for use of intoxicating substances by any currently reliable testing method, including, but not limited to, breathalyzers and urinalysis.

(2) Drug testing must always be authorized by the Warden or his/her designee and must be based on reasonable suspicion that you are under the influence of an intoxicating substance upon entering, or while inside, a Bureau facility or Bureau grounds.

(3) Searches of this type will always be performed discreetly, in a private area away from others, and by staff members adequately trained to perform the test. Whenever possible, urinalysis tests will be conducted by staff members of the same sex as the non-inmate being tested. Urinalysis tests may be conducted by staff members of the opposite sex only in emergency situations with the Warden's authorization.

§ 511.17 When a non-inmate will be denied entry to or required to leave a Bureau facility or Bureau grounds.

At the Warden's, or his/her designee's, discretion, and based on this subpart, you may be denied entry to, or required to leave, a Bureau facility or Bureau grounds if:

(a) You refuse to be searched under this subpart; or

(b) There is reasonable suspicion that you may be engaged in, attempting, or about to engage in, prohibited activity that jeopardizes the Bureau's ability to ensure the safety, security, and orderly operation of its facilities, or protect the public. ''Reasonable suspicion,'' for this purpose, may be based on the results of a search conducted under this subpart, or any other reliable information.

§ 511.18 When Bureau staff can arrest and detain a non-inmate.

(a) You may be arrested and detained by Bureau staff anytime there is probable cause indicating that you have violated or attempted to violate applicable criminal laws while at a Bureau facility, as authorized by 18 U.S.C. 3050.

(b) ''Probable cause'' exists when specific facts and circumstances lead a reasonably cautious person (not necessarily a law enforcement officer) to believe a violation of criminal law has occurred, and warrants consideration for prosecution.

(c) Non-inmates arrested by Bureau staff under this regulation will be physically secured, using minimally necessary force and restraints, in a private area of the facility away from others. Appropriate law enforcement will be immediately summoned to investigate the incident, secure evidence, and commence criminal prosecution.

PART 512—RESEARCH

Subpart A [Reserved]

Subpart B—Research

Sec.

512.10 Purpose and scope.
512.11 Requirements for research projects and researchers.
512.12 Content of research proposal.
512.13 Institutional Review Board.

512.14 Submission and processing of proposal.
512.15 Access to Bureau of Prisons records.
512.16 Informed consent.
512.17 Monitoring approved research projects.
512.18 Termination or suspension.
512.19 Reports.
512.20 Publication of results of research project.
512.21 Copyright provisions.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

Subpart A [Reserved]

Subpart B—Research

SOURCE: 59 FR 13860, Mar. 23, 1994, unless otherwise noted.

§512.10 Purpose and scope.

General provisions for the protection of human subjects during the conduct of research are contained in 28 CFR part 46. The provisions of this subpart B specify additional requirements for prospective researchers (both employees and non-employees) to obtain approval to conduct research within the Bureau of Prisons (Bureau) and responsibilities of Bureau staff in processing proposals and monitoring research projects. Although some research may be exempt from 28 CFR part 46 under §46.101(b)(5), as determined by the Office of Research and Evaluation (ORE) of the Bureau, no research is exempt from 28 CFR part 512. For the purpose of this subpart, implementation of Bureau programmatic or operational initiatives made through pilot projects is not considered to be research.

[59 FR 13860, Mar. 23, 1994, as amended at 62 FR 6661, Feb. 12, 1997]

§512.11 Requirements for research projects and researchers.

(a) Except as provided for in paragraph (b) of this section, the Bureau requires the following:

(1) In all research projects the rights, health, and human dignity of individuals involved must be respected.

(2) The project must have an adequate research design and contribute to the advancement of knowledge about corrections.

(3) The project must not involve medical experimentation, cosmetic research, or pharmaceutical testing.

(4) The project must minimize risk to subjects; risks to subjects must be reasonable in relation to anticipated benefits. The selection of subjects within any one institution must be equitable. When applicable, informed consent must be sought and documented (see §§512.15 and 512.16).

(5) Incentives may not be offered to help persuade inmate subjects to participate. However, soft drinks and snacks to be consumed at the test setting may be offered. Reasonable accommodations such as nominal monetary recompense for time and effort may be offered to non-confined research subjects who are both:

(i) No longer in Bureau of Prisons custody, and

(ii) Participating in authorized research being conducted by Bureau employees or contractors.

(6) The researcher must have academic preparation or experience in the area of study of the proposed research.

(7) The researcher must assume responsibility for actions of any person engaged to participate in the research project as an associate, assistant, or subcontractor to the researcher.

(8) Except as noted in the informed consent statement to the subject, the researcher must not provide research information which identifies a subject to any person without that subject's prior written consent to release the information. For example, research information identifiable to a particular individual cannot be admitted as evidence or used for any purpose in any action, suit or other judicial, administrative, or legislative proceeding without the written consent of the individual to whom the data pertains.

(9) The researcher must adhere to applicable provisions of the Privacy Act of 1974 and regulations pursuant to this Act.

(10) The research design must be compatible with both the operation of prison facilities and protection of human subjects. The researcher must observe the rules of the institution or

office in which the research is conducted.

(11) Any researcher who is a non-employee of the Bureau must sign a statement in which the researcher agrees to adhere to the provisions of this subpart.

(12) Except for computerized data records maintained at an official Department of Justice site, records which contain nondisclosable information directly traceable to a specific person may not be stored in, or introduced into, an electronic retrieval system.

(13) If the researcher is conducting a study of special interest to the Office of Research and Evaluation (ORE), but the study is not a joint project involving ORE, the researcher may be asked to provide ORE with the computerized research data, not identifiable to individual subjects, accompanied by detailed documentation. These arrangements must be negotiated prior to the beginning of the data collection phase of the project.

(14) The researcher must submit planned methodological changes in a research project to the IRB for approval, and may be required to revise study procedures in accordance with the new methodology.

(b) Requests from Federal agencies, the Congress, the Federal judiciary, or State or local governments to collect information about areas for which they are responsible and requests by private organizations for organizational rather than personal information from Bureau staff shall be reviewed by ORE to determine which provisions of this subpart may be waived without jeopardizing the safety of human subjects. ORE shall document in writing the waiver of any specific provision along with the justification.

[62 FR 6661, Feb. 12, 1997]

§ 512.12 Content of research proposal.

When submitting a research proposal, the applicant shall provide the following information:

(a) A summary statement which includes:

(1) Name(s) and current affiliation(s) of the researcher(s);

(2) Title of the study;

(3) Purpose of the project;

(4) Location of the project;

(5) Methods to be employed;

(6) Anticipated results;

(7) Duration of the study;

(8) Number of subjects (staff/inmates) required and amount of time required from each; and

(9) Indication of risk or discomfort involved as a result of participation.

(b) A comprehensive statement which includes:

(1) Review of related literature;

(2) Detailed description of the research method;

(3) Significance of anticipated results and their contribution to the advancement of knowledge;

(4) Specific resources required from the Bureau;

(5) Description of all possible risks, discomforts, and benefits to individual subjects or a class of subjects, and a discussion of the likelihood that the risks and discomforts will actually occur;

(6) Description of steps taken to minimize any risks described in (b)(5) of this section.

(7) Description of physical and/or administrative procedures to be followed to:

(i) Ensure the security of any individually identifiable data that are being collected for the project, and

(ii) Destroy research records or remove individual identifiers from those records when the research has been completed.

(8) Description of any anticipated effects of the research project on institutional programs and operations; and

(9) Relevant research materials such as vitae, endorsements, sample informed consent statements, questionnaires, and interview schedules.

(c) A statement regarding assurances and certification required by 28 CFR part 46, if applicable.

§ 512.13 Institutional Review Board.

(a) The Bureau of Prisons' central institutional review board shall be called the Bureau Research Review Board (BRRB). It shall consist of the Chief, ORE, at least four other members, and one alternate, appointed by the Director, and shall meet a sufficient number of times to insure that each project covered by 28 CFR part 46 receives an annual review. A majority of members

shall not be Bureau employees. The BRRB shall include an individual with legal expertise and a representative for inmates whom the Director determines is able to identify with inmate concerns and evaluate objectively a research proposal's impact on, and relevance to, inmates and to the correctional process.

(b) The Chief, ORE, shall serve as chairperson of the BRRB. If a potential conflict of interest exists for the BRRB chairperson on a particular research proposal, the Assistant Director, Information, Policy, and Public Affairs Division, shall appoint another individual to serve as chairperson on matters pertaining to that project.

§ 512.14 Submission and processing of proposal.

(a) An applicant may submit a preliminary research proposal for review by the Office of Research and Evaluation, Federal Bureau of Prisons, 320 First Street, NW., Washington, DC 20534. Staff response to the preliminary proposal does not constitute a final decision.

(b) If the study is to be conducted at only one institution, the applicant shall submit a formal proposal to the warden of that institution. Proposal processing will be as follows:

(1) The warden shall appoint a local research review board to consult with operational staff, to evaluate the proposal for compliance with research policy, and to make recommendations to the warden. The local research review board is encouraged, but not required, to meet the membership requirements of an IRB, as specified in 28 CFR part 46.

(2) The warden shall review the comments of the board, make a recommendation regarding the proposal, and forward the proposal package to the Regional Director, with a copy to the Chief, ORE.

(3) The Regional Director shall review the proposal and forward recommendations to the Chief, ORE.

(c) If the study is to be conducted at more than one institution or at any other Bureau location, the applicant shall submit the research proposal to the Chief, Office of Research and Evaluation, Federal Bureau of Prisons, 320 First Street, NW., Washington, DC 20534. The Chief, ORE, shall determine an appropriate review process.

(d) All formal proposals will be reviewed by the BRRB.

(e) The BRRB chairperson may exercise the authority of the full BRRB under an expedited review process when another official IRB (either within or outside the Bureau) has approved the research, or when, in his/her judgment, the research proposal meets the minimal risk standard and involves only the following:

(1) The study of existing data, documents, or records; and/or

(2) The study of individual or group behavior or characteristics of individuals, where the investigator does not manipulate subjects' behavior and the research will not involve stress to subjects. Such research would include test development and studies of perception, cognition, or game theory. If a proposal is processed under expedited review, the BRRB chairperson must document in writing the reason for that determination.

(f) The Chief, ORE, shall review all recommendations made and shall submit them in writing to the Director, Bureau of Prisons.

(g) The Director, Bureau of Prisons, has final authority to approve or disapprove all research proposals. The Director may delegate this authority to the Assistant Director, Information, Policy, and Public Affairs Division.

(h) The approving authority shall notify in writing the involved region(s), institution(s), and the prospective researcher of the final decision on a research proposal.

[59 FR 13860, Mar. 23, 1994, as amended at 62 FR 6661, Feb. 12, 1997]

§ 512.15 Access to Bureau of Prisons records.

(a) Employees, including consultants, of the Bureau who are conducting authorized research projects shall have access to those records relating to the subject which are necessary to the purpose of the research project without having to obtain the subject's consent.

(b) A non-employee of the Bureau is limited in access to information available under the Freedom of Information Act (5 U.S.C. 552).

(c) A non-employee of the Bureau may receive records in a form not individually identifiable when advance adequate written assurance that the record will be used solely as a statistical research or reporting record is provided to the agency (5 U.S.C. 552a(b)(5)).

§ 512.16 Informed consent.

(a) Before commencing a research project requiring participation by staff or inmates, the researcher shall give each participant a written informed consent statement containing the following information:

(1) Identification of the principal investigator(s);

(2) Objectives of the research project;

(3) Procedures to be followed in the conduct of research;

(4) Purpose of each procedure;

(5) Anticipated uses of the results of the research;

(6) A statement of benefits reasonably to be expected;

(7) A declaration concerning discomfort and risk, including a description of anticipated discomfort and risk;

(8) A statement that participation is completely voluntary and that the participant may withdraw consent and end participation in the project at any time without penalty or prejudice (the inmate will be returned to regular assignment or activity by staff as soon as practicable);

(9) A statement regarding the confidentiality of the research information and exceptions to any guarantees of confidentiality required by federal or state law. For example, a researcher may not guarantee confidentiality when the subject indicates an intent to commit future criminal conduct or harm himself/herself or someone else, or, if the subject is an inmate, indicates an intent to leave the facility without authorization.

(10) A statement that participation in the research project will have no effect on the inmate participant's release date or parole eligibility;

(11) An offer to answer questions about the research project; and

(12) Appropriate additional information as needed to describe adequately the nature and risks of the research.

(b) A researcher who is an employee of the Bureau shall include in the informed consent statement a declaration of the authority under which the research is conducted.

(c) A researcher who is an employee of the Bureau, in addition to presenting the statement of informed consent to the subject, shall also obtain the subject's signature on the statement of informed consent, when:

(1) The subject's activity requires something other than response to a questionnaire or interview; or

(2) The Chief, ORE, determines the research project or data-collection instrument is of a sensitive nature.

(d) A researcher who is a non-employee of the Bureau, in addition to presenting the statement of informed consent to the subject, shall also obtain the subject's signature on the statement of informed consent prior to initiating the research activity. The researcher may not be required to obtain the signature if the researcher can demonstrate that the only link to the subject's identity is the signed statement of informed consent or that there is significantly more risk to the subject if the statement is signed. The signed statement shall be submitted to the chairperson of the appropriate local research review board.

§ 512.17 Monitoring approved research projects.

The BRRB shall monitor all research projects for compliance with Bureau policies. At a minimum, yearly reviews will be conducted.

§ 512.18 Termination or suspension.

The Director, Bureau of Prisons, may suspend or terminate a research project if it is believed that the project violates research policy or that its continuation may prove detrimental to the inmate population, the staff, or the orderly operation of the institution.

§ 512.19 Reports.

The researcher shall prepare reports of progress on the research and at least one report of findings.

(a) At least once a year, the researcher shall provide the Chief, ORE, with a report on the progress of the research.

(b) At least 12 working days before any report of findings is to be released, the researcher shall distribute one copy of the report to each of the following: the chairperson of the BRRB, the regional director, and the warden of each institution which provided data or assistance. The researcher shall include an abstract in the report of findings.

§ 512.20 Publication of results of research project.

(a) A researcher may publish in book form and professional journals the results of any research project conducted under this subpart.

(1) In any publication of results, the researcher shall acknowledge the Bureau's participation in the research project.

(2) The researcher shall expressly disclaim approval or endorsement of the published material as an expression of the policies or views of the Bureau.

(b) Prior to submitting for publication the results of a research project conducted under this subpart, the researcher shall provide two copies of the material, for informational purposes only, to the Chief, Office of Research and Evaluation, Central Office, Bureau of Prisons.

[59 FR 13860, Mar. 23, 1994, as amended at 62 FR 6662, Feb. 12, 1997]

§ 512.21 Copyright provisions.

(a) An employee of the Bureau may not copyright any work prepared as part of his/her official duties.

(b) As a precondition to the conduct of research under this subpart, a non-employee shall grant in writing to the Bureau a royalty-free, non-exclusive, and irrevocable license to reproduce, publish, translate, and otherwise use and authorize others to publish and use original materials developed as a result of research conducted under this subpart.

(c) Subject to a royalty-free, non-exclusive and irrevocable license, which the Bureau of Prisons reserves, to reproduce, publish, translate, and otherwise use and authorize others to publish and use such materials, a non-employee may copyright original materials developed as a result of research conducted under this subpart.

[59 FR 13860, Mar. 23, 1994, as amended at 62 FR 6662, Feb. 12, 1997]

PART 513—ACCESS TO RECORDS

Subpart A [Reserved]

Subpart B—Production or Disclosure of FBI/NCIC Information

Sec.
513.10 Purpose and scope.
513.11 Procedures for requesting a FBI identification record or a NCIC/III record.
513.12 Inmate request for record clarification.

Subpart C—Release of Information to Law Enforcement Agencies

513.20 Release of information to law enforcement agencies.

Subpart D—Release of Information

GENERAL PROVISIONS AND PROCEDURES

513.30 Purpose and scope.
513.31 Limitations.
513.32 Guidelines for disclosure.
513.33 Production of records in court.
513.34 Protection of individual privacy—disclosure of records to third parties.
513.35 Accounting/nonaccounting of disclosures to third parties.
513.36 Government contractors.

INMATE REQUESTS TO INSTITUTION FOR INFORMATION

513.40 Inmate access to Inmate Central File.
513.41 Inmate access to Inmate Central File in connection with parole hearings.
513.42 Inmate access to medical records.
513.43 Inmate access to certain Bureau Program Statements.
513.44 Fees for copies of Inmate Central File and Medical Records.

PRIVACY ACT REQUESTS FOR INFORMATION

513.50 Privacy Act requests by inmates.

FREEDOM OF INFORMATION ACT REQUESTS FOR INFORMATION

513.60 Freedom of Information Act requests.
513.61 Freedom of Information Act requests by inmates.
513.62 Freedom of Information Act requests by former inmates.
513.63 Freedom of Information Act requests on behalf of an inmate or former inmate.
513.64 Acknowledgment of Freedom of Information Act requests.
513.65 Review of documents for Freedom of Information Act requests.

513.66 Denials and appeals of Freedom of Information Act requests.
513.67 Fees for Freedom of Information Act requests.
513.68 Time limits for responses to Freedom of Information Act requests.

AUTHORITY: 5 U.S.C. 301, 552, 552a; 13 U.S.C.; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to conduct occurring on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 31 U.S.C. 3711(f); 5 CFR part 297; 28 CFR 0.95–0.99 and parts 16 and 301.

SOURCE: 45 FR 44228, June 30, 1980, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Production or Disclosure of FBI/NCIC Information

SOURCE: 58 FR 68765, Dec. 29, 1993, unless otherwise noted.

§ 513.10 Purpose and scope.

This subpart describes the procedures to be followed by an inmate who requests a copy of his or her FBI identification record or National Crime Information Center Interstate Identification Index (NCIC/III) record and references the procedures to follow in order to challenge the contents of such record.

§ 513.11 Procedures for requesting a FBI identification record or a NCIC/III record.

(a) *FBI identification record.* (1) An inmate may request a copy of his or her current FBI identification record directly from the FBI by following the procedure outlined in 28 CFR 16.30 through 16.34.

(i) Bureau of Prisons staff shall assist the inmate to obtain the fingerprint impressions required to be submitted with such an application.

(ii) The inmate may direct that funds be withdrawn from his or her institution account to pay the applicable fee.

(2) An inmate may request a copy of his or her FBI identification record from institution staff.

(i) If the requested FBI identification record is in the inmate's institution file, staff shall provide the inmate with a copy.

(ii) If the requested FBI identification record is not in the inmate's institution file, staff shall direct the inmate to the procedure referenced in paragraph (a)(1) of this section.

(b) *NCIC/III identification record.* An inmate who wishes to obtain a copy of his or her NCIC/III record must submit a written request to the FBI. The procedures outlined in 28 CFR 16.32, 16.33, and paragraphs (a)(1)(i) and (ii) of this section apply to such request.

§ 513.12 Inmate request for record clarification.

Where the inmate believes that his or her FBI identification record is incorrect or inaccurate, the inmate may follow procedures outlined in 28 CFR 16.34. The procedures in 28 CFR 16.34 also apply for the clarification of an inmate's NCIC/III record.

Subpart C—Release of Information to Law Enforcement Agencies

§ 513.20 Release of information to law enforcement agencies.

(a) The Bureau of Prisons will provide to the head of any law enforcement agency of a state or of a unit of local government in a state information on federal prisoners who have been convicted of felony offenses and who are confined at a residential community treatment center located in the geographical area in which the requesting agency has jurisdiction. Law enforcement personnel interested in obtaining this information must forward a written request to the appropriate Regional Community Programs Administrator (see 28 CFR part 503 for the mailing address). The type of information that the Bureau of Prisons may provide is set forth in 18 U.S.C. 4082(f). That information includes: names, dates of birth, FBI numbers, nature of the offenses against the United States, fingerprints, photographs, and the designated community treatment centers, with prospective dates of release.

(b) Any law enforcement agency which receives information under this rule may not disseminate such information outside of such agency. If an agency disseminates information contrary to this restriction, the Bureau of

Prisons may terminate or suspend release of information to that agency.

[53 FR 15538, Apr. 29, 1988]

Subpart D—Release of Information

SOURCE: 61 FR 64950, Dec. 9, 1996, unless otherwise noted.

GENERAL PROVISIONS AND PROCEDURES

§ 513.30 Purpose and scope.

This subpart establishes procedures for the release of requested records in possession of the Federal Bureau of Prisons (''Bureau''). It is intended to implement provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a, and to supplement Department of Justice (DOJ) regulations concerning the production or disclosure of records or information, 28 CFR part 16.

§ 513.31 Limitations.

(a) *Social Security Numbers.* As of September 27, 1975, Social Security Numbers may not be used in their entirety as a method of identification for any Bureau record system, unless such use is authorized by statute or by regulation adopted prior to January 1, 1975.

(b) *Employee records.* Access and amendment of employee personnel records under the Privacy Act are governed by Office of Personnel Management regulations published in 5 CFR part 297 and by Department of Justice regulations published in 28 CFR part 16.

§ 513.32 Guidelines for disclosure.

The Bureau provides for the disclosure of agency information pursuant to applicable laws, e.g. the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a).

§ 513.33 Production of records in court.

Bureau records are often sought by subpoena, court order, or other court demand, in connection with court proceedings. The Attorney General has directed that these records may not be produced in court without the approval of the Attorney General or his or her designee. The guidelines are set forth in 28 CFR part 16, subpart B.

§ 513.34 Protection of individual privacy—disclosure of records to third parties.

(a) Information that concerns an individual and is contained in a system of records maintained by the Bureau shall not be disclosed to any person, or to another agency except under the provisions of the Privacy Act, 5 U.S.C. 552a, the Freedom of Information Act, 5 U.S.C. 552, and Departmental regulations.

(b) Lists of Bureau inmates shall not be disclosed.

§ 513.35 Accounting/nonaccounting of disclosures to third parties.

Accounting/nonaccounting of disclosures to third parties shall be made in accordance with Department of Justice regulations contained in 28 CFR 16.52.

§ 513.36 Government contractors.

(a) No Bureau component may contract for the operation of a record system by or on behalf of the Bureau without the express written approval of the Director or the Director's designee.

(b) Any contract which is approved shall contain the standard contract requirements promulgated by the General Services Administration (GSA) to ensure compliance with the requirements imposed by the Privacy Act. The contracting component shall have the responsibility to ensure that the contractor complies with the contract requirements relating to privacy.

INMATE REQUESTS TO INSTITUTION FOR INFORMATION

§ 513.40 Inmate access to Inmate Central File.

Inmates are encouraged to use the simple access procedures described in this section to review disclosable records maintained in his or her Inmate Central File, rather than the FOIA procedures described in §§ 513.60 through 513.68 of this subpart. Disclosable records in the Inmate Central File include, but are not limited to, documents relating to the inmate's

sentence, detainer, participation in Bureau programs such as the Inmate Financial Responsibility Program, classification data, parole information, mail, visits, property, conduct, work, release processing, and general correspondence. This information is available without filing a FOIA request. If any information is withheld from the inmate, staff will provide the inmate with a general description of that information and also will notify the inmate that he or she may file a FOIA request.

(a) *Inmate review of his or her Inmate Central File.* An inmate may at any time request to review all disclosable portions of his or her Inmate Central File by submitting a request to a staff member designated by the Warden. Staff are to acknowledge the request and schedule the inmate, as promptly as is practical, for a review of the file at a time which will not disrupt institution operations.

(b) *Procedures for inmate review of his or her Inmate Central File.* (1) Prior to the inmate's review of the file, staff are to remove the Privacy Folder which contains documents withheld from disclosure pursuant to § 513.32.

(2) During the file review, the inmate is to be under direct and constant supervision by staff. The staff member monitoring the review shall enter the date of the inmate's file review on the Inmate Activity Record and initial the entry. Staff shall ask the inmate to initial the entry also, and if the inmate refuses to do so, shall enter a notation to that effect.

(3) Staff shall advise the inmate if there are documents withheld from disclosure and, if so, shall advise the inmate of the inmate's right under the provisions of § 513.61 to make a FOIA request for the withheld documents.

§ 513.41 Inmate access to Inmate Central File in connection with parole hearings.

A parole-eligible inmate (an inmate who is currently serving a sentence for an offense committed prior to November 1, 1987) may review disclosable portions of the Inmate Central File prior to the inmate's parole hearing, under the general procedures set forth in § 513.40. In addition, the following guidelines apply:

(a) A parole-eligible inmate may request to review his or her Inmate Central File by submitting the appropriate Parole Commission form. This form ordinarily shall be available to each eligible inmate within five work days after a list of eligible inmates is prepared.

(b) Bureau staff ordinarily shall schedule an eligible inmate for a requested Inmate Central File review within seven work days of the request after the inmate has been scheduled for a parole hearing. A reasonable extension of time is permitted for documents which have been provided (prior to the inmate's request) to originating agencies for clearance, or which are otherwise not available at the institution.

(c) A report received from another agency which is determined to be nondisclosable (see § 513.40(b)) will be summarized by that agency, in accordance with Parole Commission regulations. Bureau staff shall place the summary in the appropriate disclosable section of the Inmate Central File. The original report (or portion which is summarized in another document) will be placed in the portion of the Privacy File for Joint Use by the Bureau and the Parole Commission.

(d) Bureau documents which are determined to be nondisclosable to the inmate will be summarized for the inmate's review. A copy of the summary will be placed in the disclosable section of the Inmate Central File. The document from which the summary is taken will be placed in the Joint Use Section of the Privacy Folder. Nondisclosable documents not summarized for the inmate's review are not available to the Parole Commission and are placed in a nondisclosable section of the Inmate Central File.

(e) When no response regarding disclosure has been received from an originating agency in time for inmate review prior to the parole hearing, Bureau staff are to inform the Parole Commission Hearing Examiner.

§ 513.42 Inmate access to medical records.

(a) Except for the limitations of paragraphs (c) and (d) of this section, an inmate may review records from his or her medical file (including dental records) by submitting a request to a staff member designated by the Warden.

(b) Laboratory reports which contain only scientific testing results and which contain no staff evaluation or opinion (such as Standard Form 514A, Urinalysis) are ordinarily disclosable. Lab results of HIV testing may be reviewed by the inmate. However, an inmate may not retain a copy of his or her test results while the inmate is confined in a Bureau facility or a Community Corrections Center. A copy of an inmate's HIV test results may be forwarded to a third party outside the institution and chosen by the inmate, provided that the inmate gives written authorization for the disclosure.

(c) Medical records containing subjective evaluations and opinions of medical staff relating to the inmate's care and treatment will be provided to the inmate only after the staff review required by paragraph (d) of this section. These records include, but are not limited to, outpatient notes, consultation reports, narrative summaries or reports by a specialist, operative reports by the physician, summaries by specialists as the result of laboratory analysis, or in-patient progress reports.

(d) Prior to release to the inmate, records described in paragraph (c) of this section shall be reviewed by staff to determine if the release of this information would present a harm to either the inmate or other individuals. Any records determined not to present a harm will be released to the inmate at the conclusion of the review by staff. If any records are determined by staff not to be releasable based upon the presence of harm, the inmate will be so advised in writing and provided the address of the agency component to which the inmate may address a formal request for the withheld records. An accounting of any medical records will be maintained in the inmate's medical file.

§ 513.43 Inmate access to certain Bureau Program Statements.

Inmates are encouraged to use the simple local access procedures described in this section to review certain Bureau Program Statements, rather than the FOIA procedures described in §§ 513.60 through 513.68 of this subpart.

(a) For a current Bureau Program Statement containing rules (regulations published in the FEDERAL REGISTER and codified in 28 CFR), local access is available through the institution law library.

(b) For a current Bureau Program Statement not containing rules (regulations published in the FEDERAL REGISTER and codified in 28 CFR), inmates may request that it be placed in the institution law library. Placement of a requested Program Statement in the law library is within the discretion of the Warden, based upon local institution conditions.

(c) Inmates are responsible for the costs of making personal copies of any Program Statements maintained in the institution law library. For copies of Program Statements obtained under the FOIA procedures described in §§ 513.60 through 513.68 of this subpart, fees will be calculated in accordance with 28 CFR 16.10.

§ 513.44 Fees for copies of Inmate Central File and Medical Records.

Within a reasonable time after a request, Bureau staff are to provide an inmate personal copies of requested disclosable documents maintained in the Inmate Central File and Medical Record. Fees for the copies are to be calculated in accordance with 28 CFR 16.10.

PRIVACY ACT REQUESTS FOR INFORMATION

§ 513.50 Privacy Act requests by inmates.

Because inmate records are exempt from disclosure under the Privacy Act (see 28 CFR 16.97), inmate requests for records under the Privacy Act will be processed in accordance with the FOIA. See §§ 513.61 through 513.68.

FREEDOM OF INFORMATION ACT REQUESTS FOR INFORMATION

§ 513.60 Freedom of Information Act requests.

Requests for any Bureau record (including Program Statements and Operations Memoranda) ordinarily shall be processed pursuant to the Freedom of Information Act, 5 U.S.C. 552. Such a request must be made in writing and addressed to the Director, Federal Bureau of Prisons, 320 First Street, NW., Washington, D.C. 20534. The requester shall clearly mark on the face of the letter and the envelope ''FREEDOM OF INFORMATION REQUEST,'' and shall clearly describe the records sought. See §§ 513.61 through 513.63 for additional requirements.

§ 513.61 Freedom of Information Act requests by inmates.

(a) Inmates are encouraged to use the simple access procedures described in § 513.40 to review disclosable records maintained in his or her Inmate Central File.

(b) An inmate may make a request for access to documents in his or her Inmate Central File or Medical File (including documents which have been withheld from disclosure during the inmate's review of his or her Inmate Central File pursuant to § 513.40) and/or other documents concerning the inmate which are not contained in the Inmate Central File or Medical File. Staff shall process such a request pursuant to the applicable provisions of the Freedom of Information Act, 5 U.S.C. 552.

(c) The inmate requester shall clearly mark on the face of the letter and on the envelope ''FREEDOM OF INFORMATION ACT REQUEST'', and shall clearly describe the records sought, including the approximate dates covered by the record. An inmate making such a request must provide his or her full name, current address, date and place of birth. In addition, if the inmate requests documents to be sent to a third party, the inmate must provide with the request an example of his or her signature, which must be verified and dated within three (3) months of the date of the request.

§ 513.62 Freedom of Information Act requests by former inmates.

Former federal inmates may request copies of their Bureau records by writing to the Director, Federal Bureau of Prisons, 320 First Street, NW., Washington, D.C. 20534. Such requests shall be processed pursuant to the provisions of the Freedom of Information Act. The request must be clearly marked on the face of the letter and on the envelope ''FREEDOM OF INFORMATION ACT REQUEST'', and must describe the record sought, including the approximate dates covered by the record. A former inmate making such a request must provide his or her full name, current address, date and place of birth. In addition, the requester must provide with the request an example of his or her signature, which must be either notarized or sworn under penalty of perjury, and dated within three (3) months of the date of the request.

§ 513.63 Freedom of Information Act requests on behalf of an inmate or former inmate.

A request for records concerning an inmate or former inmate made by an authorized representative of that inmate or former inmate will be treated as in § 513.61, on receipt of the inmate's or former inmate's written authorization. This authorization must be dated within three (3) months of the date of the request letter. Identification data, as listed in 28 CFR 16.41, must be provided.

§ 513.64 Acknowledgment of Freedom of Information Act requests.

(a) All requests for records under the Freedom of Information Act received by the FOI/PA Administrator, Office of General Counsel, will be reviewed and may be forwarded to the appropriate Regional Office for proper handling. Requests for records located at a Bureau facility other than the Central Office or Regional Office may be referred to the appropriate staff at that facility for proper handling.

(b) The requester shall be notified of the status of his or her request by the office with final responsibility for processing the request.

§ 513.65 Review of documents for Freedom of Information Act requests.

If a document is deemed to contain information exempt from disclosure, any reasonably segregable portion of the record shall be provided to the requester after deletion of the exempt portions. If documents, or portions of documents, in an Inmate Central File have been determined to be nondisclosable by institution staff but are later released by Regional or Central Office staff pursuant to a request under this section, appropriate instructions will be given to the institution to move those documents, or portions, from the Inmate Privacy Folder into the disclosable section of the Inmate Central File.

§ 513.66 Denials and appeals of Freedom of Information Act requests.

If a request made pursuant to the Freedom of Information Act is denied in whole or in part, a denial letter must be issued and signed by the Director or his or her designee, and shall state the basis for denial under § 513.32. The requester who has been denied such access shall be advised that he or she may appeal that decision to the Office of Information and Privacy, U.S. Department of Justice, Suite 570, Flag Building, Washington, D.C. 20530. Both the envelope and the letter of appeal itself should be clearly marked: ''Freedom of Information Act Appeal.''

§ 513.67 Fees for Freedom of Information Act requests.

Fees for copies of records disclosed under the FOIA, including fees for a requester's own records, may be charged in accordance with Department of Justice regulations contained in 28 CFR 16.10.

§ 513.68 Time limits for responses to Freedom of Information Act requests.

Consistent with sound administrative practice and the provisions of 28 CFR 16.1, the Bureau strives to comply with the time limits set forth in the Freedom of Information Act.

SUBCHAPTER B—INMATE ADMISSION, CLASSIFICATION, AND TRANSFER

PART 522—ADMISSION TO INSTITUTION

Subpart A [Reserved]

Subpart B—Civil Contempt of Court Commitments

Sec.
522.10 Purpose.
522.11 Civil contempt commitments.
522.12 Relationship between existing criminal sentences imposed under the U.S. or D.C. Code and new civil contempt commitment orders.
522.13 Relationship between existing civil contempt commitment orders and new criminal sentences imposed under the U.S. or D.C. Code.
522.14 Inmates serving civil contempt commitments.
522.15 No good time credits for inmates serving only civil contempt commitments.

Subpart C—Intake Screening

522.20 Purpose and scope.
522.21 Procedures.

Subpart D—Unescorted Transfers and Voluntary Surrenders

522.30 Purpose and scope.

Subpart E [Reserved]

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3568 (Repealed November 1, 1987 as to offenses committed on or after that date), 3585, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to conduct occurring on or after November 1, 1987), 4161–4166, (repealed October 12, 1984, as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; D.C. Code § 24–101(b).

SOURCE: 44 FR 38244, June 29, 1979, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Civil Contempt of Court Commitments

SOURCE: 70 FR 67092, Nov. 4, 2005, unless otherwise noted.

§ 522.10 Purpose.

(a) This subpart describes the procedures for federal civil contempt of court commitments (civil contempt commitments) referred to the Bureau of Prisons (Bureau). These cases are not commitments to the custody of the Attorney General for service of terms of imprisonment following criminal convictions.

(b) We cooperate with the federal courts to implement civil contempt commitments by making our facilities and resources available. When we receive notification from the federal court that the reason for the civil contempt commitment has ended or that the inmate is to be released for any other reason, we will terminate the inmate's civil contempt commitment.

§ 522.11 Civil contempt commitments.

Inmates can come into Bureau custody for civil contempt commitments in two ways:

(a) The U.S. Marshals Service may request a designation from the Bureau for a civil contempt commitment if local jails are not suitable due to medical, security or other reasons; or

(b) The committing court may specify a Bureau institution as the place of incarceration in its contempt order. We will designate the facility specified in the court order unless there is a reason for not placing the inmate in that facility.

§ 522.12 Relationship between existing criminal sentences imposed under the U.S. or D.C. Code and new civil contempt commitment orders.

If a criminal sentence imposed under the U.S. Code or D.C. Code exists when a civil contempt commitment is ordered, we delay or suspend credit towards service of the criminal sentence for the duration of the civil contempt commitment, unless the committing judge orders otherwise.

§ 522.13 Relationship between existing civil contempt commitment orders and new criminal sentences imposed under the U.S. or D.C. Code.

(a) Except as stated in (b), if a civil contempt commitment order is in effect when a criminal sentence of imprisonment is imposed under the U.S. or D.C. Code, the criminal sentence runs consecutively to the commitment order, unless the sentencing judge orders otherwise.

(b) *For federal criminal sentences imposed for offenses committed before November 1, 1987, under 18 U.S.C. Chapter 227:* If a civil contempt commitment order is in effect when a criminal sentence of imprisonment is imposed, the criminal sentence runs concurrent with the commitment order, unless the sentencing judge orders otherwise.

§ 522.14 Inmates serving civil contempt commitments.

We treat inmates serving civil contempt commitments in Bureau institutions the same as pretrial inmates. If an inmate is serving a civil contempt commitment and a concurrent criminal sentence, we treat the inmate the same as a person serving a criminal sentence.

§ 522.15 No good time credits for inmates serving only civil contempt commitments.

While serving only the civil contempt commitment, an inmate is not entitled to good time sentence credit.

Subpart C—Intake Screening

§ 522.20 Purpose and scope.

Bureau of Prisons staff screen newly arrived inmates to ensure that Bureau health, safety, and security standards are met.

[45 FR 44229, June 30, 1980]

§ 522.21 Procedures.

(a) Except for such camps and other satellite facilities where segregating a newly arrived inmate in detention is not feasible, the Warden shall ensure that a newly arrived inmate is cleared by the Medical Department and provided a social interview by staff before assignment to the general population.

(1) Immediately upon an inmate's arrival, staff shall interview the inmate to determine if there are non-medical reasons for housing the inmate away from the general population. Staff shall evaluate both the general physical appearance and emotional condition of the inmate.

(2) Within 24 hours after an inmate's arrival, medical staff shall medically screen the inmate in compliance with Bureau of Prisons' medical procedures to determine if there are medical reasons for housing the inmate away from the general population or for restricting temporary work assignments.

(3) Staff shall place recorded results of the intake medical screening and the social interview in the inmate's central file.

[45 FR 44229, June 30, 1980]

Subpart D—Unescorted Transfers and Voluntary Surrenders

§ 522.30 Purpose and scope.

When the court orders or recommends an unescorted commitment to a Bureau of Prisons institution, the Bureau of Prisons authorizes the commitment and designates the institution for service of sentence. The Bureau of Prisons also authorizes furlough transfers of inmates between Bureau of Prisons institutions or to nonfederal institutions in appropriate circumstances in accordance with 18 U.S.C. 3622 or 4082, and within the guidelines of the Bureau of Prisons policy on furloughs, which allows inmates to travel unescorted and to report voluntarily to an assigned institution.

[61 FR 64953, Dec. 9, 1996]

Subpart E [Reserved]

PART 523—COMPUTATION OF SENTENCE

Subpart A—Good Time

Sec.
523.1 Definitions.
523.2 Good time credit for violators.

Subpart B—Extra Good Time

523.10 Purpose and scope.
523.11 Meritorious good time.

523.12 Work/study release good time.
523.13 Community corrections center good time.
523.14 Industrial good time.
523.15 Camp or farm good time.
523.16 Lump sum awards.
523.17 Procedures.

Subpart C—Good Conduct Time

523.20 Good conduct time.

Subpart D—District of Columbia Educational Good Time Credit

523.30 What is educational good time sentence credit?
523.31 Who is eligible for DCEGT?
523.32 How much DCEGT can I earn?
523.33 How is eligibility for DCEGT limited?
523.34 How can I challenge DCEGT award decisions?

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3568 (repealed November 1, 1987 as to offenses committed on or after that date), 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to conduct occurring on or after November 1, 1987), 4161–4166 (repealed October 12, 1984 as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510.

SOURCE: 54 FR 32028, Aug. 3, 1989, unless otherwise noted.

Subpart A—Good Time

§ 523.1 Definitions.

(a) *Statutory good time* means a credit to a sentence as authorized by 18 U.S.C. 4161. The total amount of statutory good time which an inmate is entitled to have deducted on any given sentence, or aggregate of sentences, is calculated and credited in advance, when the sentence is computed.

(b) *Extra good time* means a credit to a sentence as authorized by 18 U.S.C. 4162 for performing exceptionally meritorious service or for performing duties of outstanding importance in an institution or for employment in a Federal Prison Industry or Camp. ''Extra Good Time'' thus includes Meritorious Good Time, Work/Study Release Good Time, Community Corrections Center Good Time, Industrial Good Time, Camp or Farm Good Time, and Lump Sum Awards. Extra good time and seniority are inseparable with the exception of lump sum awards for which no seniority is earned.

(c) *Seniority* refers to the time accrued in an extra good time earning status. Twelve months of ''seniority'' automatically cause the earning rate to increase from three days per month to five days per month and seniority is then vested.

(d) *Earning status* refers to the status of an inmate who is in an assignment or employment which accrues extra good time.

§ 523.2 Good time credit for violators.

(a) An inmate conditionally released from imprisonment either by parole or mandatory release can earn statutory good time, upon being returned to custody for violation of supervised release, based on the number of days remaining to be served on the sentence. The rate of statutory good time for the violator term is computed at the rate of the total sentence from which released.

(b) An inmate whose special parole term is revoked can earn statutory good time based on the number of days remaining to be served on the special parole violator term. The rate of statutory good time for the violator term is computed at the rate of the initial special parole term plus the total sentence that was served prior to the special parole term and to which the special parole term was attached.

(c) Once an inmate is conditionally released from imprisonment, either by parole, including special parole, or mandatory release, the good time earned (extra or statutory) during that period of imprisonment is of no further effect either to shorten the period of supervision or to shorten the period of imprisonment which the inmate may be required to serve for violation of parole or mandatory release.

Subpart B—Extra Good Time

§ 523.10 Purpose and scope.

(a) The Bureau of Prisons awards extra good time credit for performing exceptionally meritorious service, or for performing duties of outstanding importance or for employment in an industry or camp. An inmate may earn only one type of extra good time award at a time (e.g., an inmate earning industrial or camp good time is not eligible for meritorious good time), except

that a lump sum award as provided in § 523.16 may be given in addition to another extra good time award. The Warden or the Discipline Hearing Officer may not forfeit or withhold extra good time. The Warden may disallow or terminate the awarding of any type of extra good time (except lump sum awards), but only in a nondisciplinary context and only upon recommendation of staff. The Discipline Hearing Officer may disallow or terminate the awarding of any type of extra good time (except lump sum awards), as a disciplinary sanction. Once an awarding of meritorious good time has been terminated, the Warden must approve a new staff recommendation in order for the award to recommence. A ''disallowance'' means that an inmate does not receive an extra good time award for only one calendar month. Unless other action is taken, the award resumes the following calendar month. A ''disallowance'' must be for the entire amount of extra good time for that calendar month. There may be no partial disallowance. A decision to disallow or terminate extra good time may not be suspended pending future consideration. A retroactive award of meritorious good time may not include a month in which extra good time has been disallowed or terminated.

(b) The provisions of this rule do not apply to inmates sentenced under the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. This means that inmates sentenced under the Sentencing Reform Act provisions for offenses committed on or after November 1, 1987 are not eligible for either statutory or extra good time, but may be considered for a maximum of 54 days of good conduct time credit per year (see 18 U.S.C. 3624(b)).

§ 523.11 Meritorious good time.

(a) Staff are responsible for recommending meritorious good time based upon work performance. Each recommendation must include a justification which clearly shows that the work being performed is of an exceptionally meritorious nature or is of outstanding importance in connection with institutional operations. Work performance and the importance of the work performed are the only criteria for awarding meritorious good time.

(b) A retroactive award of meritorious good time is ordinarily limited to three months, excluding the month in which the recommendation is made. A retroactive award in excess of three months requires the approval of the Warden or designee (may not be delegated below the level of Associate Warden). Staff are to include with any recommendation for an inmate to receive a retroactive award of meritorious good time, a written statement confirming the inmate's eligibility for the retroactive award.

(c) Meritorious good time continues uninterrupted regardless of work assignment changes unless the Warden or the Discipline Hearing Officer takes specific action to terminate or disallow the award.

§ 523.12 Work/study release good time.

Extra good time for an inmate in work or study release programs is awarded automatically, beginning on the date the inmate is assigned to the program and continuing without further approval as long as the inmate is participating in the program, unless the award is disallowed.

§ 523.13 Community corrections center good time.

Extra good time for an inmate in a Federal or contract Community Corrections Center is awarded automatically, beginning on arrival at the facility and continuing as long as the inmate is confined at the Center, unless the award is disallowed.

§ 523.14 Industrial good time.

Extra good time for an inmate employed in Federal Prison Industries, Inc., is automatically awarded, beginning on the first day of such employment, and continuing as long as the inmate is employed by Federal Prison Industries, unless the award is disallowed. An inmate on a waiting list for employment in Federal Prison Industries is not awarded industrial good time until actually employed.

§ 523.15 Camp or farm good time.

An inmate assigned to a farm or camp is automatically awarded extra

good time, beginning on the date of commitment to the camp or farm, and continuing as long as the inmate is assigned to the farm or camp, unless the award is disallowed.

§ 523.16 Lump sum awards.

Any staff member may recommend to the Warden the approval of an inmate for a lump sum award of extra good time. Such recommendations must be for an exceptional act or service that is not part of a regularly assigned duty. The Warden may make lump sum awards of extra good time not to exceed thirty days. If the recommendation is for an award in excess of thirty days and the Warden concurs, the Warden shall refer the recommendation to the Regional Director who may approve the award. No award may be approved which would exceed the maximum number of days allowed under 18 U.S.C. 4162. The actual length of time served on the sentence, to the date that the exceptional act or service terminated, is the basis on which the maximum amount possible to award is calculated. No seniority is accrued for such awards. Staff may recommend lump sum awards of extra good time for the following reasons:

(a) An act of heroism;

(b) Voluntary acceptance and satisfactory performance of an unusually hazardous assignment;

(c) An act which protects the lives of staff or inmates or the property of the United States; this is to be an act and not merely the providing of information in custodial or security matters;

(d) A suggestion which results in substantial improvement of a program or operation, or which results in significant savings; or

(e) Any other exceptional or outstanding service.

§ 523.17 Procedures.

(a) Extra good time is awarded at a rate of three days per month during the first twelve months of seniority in an earning status and at the rate of five days per month thereafter. The first twelve months of seniority need not be based on a continuous period of twelve months. If the beginning or termination date of an extra good time award occurs after the first day of a month, a partial award of days is made.

(b) An inmate may be awarded extra good time even though some or all of the inmate's statutory good time has been forfeited or withheld.

(c) Parole and mandatory release violators may earn extra good time the same as other inmates. Once an inmate is conditionally released from imprisonment, either by parole, including special parole, or mandatory release, the good time earned during that period of imprisonment is of no further effect either to shorten the period of supervision or to shorten the period of imprisonment which the inmate may be required to serve for violation of parole or mandatory release.

(d) Staff working in the community have the same extra good time authority as the Warden when approving the award of good time for an inmate confined in a non-federal facility and may approve meritorious good time or lump sum awards in accordance with this rule upon recommendations made by a responsible person employed by the non-federal facility. The appropriate staff in the Regional Office may review all such awards if the Regional Director requires the review.

(e) An inmate who is transferred remains in the earning status at time of transfer, unless the reason for transfer would otherwise have caused removal from an earning status, and provided the inmate's behavior is such while in transit that it does not justify removal. Where the receiving institution is a camp, farm, or community corrections center, the extra good time continues automatically upon the inmate's arrival. Where the receiving institution is other than a camp, farm, or community corrections center, the extra good time is terminated upon arrival, and staff at the receiving institution shall review each case to determine if the inmate should continue in meritorious good time earning status if not immediately employed in Federal Prison Industries or assigned to a work/study release program. If the inmate then is not continued in meritorious good time earning status, later awards must comply with procedures outlined in § 523.11.

(f) An inmate serving a life sentence may earn extra good time even though there is no mandatory release date from which to deduct the credit since the possibility exists that the sentence may be reduced or commuted to a definite term.

(g) Extra good time is not automatically discontinued while an inmate is hospitalized, on furlough, out of the institution on a writ of habeas corpus, or removed under the Interstate Agreement on Detainers. Extra good time may be terminated or disallowed during such absences if the Warden or the Discipline Hearing Officer finds that the inmate's behavior warrants such action.

(h) Extra good time earned by an inmate in a District of Columbia Department of Corrections facility is treated the same as if earned in a Bureau of Prisons institution, upon transfer to a Bureau institution.

(i) An inmate committed under the provisions of 18 U.S.C. 3651 (split sentence) may earn extra good time credits provided the sentence imposed is not under the provisions of 18 U.S.C. 5010 (b) or (c) (YCA). All extra good time and seniority earned is carried over to any subsequent probation violator sentence based on the original split sentence.

(j) An inmate committed under the provisions of 18 U.S.C. 4205(c) may earn extra good time credits towards the final sentence that may be imposed. Such extra good time credits do not reduce the three months allowed for study. An inmate committed under the provisions of 18 U.S.C. 4244, as amended effective October 12, 1984, may earn extra good time credits toward the final sentence that may be imposed. Such extra good time credits do not reduce the provisional sentence. Extra good time may continue during a commitment for examination of hospitalization and treatment under 18 U.S.C. 4245, as amended effective October 12, 1984.

(k) Inmates committed under the provisions of 18 U.S.C. 4244, 4246–47, 4252, 5010 (b), (c), (e), or 5037(c) as these sections were in effect prior to October 12, 1984, are not entitled to extra good time deductions. Inmates committed under the provisions of 18 U.S.C. 4241, 4242, 4243, or 4246 as these sections were amended effective October 12, 1984, are not entitled to extra good time deductions.

(l) A pretrial detainee may not earn good time while in pretrial status. A pretrial detainee, however, may be recommended for good time credit. This recommendation shall be considered in the event that the pretrial detainee is later sentenced on the crime for which he or she was in pretrial status.

(m) An inmate committed for civil contempt is not entitled to extra good time deductions while serving the civil contempt sentence.

(n) A military or Coast Guard inmate may earn extra good time. Extra good time earned in Federal Prison Industries in a military or Coast Guard installation is treated the same as if earned in Federal Prison Industries in the Bureau of Prisons. Other forms of military or Coast Guard extra good time, such as Army Abatement time, are fully credited, but no seniority is allowed.

(o) American citizens who are serving sentences in foreign countries and who are subsequently returned to this country under the provisions of 18 U.S.C. chapter 306 (Pub. L. 95–144) may have earned work, labor, or program time credits in the foreign country similar to extra good time earned under 18 U.S.C. 4162. Such foreign ''extra good time'' credits shall be treated as if awarded under § 523.16, Lump Sum Awards, with any future lump sum award consideration in this country calculated on the basis of time served in custody of the Bureau of Prisons. After return to this country an inmate may earn extra good time at the three-day rate and advance to the five-day rate after one year of seniority is accrued. No seniority is accrued for foreign ''extra good time'' credits.

(p) An inmate in extra good time earning status may not waive or refuse extra good time credits.

(q) Once extra good time is awarded, it becomes vested and may not be forfeited or withheld, or retroactively terminated or disallowed.

Subpart C—Good Conduct Time

§ 523.20 Good conduct time.

(a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

(b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

(c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will award

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, an alien who is subject to a final order of removal, deportation, or exclusion is eligible for, but is not required to, participate in a literacy program, or to be making satisfactory progress toward earning a General Educational Development (GED) credential, to be eligible for a yearly award of good conduct time.

(e) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see tables 3 through 6 in § 541.13 of this chapter).

[70 FR 66754, Nov. 3, 2005]

Subpart D—District of Columbia Educational Good Time Credit

SOURCE: 67 FR 48386, July 24, 2002, unless otherwise noted.

§ 523.30 What is educational good time sentence credit?

Educational good time sentence credit is authorized by District of Columbia (D.C.) Code § 24–221.01, and reduces the amount of time to serve under a term of imprisonment. In these rules, we refer to D.C. educational good time as ''DCEGT.''

§ 523.31 Who is eligible for DCEGT?

You are eligible for DCEGT if:

(a) You are incarcerated in a Bureau of Prisons' (Bureau) institution or a Bureau contract facility;

(b) You are serving a term of imprisonment for a D.C. criminal code violation committed before August 5, 2000;

(c) Your Unit Team approved or designed a plan for you to complete a program designated by the Bureau as eligible for DCEGT;

(d) The Supervisor of Education (SOE) finds that you successfully completed a Bureau-designated education program on or after August 5, 1997; and

(e) You did not violate prison discipline rules while enrolled in the program (see § 523.33).

§ 523.32 How much DCEGT can I earn?

(a) You can earn 5 days DCEGT for each month you were enrolled in a designated program, up to the maximum amount designated by the Bureau for the type of program successfully completed.

(b) You are limited to 5 days per month DCEGT, even if enrolled in more than one designated program.

(c) Enrollment in a designated program for any portion of a calendar month earns one full month's worth of DCEGT.

(d) You are not eligible for DCEGT which, if awarded, would make you past due for release.

(e) Once appropriately awarded, DCEGT vests, and cannot be forfeited.

§ 523.33 How is eligibility for DCEGT limited?

Eligibility for DCEGT is limited in two ways:

(a) If you violate prison rules, you are not eligible for one month's worth of DCEGT for each disciplinary incident committed during the program enrollment period. A Discipline Hearing Officer, or other staff using procedures similar to those in 28 CFR 541.17, must determine that you committed a prohibited act.

(b) The nature of your offense may limit your eligibility for DCEGT under D.C. Code 24–221.01b or 24–221.06.

§ 523.34 How can I challenge DCEGT award decisions?

You can use the Administrative Remedy Program, 28 CFR 542.10 through 542.19, to challenge Bureau of Prisons decisions regarding DCEGT.

PART 524—CLASSIFICATION OF INMATES

Subpart A [Reserved]

Subpart B—Classification and Program Review of Inmates

Sec.
524.10 Purpose.
524.11 Process for classification and program reviews.

Subpart C—Youth Corrections Act (YCA) Programs

524.20 Purpose and scope.
524.21 Definitions.
524.22 YCA program.
524.23 Program reviews.
524.24 Parole hearings.
524.25 U.S. Parole Commission.

Subpart D [Reserved]

Subpart E—Progress Reports

524.40 Purpose and scope.
524.41 Types of progress reports.
524.42 Content of progress reports.
524.43 Inmate's access to progress reports.

Subpart F—Central Inmate Monitoring (CIM) System

524.70 Purpose and scope.
524.71 Responsibility.
524.72 CIM assignment categories.
524.73 Classification procedures.
524.74 Activities clearance.
524.75 Periodic review.
524.76 Appeals of CIM classification.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3521–3528, 3621, 3622, 3624, 4001, 4042, 4046, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 21 U.S.C. 848; 28 U.S.C. 509, 510.

Subpart A [Reserved]

Subpart B—Classification and Program Review of Inmates

SOURCE: 71 FR 36007, June 23, 2006, unless otherwise noted.

§ 524.10 Purpose.

The purpose of this subpart is to explain the Bureau of Prisons (Bureau) process for classifying newly committed inmates and conducting program reviews for all inmates except:

(a) Pretrial inmates, covered in 28 CFR part 551; and

(b) Inmates committed for study and observation.

§ 524.11 Process for classification and program reviews.

(a) *When:*

(1) Newly committed inmates will be classified within 28 calendar days of arrival at the institution designated for service of sentence.

(2) Inmates will receive a program review at least once every 180 calendar days. When an inmate is within twelve months of the projected release date, staff will conduct a program review at least once every 90 calendar days.

(b) *Inmate appearance before classification team:*

(1) Inmates will be notified at least 48 hours before that inmate's scheduled appearance before the classification team (whether for the initial classification or later program reviews).

(2) Inmates may submit a written waiver of the 48-hour notice requirement.

(3) The inmate is expected to attend the initial classification and all later program reviews. If the inmate refuses to appear at a scheduled meeting, staff must document on the Program Review Report the inmate's refusal and, if

known, the reasons for refusal, and give a copy of this report to the inmate.

(c) *Program Review Report:* Staff must complete a Program Review Report at the inmate's initial classification. This report ordinarily includes information on the inmate's apparent needs and offers a correctional program designed to meet those needs. The Unit Manager and the inmate must sign the Program Review Report, and a copy must be given to the inmate.

(d) *Work Programs:* Each sentenced inmate who is physically and mentally able is assigned to a work program at initial classification. The inmate must participate in this work assignment and any other program required by Bureau policy, court order, or statute. The inmate may choose not to participate in other voluntary programs.

Subpart C—Youth Corrections Act (YCA) Programs

SOURCE: 58 FR 50808, Sept. 28, 1993, unless otherwise noted.

§ 524.20 Purpose and scope.

This subpart establishes procedures for designation, classification, parole, and release of Youth Corrections Act (YCA) inmates. In keeping with court findings, and in accord with the repeal of 18 U.S.C. chapter 402, sections 5011 and 5015(b), all offenders sentenced under the provisions of the YCA presently in custody, those retaken into custody as parole violators, and those yet to be committed (probation violators, appeal bond cases, etc.) may be transferred to or placed in adult institutions under the provisions of this policy.

§ 524.21 Definitions.

(a) *YCA inmate:* An inmate sentenced under provision of the Youth Corrections Act who has not received an in-person ''no further benefit'' finding by his or her sentencing judge, and whose YCA sentence has not been completely absorbed by an adult federal sentence.

(b) *No further benefit:* An in-person finding by the inmate's sentencing court that YCA treatment will not be of further benefit to the inmate. An inmate receiving such court finding is accordingly not considered to be a YCA inmate.

§ 524.22 YCA program.

(a) Wardens are to ensure each committed youth offender is scheduled for a three-phase program plan which will include a classification phase, a treatment phase, and a pre-release phase. A program plan for each YCA inmate will be developed by the Unit Team as a part of the classification phase. The Warden may exempt a YCA inmate from program participation when individual circumstances warrant such exceptions. Such exceptions must be requested and acknowledged by the inmate, and the reason(s) for exemption must be documented in the inmate's central file.

(1) *Classification phase:* The classification phase begins upon the inmate's arrival at the designated institution. It consists of evaluation, orientation, unit assignment, and concludes when the inmate has attended the initial classification (or transfer classification) meeting with the Unit Team. YCA inmates are to participate in the classification process prior to the development of their individual program plans. The YCA inmate is to have received a psychological screening prior to attending the initial classification meeting. YCA program plans will include specific goals relative to:

(i) Behavior;

(ii) Treatment/self improvement;

(iii) Pre-release.

(2) *Treatment phase:* YCA inmates are to be exposed to unit-based and community-based (if otherwise eligible) programs. Each YCA inmate shall be periodically reviewed during this phase. The treatment phase begins when the inmate attends the programs and activities described in the program plan which were established at the culmination of the classification phase. Each YCA inmate shall be assigned programs in accordance with the inmate's needs and the established program plan. The ''program day'' shall consist of morning, afternoon, and evening time periods, during which the inmate shall be scheduled for treatment programs, work, and leisure-time activities. The inmate shall be expected to comply with the program

plan. The inmate's participation in a treatment program is required, not optional. An inmate's failure to participate may result in disciplinary action.

(3) *Pre-release phase:* The YCA inmate shall enter the pre-release phase approximately 9 months prior to release. The pre-release phase is ordinarily divided into two segments: participation in the institution pre-release program and a stay at a Community Corrections Center (CCC), if otherwise eligible. Institution pre-release programs shall focus on the types of problems the inmate may face upon return to the community, such as re-establishing family relationships, managing a household, finding and keeping a job, and developing a successful life style. In addition, the pre-release phase may include visits from prospective employers.

(b) Staff shall establish incentives to motivate YCA inmates and to encourage program completion. Examples of such incentives which may be used are special recognition, awards, and ''vacation days''.

(c) The program plan, and the YCA inmate's participation in fulfilling goals contained within the plan, are fundamental factors considered by the U.S. Parole Commission in determining when a YCA inmate should be paroled. Given the importance and joint use of the YCA programming process, the current program plan and a summary of the inmate's progress in meeting established treatment goals must be made available for review and discussion by the Commission at each parole hearing. In addition, a staff member familiar with the YCA inmate's case should be present at any parole hearing to clarify any questions concerning the plan or the inmate's progress in completing the plan.

(d) Upon full and satisfactory completion of the program plan, the Warden will notify the U.S. Parole Commission and make a specific recommendation for release.

§ 524.23 Program reviews.

Staff shall conduct periodic reviews of the inmate's program plan and shall modify the plan in accordance with the level of progress shown. Each YCA inmate shall be afforded a review at least once each 90 days, and shall have a formal progress report prepared every year summarizing the inmate's level of achievement. If the inmate's program plan needs to be modified in light of the progress made, or the lack thereof, appropriate changes will be made and a revised program plan will be developed and documented. Staff shall ordinarily notify the inmate of the 90-day review at least 48 hours prior to the inmate's scheduled appearance before the Unit Team. An inmate may waive in writing the requirement of 48 hours notice.

§ 524.24 Parole hearings.

All YCA inmates have been extended the parole procedures present in *Watts* vs. *Hadden*. YCA inmates shall be scheduled for interim hearings on the following schedules:

(a) For those inmates serving YCA sentences of less than 7 years, an in-person hearing will be scheduled every 9 months.

(b) For those inmates serving YCA sentences of 7 years or more, an in-person hearing will be scheduled every 12 months.

(c) Upon notification of a response to treatment/certified completion of a program plan by the Bureau of Prisons, the Parole Commission will schedule the inmate for an in-person hearing on the next available docket, unless the inmate is paroled on the record. If a hearing is held and the inmate is denied parole, the next hearing shall be scheduled in accordance with the schedule outlined in paragraphs (a) and (b) of this section.

(d) The hearings mentioned in paragraphs (a) and (b) of this section are not required for inmates who have been continued to expiration or mandatory parole who have less than one year remaining to serve or to a CCC placement date.

§ 524.25 U.S. Parole Commission.

The U.S. Parole Commission is the releasing authority for all YCA inmates except for full term and conditional releases. The Commission shall be provided a progress report:

(a) Upon request of the Commission,

(b) Prior to any interim hearing or pre-release record review, or

(c) Upon determination by the inmate's Unit Team, with concurrence by

the Warden, that the inmate has completed his or her program plan.

Subpart D [Reserved]

Subpart E—Progress Reports

SOURCE: 55 FR 49977, Dec. 3, 1990, unless otherwise noted.

§ 524.40 Purpose and scope.

The Bureau of Prisons maintains current information on each inmate through progress reports completed by staff. The progress report summarizes information relating to the inmate's adjustment during confinement, program participation, and readiness for release.

§ 524.41 Types of progress reports.

The Bureau of Prisons prepares the following types of progress reports.

(a) Initial Hearing—prepared for an inmate's initial parole hearing when progress has not been summarized within the previous 180 days.

(b) Statutory Interim/Two-Thirds Review—prepared for a parole hearing conducted 18 or 24 months following a hearing at which no effective parole date was established, or for a two-thirds review (see 28 CFR 2.53) unless the inmate has waived the parole hearing.

(c) Pre-Release—

(1) Record Review—prepared for and mailed to the appropriate Parole Commission office at least eight months prior to the inmate's presumptive parole date.

(2) Final—prepared at least 90 days prior to the release of an offender to a term of supervision.

(d) *Transfer report*—prepared on an inmate transferring to community confinement or any non-Bureau facility.

(e) Other—prepared for any reason other than those previously stated in this section. The reason (e.g., court request, clemency review) is specified in the report.

[55 FR 49977, Dec. 3, 1990, as amended at 59 FR 6856, Feb. 11, 1994; 60 FR 10722, Feb. 27, 1995; 63 FR 7604, Feb. 13, 1998; 78 FR 63877, Oct. 25, 2013]

§ 524.42 Content of progress reports.

Staff shall include the following in each progress report:

(a) Institution (full name) and Date;

(b) Type of Progress Report;

(c) Committed name;

(d) Registration number;

(e) Age;

(f) Present security and custody level;

(g) Offense(s) for which committed;

(h) Sentence;

(i) Date sentence began;

(j) Time served to date, including jail time credit;

(k) Good conduct time/Extra good time earned;

(l) Statutory good time withheld or forfeited; Disallowed good conduct time;

(m) Projected release date;

(n) Most recent Parole Commission action, including any special conditions or requirements (if applicable);

(o) Detainers and pending charges on file;

(p) Institutional adjustment; this ordinarily includes information on the inmate's:

(1) Program plans;

(2) Work assignments and skills acquired;

(3) Educational/vocational participation;

(4) Counseling programs;

(5) Incident reports;

(6) Institutional movement;

(7) Physical and mental health, including any significant mental or physical health problems, and any corrective action taken; and

(8) Financial responsibility.

(q) Release planning:

(1) Where appropriate, staff shall request that the inmate provide a specific release plan;

(2) Staff shall identify available release resources (including CCC) and any particular problem that may be present in release planning.

[59 FR 6857, Feb. 11, 1994]

§ 524.43 Inmate's access to progress reports.

Upon request, an inmate may read and receive a copy of any progress report retained in the inmate's central file which had been prepared on that inmate after October 15, 1974. Staff

shall allow the inmate the opportunity to read a newly prepared progress report and shall request the inmate sign and date the report. If the inmate refuses to do so, staff witnessing the refusal shall document this refusal on the report. Staff shall then offer to provide a copy of the progress report to the inmate.

[59 FR 6857, Feb. 11, 1994]

Subpart F—Central Inmate Monitoring (CIM) System

SOURCE: 61 FR 40143, July 31, 1996, unless otherwise noted.

§ 524.70 Purpose and scope.

The Bureau of Prisons monitors and controls the transfer, temporary release (e.g., on writ), and community activities of certain inmates who present special needs for management. Such inmates, known as central inmate monitoring (CIM) cases, require a higher level of review which may include Central Office and/or Regional Office clearance for transfers, temporary releases, or community activities. This monitoring is not to preclude a CIM case from such activities, when the inmate is otherwise eligible, but rather is to provide protection to all concerned and to contribute to the safe and orderly operation of federal institutions.

§ 524.71 Responsibility.

Authority for actions relative to the CIM system is delegated to the Assistant Director, Correctional Programs Division, to Regional Directors, and to Wardens. The Assistant Director, Correctional Programs Division, and Regional Directors shall assign a person responsible for coordinating CIM activities. The Case Management Coordinator (CMC) shall provide oversight and coordination of CIM activities at the institutional level, and the Community Corrections Manager shall assume these responsibilities for contract facilities.

§ 524.72 CIM assignment categories.

CIM cases are classified according to the following assignments:

(a) *Witness Security cases*. Individuals who agree to cooperate with law enforcement, judicial, or correctional authorities, frequently place their lives or safety in jeopardy by being a witness or intended witness against persons or groups involved in illegal activities. Accordingly, procedures have been developed to help ensure the safety of these individuals. There are two types of Witness Security cases: Department of Justice (authorized by the Attorney General under title V of Public Law 91–452, 84 Stat. 933); and Bureau of Prisons Witness Security cases (authorized by the Assistant Director, Correctional Programs Division).

(b) *Threats to government officials*. Inmates who have made threats to government officials or who have been identified, in writing, by the United States Secret Service as requiring special surveillance.

(c) *Broad publicity*. Inmates who have received widespread publicity as a result of their criminal activity or notoriety as public figures.

(d) *Disruptive group*. Inmates who belong to or are closely affiliated with groups (e.g., prison gangs), which have a history of disrupting operations and security in either state or federal penal (which includes correctional and detention facilities) institutions. This assignment also includes those persons who may require separation from a specific disruptive group.

(e) *State prisoners*. Inmates, other than Witness Security cases, who have been accepted into the Bureau of Prisons for service of their state sentences. This assignment includes cooperating state witnesses and regular state boarders.

(f) *Separation*. Inmates who may not be confined in the same institution (unless the institution has the ability to prevent any physical contact between the separatees) with other specified individuals who are presently housed in federal custody or who may come into federal custody in the future. Factors to consider in classifying an individual to this assignment include, but are not limited to, testimony provided by or about an individual (in open court, to a grand jury,

etc.), and whether the inmate has exhibited aggressive or intimidating behavior towards other specific individuals, either in the community or within the institution. This assignment also includes those inmates who have provided authorities with information concerning the unauthorized or illegal activities of others. This assignment may also include inmates from whom there is no identifiable threat, but who are to be separated from others at the request of the Federal Judiciary or U.S. Attorneys.

(g) *Special supervision*. Inmates who require special management attention, but who do not ordinarily warrant assignment in paragraphs (a) through (f) of this section. For example, this assignment may include an inmate with a background in law enforcement or an inmate who has been involved in a hostage situation. Others may include those who are members of a terrorist group with a potential for violence.

§ 524.73 Classification procedures.

(a) *Initial assignment*. Except as provided for in paragraphs (a) (1) through (4) of this section, an inmate (including pretrial inmates) may be classified as a CIM case at any time by a Community Corrections Manager or by appropriate staff at the Central Office, Regional Office, or institution. This initial classification is effective upon documentation in the inmate's record.

(1) *Witness Security cases*. Witness Security cases are designated by the Central Office only. An inmate's participation in the Department of Justice Witness Security Program is voluntary. A commitment interview and an admission and orientation interview are to be conducted with the Witness Security inmate to ensure that the inmate understands the conditions of confinement within the Bureau of Prisons. Central Office classification of an individual as a Witness Security case, under either the Department of Justice or Bureau of Prisons, does not require additional review, and overrides any other CIM assignment.

(2) *State prisoners*. Appropriate staff in the Central Office or Regional Office designate state prisoners accepted into the Bureau of Prisons from state or territorial jurisdictions. All state prisoners while solely in service of the state sentence are automatically included in the CIM system to facilitate designations, transfers, court appearances, and other movements.

(3) *Special supervision*. Placement in this assignment may be made only upon the authorization of a Regional Director or the Assistant Director, Correctional Programs Division.

(4) *Recommitted offenders*. An inmate who is recommitted to federal custody, who at the time of release was classified as a CIM case, retains this classification pending a review of the CIM status in accordance with paragraph (c) of this section.

(b) *Notification*. The case manager shall ensure that the affected inmate is notified in writing as promptly as possible of the classification and the basis for it. Witness Security cases will be notified through a commitment interview. The notice of the basis may be limited in the interest of security or safety. For example, in separation cases under § 524.72, notice will not include the names of those from whom the inmate must be separated. The inmate shall sign for and receive a copy of the notification form. If the inmate refuses to sign the notification form, staff witnessing the refusal shall indicate this fact on the notification form and then sign the form. Notification is not required for pretrial inmates. Any subsequent modification of a CIM assignment or removal from the CIM system requires separate notification to the inmate.

(c) *Initial review*. A classification may be made at any level to achieve the immediate effect of requiring prior clearance for an inmate's transfer, temporary release, or participation in community activities. Except for Central Office or Regional Office classification of an individual as a state prisoner in sole service of the state sentence or for classification of pretrial inmates made by designated staff at the institution, a review by designated staff (ordinarily within 60 days of notification to the inmate) is required to determine whether a sound basis exists for the classification. Staff making the initial classification shall forward to the reviewing authority complete information regarding the inmate's classification. An

inmate not notified of a change in the classification by the reviewing authority within 60 days from the date of the initial notification may consider the CIM classification final. Reviewing authorities for CIM classification are:

(1) *Central Office Inmate Monitoring Section*—reviews classification decisions for all future separation assignments (including recommitments) for Witness Security cases and for any combination of assignments involving Witness Security cases.

(2) *Regional Office*—reviews CIM classification decisions for Disruptive Group, Broad Publicity, Threat to Government Officials, Special Supervision, State Prisoners not in sole service of state sentence and initial multiple assignments except Witness Security Cases.

(3) *Warden, or Designee*—reviews CIM classification decisions for all separation assignments.

(d) *Removal.* (1) Because participation in the Department of Justice Witness Security Program is voluntary, such participants may request removal from this assignment at any time. Such request shall be forwarded to the Central Office Inmate Monitoring Section. Actual removal of the CIM assignment will not occur until after approval from the Department of Justice is received.

(2) The reviewing authority is responsible for determining if removal or modification of any CIM classification other than a Department of Justice Witness Security case is appropriate. The inmate retains the CIM classification pending a decision by the reviewing authority.

(3) When an inmate is removed for any reason from a CIM classification (for example, because the reviewing authority either disapproves the CIM classification or approves removal of a CIM classification based on new information), the appropriate staff member shall ensure that the relevant portions of the inmate central file are either removed or, when part of a larger document, are amended to clearly reflect removal of the CIM assignment. Staff shall notify the inmate of the decision and document any change in the inmate's record, and supportive documentation and the written basis for removal are to be retained in the inmate privacy file.

§ 524.74 Activities clearance.

(a) Except as provided for in paragraph (b) of this section, the Warden is the clearance authority on all transfers, temporary releases, community activities, and escorted trips.

(b) *Witness Security cases.* Central Office Inmate Monitoring Section staff shall be the clearance authority on all transfers, temporary releases, community activities, and escorted trips for Witness Security cases, except in a medical emergency. In a medical emergency, the Warden may transfer a Witness Security case to a local hospital for emergency medical care without prior clearance.

§ 524.75 Periodic review.

The Warden shall ensure that the status of an inmate's CIM assignment is considered at each program review. When staff believe that removal or modification of a CIM classification is appropriate, the institution's CMC and the appropriate reviewing authority must be notified. Only the reviewing authority shall determine if removal or modification of the CIM classification is appropriate.

§ 524.76 Appeals of CIM classification.

An inmate may at any time appeal (through the Administrative Remedy Program) the inmate's classification as a CIM case. Inmates identified as Witness Security cases may choose to address their concerns directly to the Inmate Monitoring Section, Central Office, rather than use the Administrative Remedy Program.

PART 527—TRANSFERS

Subparts A–C [Reserved]

Subpart D—Transfer of Inmates to State Agents for Production on State Writs

Sec.
527.30 Purpose and scope.
527.31 Procedures.

Subpart E—Transfer of Offenders To or From Foreign Countries

527.40 Purpose and scope.

527.41 Definitions.
527.42 Limitations on transfer of offenders to foreign countries.
527.43 Notification of Bureau of Prisons inmates.
527.44 Transfer of Bureau of Prisons inmates to other countries.
527.45 Transfer of State prisoners to other countries.
527.46 Receiving United States citizens from other countries.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3565, 3569, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4100–4115, 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 4201–4218, 5003, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

Subparts A–C [Reserved]

Subpart D—Transfer of Inmates to State Agents for Production on State Writs

SOURCE: 46 FR 34549, July 1, 1981, unless otherwise noted.

§ 527.30 Purpose and scope.

The Bureau of Prisons will consider a request made on behalf of a state or local court that an inmate be transferred to the physical custody of state or local agents pursuant to state writ of habeas corpus *ad prosequendum* or *ad testificandum*. The Warden at the institution in which the inmate is confined is authorized to approve this transfer in accordance with the provisions of this rule.

§ 527.31 Procedures.

(a) These procedures apply to state and federal inmates serving sentences in federal institutions, and shall be followed prior to an inmate's transfer to state or local agents other than through the Interstate Agreement on Detainers.

(b) The Warden shall authorize transfer only when satisfied that the inmate's appearance is necessary, that state and local arrangements are satisfactory, that the safety or other interests of the inmate (such as an imminent parole hearing) are not seriously jeopardized, and that federal interests, which include those of the public, will not be interfered with, or harmed. Authorization may not be given where substantial concern exists over any of these considerations.

(c) The request for transfer of custody to state agents shall be made by the prosecutor or other authority who acts on behalf of the court and shall be directed to the Warden of the institution in which the inmate is confined. The request shall be made by letter. The request shall indicate the need for appearance of the inmate, name of the court, nature of the action, date of the requested appearance, name and phone number of the state agency or other organization with responsibility for transporting the inmate, the name and location where the inmate will be confined during legal proceedings, and anticipated date of return. For civil cases, the request shall also indicate the reason that production on writ is necessary and some other alternative is not available. The applying authority shall provide either at the time of application or with the agent assuming custody, a statement signed by an authorized official that state or local officials with custody will provide for the safekeeping, custody, and care of the inmate, will assume full responsibility for that custody, and will return the inmate to Bureau of Prisons' custody promptly on conclusion of the inmate's appearance in the state or local proceedings for which the writ is issued.

(d) A certified copy of the writ (one with the Seal of the Court) must be received at the institution prior to release of the inmate. Institution staff shall verify the authenticity of the writ.

(e) Institution staff shall maintain contact with the state or local law enforcement agency with responsibility for transfer of the inmate to determine the exact date and time for transfer of custody. If the inmate is awaiting federal trial or has federal civil proceedings pending, staff must clear the transfer through the U.S. Attorney.

(f) Institution staff shall determine from the state or local agency the names of the agents assuming custody. Staff must carefully examine the credentials of the agents assuming custody. In any doubtful case, verification should be sought.

(g) Transfers in civil cases pursuant to a writ of habeas corpus ad testificandum must be cleared through both the Regional Counsel and the Warden. Transfer ordinarily shall be recommended only if the case is substantial, where testimony cannot be obtained through alternative means such as depositions or interrogatories, and where security arrangements permit. Postponement of the production until after the inmate's release from federal custody will always be considered, particularly if release is within twelve months.

(h) Release of inmates classified as Central Inmate Monitoring Cases requires review with and/or coordination by appropriate authorities in accordance with the provisions of 28 CFR part 524, subpart F.

[46 FR 34549, July 1, 1981, as amended at 50 FR 40105, Oct. 1, 1985; 62 FR 13826, Mar. 24, 1997]

Subpart E—Transfer of Offenders To or From Foreign Countries

SOURCE: 46 FR 59507, Dec. 4, 1981, unless otherwise noted.

§ 527.40 Purpose and scope.

Public Law 95–144 (18 U.S.C. 4100 *et seq.*) authorizes the transfer of offenders to or from foreign countries, pursuant to the conditions of a current treaty which provides for such transfer. 18 U.S.C. 4102 authorizes the Attorney General to act on behalf of the United States in regard to such treaties. In accordance with the provisions of 28 CFR 0.96b the Attorney General has delegated to the Director of the Bureau of Prisons, and to designees of the Director, the authority to receive custody of, and to transfer to and from the United States, offenders in compliance with the conditions of the treaty.

§ 527.41 Definitions.

For the purpose of this rule the following definitions apply.

(a) *Treaty nation*. A country which has entered into a treaty with the United States on the Execution of Penal Sentences.

(b) *State prisoner*. An inmate serving a sentence imposed in a court in one of the states of the United States, or in a territory or commonwealth of the United States.

(c) *Departure institution*. The Bureau of Prisons institution to which an eligible inmate is finally transferred for return to his or her country of citizenship.

(d) *Admission institution*. The Bureau of Prisons institution where a United States citizen-inmate is first received from a treaty nation.

[46 FR 59507, Dec. 4, 1981, as amended at 58 FR 47976, Sept. 13, 1993]

§ 527.42 Limitations on transfer of offenders to foreign countries.

(a) An inmate while in custody for civil contempt may not be considered for return to the inmate's country of citizenship for service of the sentence or commitment imposed in a United States court.

(b) An inmate with a committed fine may not be considered for return to the inmate's country of citizenship for service of a sentence imposed in a United States court without the permission of the court imposing the fine. When considered appropriate, the Warden may contact the sentencing court to request the court's permission to process the inmate's application for return to the inmate's country of citizenship.

[48 FR 2502, Jan. 19, 1983. Redesignated at 58 FR 47976, Sept. 13, 1993]

§ 527.43 Notification of Bureau of Prisons inmates.

(a) The Warden shall ensure that the institution's admission and orientation program includes information on international offender transfers.

(b) The case manager of an inmate who is a citizen of a treaty nation shall inform the inmate of the treaty and provide the inmate with an opportunity to inquire about transfer to the country of citizenship. The inmate is to be given an opportunity to indicate on an appropriate form whether he or she is interested in transfer to the country of citizenship.

[46 FR 59507, Dec. 4, 1981. Redesignated at 58 FR 47976, Sept. 13, 1993]

§ 527.44 Transfer of Bureau of Prisons inmates to other countries.

(a) An inmate who is qualified for and desires to return to his or her country of citizenship for service of a sentence imposed in a United States Court shall indicate his or her interest by completing and signing the appropriate form and forwarding it to the Warden at the institution where the inmate is confined.

(b) Upon verifying that the inmate is qualified for transfer, the Warden shall forward all relevant information, including a complete classification package, to the Assistant Director, Correctional Programs Division.

(c) The Assistant Director, Correctional Programs Division, shall review the submitted material and forward it to the Office of Enforcement Operations (OEO), Criminal Division, International Prisoner Transfer Unit, Department of Justice, for review.

(d) The Assistant Director, Correctional Programs Division, shall ensure that the inmate is advised of the decision of OEO.

(1) When the Department of Justice determines that transfer is not appropriate, the Assistant Director, Correctional Programs Division, shall ensure that the inmate is advised of this determination and informed that the inmate may request the reason(s) for such action from OEO.

(2) When the Department of Justice determines that transfer is appropriate, the Assistant Director, Correctional Programs Division, shall ensure that the inmate is advised of the determination and of the probability that the inmate will be given an interview with his or her nation's consular officials.

(e) Upon notification from OEO of the treaty nation's decision in regard to the inmate's transfer, the Assistant Director, Correctional Programs Division, shall arrange for the inmate to be informed of that decision.

(f) At an appropriate time subsequent to notification by the Department of Justice of an inmate's approval for transfer, the Assistant Director shall arrange for the inmate to be transferred to an appropriate departure institution.

(g) Prior to the inmate's transfer from the departure institution, the inmate shall receive a verification hearing before a U.S. Magistrate Judge or U.S. District Court Judge to document the inmate's voluntary consent for transfer. Counsel is provided the inmate for purpose of this hearing. When requested, the Warden shall allow counsel to interview the inmate prior to the hearing.

(h) Following the verification hearing, the Assistant Director, Correctional Programs Division shall arrange a schedule for delivery of the inmate to the authorities of the country of citizenship.

(1) The Assistant Director shall advise the Warden of those arrangements.

(2) The Warden shall arrange for the inmate to be transported to the foreign authorities. The Warden shall assure that required documentation (for example, proof of citizenship and appropriate travel documents) accompanies each inmate transported.

[46 FR 59507, Dec. 4, 1981. Redesignated and amended at 58 FR 47976, Sept. 13, 1993]

§ 527.45 Transfer of State prisoners to other countries.

The Bureau of Prisons may assume custody of a state prisoner who has been approved for transfer to a treaty nation for the purpose of facilitating the transfer to the treaty nation. Once approved, the state is not required to contract for the placement of the prisoner in federal custody, nor to reimburse the United States for the cost of confinement (as would ordinarily be required by 18 U.S.C. 5003).

[46 FR 59507, Dec. 4, 1981. Redesignated at 58 FR 47976, Sept. 13, 1993]

§ 527.46 Receiving United States citizens from other countries.

(a) Staff accepting custody of American inmates from a foreign authority shall ensure that the following documentation is available prior to accepting custody of the inmate:

(1) A certified copy of the sentence handed down by an appropriate, competent judicial authority of the transferring country and any modifications thereof;

(2) A statement (and a copy translated into English from the language of

the country of origin if other than English), duly authenticated, detailing the offense for which the offender was convicted, the duration of the sentence, and the length of time already served by the inmate. Included should be statements of credits to which the offender is entitled, such as work done, good behavior, pre-trial confinement, etc.; and

(3) Citizenship papers necessary for the inmate to enter the United States.

(b) The Assistant Director, Correctional Programs Division, shall direct, in writing, specific staff, preferably staff who speak the language of the treaty nation, to escort the offender from the transporting country to the admission institution. The directive shall cite 28 CFR 0.96b as the authority to escort the offender. When the admission institution is not able to accept the inmate (for example, a female inmate escorted to a male institution), the Warden shall make appropriate housing requirements with a nearby jail.

(c) As soon as practicable after the inmate's arrival at the admission institution, staff shall initiate the following actions:

(1) Arrange for the inmate to receive a complete physical examination;

(2) Advise the local U.S. Probation Office of the inmate's arrival; and

(3) Notify the U.S. Parole Commission of the inmate's arrival and projected release date.

(d) If upon computation of sentence staff determine that an inmate is entitled to immediate release via mandatory release or expiration of sentence with credits applied, release procedures shall be implemented but only after receiving a medical clearance and the results of an FBI fingerprint check.

[46 FR 59507, Dec. 4, 1981. Redesignated and amended at 58 FR 47976, 47977, Sept. 13, 1993; 62 FR 27872, May 21, 1997]

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 540—CONTACT WITH PERSONS IN THE COMMUNITY

Subpart A—General

Sec.
540.2 Definitions.

Subpart B—Correspondence

540.10 Purpose and scope.
540.11 Mail depositories.
540.12 Controls and procedures.
540.13 Notification of rejections.
540.14 General correspondence.
540.15 Restricted general correspondence.
540.16 Inmate correspondence while in segregation and holdover status.
540.17 Correspondence between confined inmates.
540.18 Special mail.
540.19 Legal correspondence.
540.20 Inmate correspondence with representatives of the news media.
540.21 Payment of postage.
540.22 Special postal services.
540.23 Inmate funds received through the mails.
540.24 Returned mail.
540.25 Change of address and forwarding of mail for inmates.

Subpart C [Reserved]

Subpart D—Visiting Regulations

540.40 Purpose and scope.
540.41 Visiting facilities.
540.42 Visiting times.
540.43 Frequency of visits and number of visitors.
540.44 Regular visitors.
540.45 Qualification as special visitor.
540.46 Attorney visits.
540.47 Media visits.
540.48 [Reserved]
540.49 Transportation assistance.
540.50 Visits to inmates not in regular population status.
540.51 Procedures.
540.52 Penalty for violation of visiting regulations.

Subpart E—Contact With News Media

540.60 Purpose and scope.
540.61 Authorization.
540.62 Institutional visits.
540.63 Personal interviews.
540.64 Press pools.
540.65 Release of information.

Subpart F—Incoming Publications

540.70 Purpose and scope.
540.71 Procedures.
540.72 Statutory restrictions requiring return of commercially published information or material which is sexually explicit or features nudity.

Subparts G–H [Reserved]

Subpart I—Telephone Regulations for Inmates

540.100 Purpose and scope.
540.101 Procedures.
540.102 Monitoring of inmate telephone calls.
540.103 Inmate telephone calls to attorneys.
540.104 Responsibility for inmate misuse of telephones.
540.105 Expenses of inmate telephone use.

AUTHORITY: 5 U.S.C. 301; 551, 552a; 18 U.S.C. 1791, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Subpart A—General

SOURCE: 50 FR 40108, Oct. 1, 1985, unless otherwise noted.

§ 540.2 Definitions.

(a) *General correspondence* means incoming or outgoing correspondence other than *special mail*. *General correspondence* includes packages sent through the mail.

(1) *Open general correspondence* means general correspondence which is not limited to a list of authorized correspondents, except as provided in § 540.17.

(2) *Restricted general correspondence* means general correspondence which is limited to a list of authorized correspondents.

(b) *Representatives of the news media* means persons whose principal employment is to gather or report news for:

(1) A newspaper which qualifies as a general circulation newspaper in the community in which it is published. A newspaper is one of ''general circulation'' if it circulates among the general

public and if it publishes news of a general character of general interest to the public such as news of political, religious, commercial, or social affairs. A key test to determine whether a newspaper qualifies as a ''general circulation'' newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or the area to which it distributes;

(2) A news magazine which has a national circulation and is sold by newsstands and by mail subscription to the general public;

(3) A national or international news service; or

(4) A radio or television news program, whose primary purpose is to report the news, of a station holding a Federal Communications Commission license.

(c) *Special mail* means correspondence *sent to* the following: President and Vice President of the United States, the U.S. Department of Justice (including the Bureau of Prisons), U.S. Attorneys Offices, Surgeon General, U.S. Public Health Service, Secretary of the Army, Navy, or Air Force, U.S. Courts (including U.S. Probation Officers), Members of the U.S. Congress, Embassies and Consulates, Governors, State Attorneys General, Prosecuting Attorneys, Directors of State Departments of Corrections, State Parole Commissioners, State Legislators, State Courts, State Probation Officers, other Federal and State law enforcement offices, attorneys, and representatives of the news media.

Special mail also includes correspondence *received from* the following: President and Vice President of the United States, attorneys, Members of the U.S. Congress, Embassies and Consulates, the U.S. Department of Justice (excluding the Bureau of Prisons but including U.S. Attorneys), other Federal law enforcement officers, State Attorneys General, Prosecuting Attorneys, Governors, U.S. Courts (including U.S. Probation Officers), and State Courts. For incoming correspondence to be processed under the special mail procedures (see §§ 540.18–540.19), the sender must be adequately identified on the envelope, and the front of the envelope must be marked ''Special Mail—Open only in the presence of the inmate''.

Subpart B—Correspondence

SOURCE: 50 FR 40109, Oct. 1, 1985, unless otherwise noted.

§ 540.10 Purpose and scope.

The Bureau of Prisons encourages correspondence that is directed to socially useful goals. The Warden shall establish correspondence procedures for inmates in each institution, as authorized and suggested in this rule.

§ 540.11 Mail depositories.

The Warden shall establish at least one mail depository within the institution for an inmate to place outgoing correspondence. The Warden may establish a separate mail depository for outgoing special mail. Each item placed in a mail depository must contain a return address (see § 540.12(d)).

[50 FR 40109, Oct. 1, 1985, as amended at 64 FR 32171, June 15, 1999]

§ 540.12 Controls and procedures.

(a) The Warden shall establish and exercise controls to protect individuals, and the security, discipline, and good order of the institution. The size, complexity, and security level of the institution, the degree of sophistication of the inmates confined, and other variables require flexibility in correspondence procedures. All Wardens shall establish open general correspondence procedures.

(b) Staff shall inform each inmate in writing promptly after arrival at an institution of that institution's rules for handling of inmate mail. This notice includes the following statement:

The staff of each institution of the Bureau of Prisons has the authority to open all mail addressed to you before it is delivered to you. ''Special Mail'' (mail from the President and Vice President of the U.S., attorneys, Members of the U.S. Congress, Embassies and Consulates, the U.S. Department of Justice (excluding the Bureau of Prisons but including U.S. Attorneys), other Federal law enforcement officers, State Attorneys General, Prosecuting Attorneys, Governors, U.S. Courts (including U.S. Probation Officers), and State Courts) may be opened only in your presence to be checked for contraband.

This procedure occurs only if the sender is adequately identified on the envelope and the front of the envelope is marked ''Special Mail—Open only in the presence of the inmate.'' Other mail may be opened and read by the staff.

If you do not want your *general* correspondence opened and read, the Bureau will return it to the Postal Service. This means that you will not receive such mail. You may choose whether you want your general correspondence delivered to you subject to the above conditions, or returned to the Postal Service. Whatever your choice, special mail will be delivered to you, after it is opened in your presence and checked for contraband. You can make your choice by signing part I or part II.

PART I—GENERAL CORRESPONDENCE TO BE RETURNED TO THE POSTAL SERVICE

I have read or had read to me the foregoing notice regarding mail. I do not want my general correspondence opened and read. I REQUEST THAT THE BUREAU OF PRISONS RETURN MY GENERAL CORRESPONDENCE TO THE POSTAL SERVICE. I understand that special mail will be delivered to me, after it is opened in my presence and checked for contraband.

(Name) _____

(Reg. No.) _____

(Date) _____

PART II—GENERAL CORRESPONDENCE TO BE OPENED, READ, AND DELIVERED

I have read or had read to me the foregoing notice regarding mail, I WISH TO RECEIVE MY GENERAL CORRESPONDENCE. I understand that the Bureau of Prisons may open and read my general correspondence if I choose to receive same. I also understand that special mail will be delivered to me, after it is opened in my presence and checked for contraband.

(Name) _____

(Reg. No.) _____

(Date) _____

Inmate (Name), (Reg. No.), refused to sign this form. He (she) was advised by me that the Bureau of Prisons retains the authority to open and read all general correspondence. The inmate was also advised that his (her) refusal to sign this form will be interpreted as an indication that he (she) wishes to receive general correspondence subject to the conditions in part II above.

Staff Member's Signature _____

Date _____

(c) Staff shall inform an inmate that letters placed in the U.S. Mail are placed there at the request of the inmate and the inmate must assume responsibility for the contents of each letter. Correspondence containing threats, extortion, etc., may result in prosecution for violation of federal laws. When such material is discovered, the inmate may be subject to disciplinary action, the written material may be copied, and all material may be referred to the appropriate law enforcement agency for prosecution.

(d) The inmate is responsible for filling out the return address completely on envelopes provided for the inmate's use by the institution. If the inmate uses an envelope not provided by the institution, the inmate is responsible for ensuring that the envelope used contains all return address information listed on the envelope provided by the institution.

[50 FR 40109, Oct. 1, 1985, as amended at 64 FR 32171, June 15, 1999]

§ 540.13 Notification of rejections.

When correspondence is rejected, the Warden shall notify the sender in writing of the rejection and the reasons for the rejection. The Warden shall also give notice that the sender may appeal the rejection. The Warden shall also notify an inmate of the rejection of any letter addressed to that inmate, along with the reasons for the rejection and shall notify the inmate of the right to appeal the rejection. The Warden shall refer an appeal to an official other than the one who originally disapproved the correspondence. The Warden shall return rejected correspondence to the sender unless the correspondence includes plans for or discussion of commission of a crime or evidence of a crime, in which case there is no need to return the correspondence or give notice of the rejection, and the correspondence should be referred to appropriate law enforcement authorities. Also, contraband need not be returned to the sender.

§ 540.14 General correspondence.

(a) Institution staff shall open and inspect all incoming general correspondence. Incoming general correspondence may be read as frequently as deemed necessary to maintain security or monitor a particular problem confronting an inmate.

(b) Except for ''special mail,'' outgoing mail from a pretrial inmate may

not be sealed by the inmate and may be read and inspected by staff.

(c)(1) Outgoing mail from a sentenced inmate in a minimum or low security level institution may be sealed by the inmate and, except as provided for in paragraphs (c)(1)(i) through (iv) of this section, is sent out unopened and uninspected. Staff may open a sentenced inmate's outgoing general correspondence:

(i) If there is reason to believe it would interfere with the orderly running of the institution, that it would be threatening to the recipient, or that it would facilitate criminal activity;

(ii) If the inmate is on a restricted correspondence list;

(iii) If the correspondence is between inmates (see § 540.17); or

(iv) If the envelope has an incomplete return address.

(2) Except for ''special mail,'' outgoing mail from a sentenced inmate in a medium or high security level institution, or an administrative institution may not be sealed by the inmate and may be read and inspected by staff.

(d) The Warden may reject correspondence sent by or to an imate if it is determined detrimental to the security, good order, or discipline of the institution, to the protection of the public, or if it might facilitate criminal activity. Correspondence which may be rejected by a Warden includes, but is not limited to, correspondence which contains any of the following:

(1) Matter which is nonmailable under law or postal regulations;

(2) Matter which depicts, describes, or encourages activities which may lead to the use of physical violence or group disruption;

(3) Information of escape plots, of plans to commit illegal activities, or to violate Bureau rules or institution guidelines;

(4) Direction of an inmate's business (See § 541.13, Prohibited Act No. 408). An inmate, unless a pre-trial detainee, may not direct a business while confined.

This does not, however, prohibit correspondence necessary to enable an inmate to protect property and funds that were legitimately the inmate's at the time of commitment. Thus, for example, an inmate may correspond about refinancing an existing mortgage or sign insurance papers, but may not operate a mortgage or insurance business while in the institution.

(5) Threats, extortion, obscenity, or gratuitous profanity;

(6) A code;

(7) Sexually explicit material (for example, personal photographs) which by its nature or content poses a threat to an individual's personal safety or security, or to institution good order; or

(8) Contraband. (See § 500.1 of this chapter. A package received without prior authorization by the Warden is considered to be contraband.)

[50 FR 40109, Oct. 1, 1985, as amended at 56 FR 4159, Feb. 1, 1991; 62 FR 65186, Dec. 10, 1997]

§ 540.15 Restricted general correspondence.

(a) The Warden may place an inmate on restricted general correspondence based on misconduct or as a matter of classification. Determining factors include the inmate's:

(1) Involvement in any of the activities listed in § 540.14(d);

(2) Attempting to solicit funds or items (e.g., samples), or subscribing to a publication without paying for the subscription;

(3) Being a security risk;

(4) Threatening a government official; or

(5) Having committed an offense involving the mail.

(b) The Warden may limit to a reasonable number persons on the approved restricted general correspondence list of an inmate.

(c) The Warden shall use one of the following procedures before placing an inmate on restricted general correspondence.

(1) Where the restriction will be based upon an incident report, procedures must be followed in accordance with inmate disciplinary regulations (part 541, subpart B of this chapter).

(2) Where there is no incident report, the Warden:

(i) Shall advise the inmate in writing of the reasons the inmate is to be placed on restricted general correspondence;

(ii) Shall give the inmate the opportunity to respond to the classification or change in classification; the inmate

has the option to respond orally or to submit written information or both; and

(iii) Shall notify the inmate of the decision and the reasons, and shall advise the inmate that the inmate may appeal the decision under the Administrative Remedy Procedure.

(d) When an inmate is placed on restricted general correspondence, the inmate may, except as provided in §§ 540.16 and 540.17:

(1) Correspond with the inmate's spouse, mother, father, children, and siblings, unless the correspondent is involved in any violation of correspondence regulations, or would be a threat to the security or good order of the institution;

(2) Request other persons also to be placed on the approved correspondence list, subject to investigation, evaluation, and approval by the Warden; with prior approval, the inmate may write to a proposed correspondence to obtain a release authorizing an investigation; and

(3) Correspond with former business associates, unless it appears to the Warden that the proposed correspondent would be a threat to the security or good order of the institution, or that the resulting correspondence could reasonably be expected to result in criminal activity. Correspondence with former business associates is limited to social matters.

(e) The Warden may allow an inmate additional correspondence with persons other than those on the inmate's approved mailing list when the correspondence is shown to be necessary and does not require an addition to the mailing list because it is not of an ongoing nature.

§ 540.16 Inmate correspondence while in segregation and holdover status.

(a) The Warden shall permit an inmate in holdover status (i.e., enroute to a designated institution) to have correspondence privileges similar to those of other inmates insofar as practical.

(b) The Warden shall permit an inmate in segregation to have full correspondence privileges unless placed on restricted general correspondence under § 540.15.

§ 540.17 Correspondence between confined inmates.

An inmate may be permitted to correspond with an inmate confined in any other penal or correctional institution if the other inmate is either a member of the immediate family, or is a party or witness in a legal action in which both inmates are involved. Such correspondence may be approved in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence. The following additional limitations apply:

(a) Such correspondence at institutions of all security levels may always be inspected and read by staff at the sending and receiving institutions (it may not be sealed by the inmate); and

(b)(1) The appropriate unit manager at each institution must approve of the correspondence if both inmates are housed in Federal institutions and both inmates are members of the same immediate family or are a party or witness in a legal action in which both inmates are involved.

(2) The Wardens of both institutions must approve of the correspondence if one of the inmates is housed at a non-Federal institution or if approval is being granted on the basis of exceptional circumstances.

[50 FR 40109, Oct. 1, 1985, as amended at 61 FR 65204, Dec. 18, 1995]

§ 540.18 Special mail.

(a) The Warden shall open incoming special mail only in the presence of the inmate for inspection for physical contraband and the qualification of any enclosures as special mail. The correspondence may not be read or copied if the sender is adequately identified on the envelope, and the front of the envelope is marked ''Special Mail—Open only in the presence of the inmate''.

(b) In the absence of either adequate identification or the ''special mail'' marking indicated in paragraph (a) of this section appearing on the envelope, staff may treat the mail as general correspondence and may open, inspect, and read the mail.

(c)(1) Except as provided for in paragraph (c)(2) of this section, outgoing special mail may be sealed by the inmate and is not subject to inspection.

(2) Special mail shall be screened in accordance with the provisions of paragraph (c)(2)(iii) of this section when the special mail is being sent by an inmate who has been placed on restricted special mail status.

(i) An inmate may be placed on restricted special mail status if the Warden, with the concurrence of the Regional Counsel, documents in writing that the special mail either has posed a threat or may pose a threat of physical harm to the recipient (e.g., the inmate has previously used special mail to threaten physical harm to a recipient).

(ii) The Warden shall notify the inmate in writing of the reason the inmate is being placed on restricted special mail status.

(iii) An inmate on restricted special mail status must present all materials and packaging intended to be sent as special mail to staff for inspection. Staff shall inspect the special mail material and packaging, in the presence of the inmate, for contraband. If the intended recipient of the special mail has so requested, staff may read the special mail for the purpose of verifying that the special mail does not contain a threat of physical harm. Upon completion of the inspection, staff shall return the special mail material to the inmate if the material does not contain contraband, or contain a threat of physical harm to the intended recipient. The inmate must then seal the special mail material in the presence of staff and immediately give the sealed special mail material to the observing staff for delivery. Special mail determined to pose a threat to the intended recipient shall be forwarded to the appropriate law enforcement entity. Staff shall send a copy of the material, minus the contraband, to the intended recipient along with notification that the original of the material was forwarded to the appropriate law enforcement entity.

(iv) The Warden shall review an inmate's restricted special mail status at least once every 180 days. The inmate is to be notified of the results of this review. An inmate may be removed from restricted special mail status if the Warden determines, with the concurrence of the Regional Counsel, that the special mail does not threaten or pose a threat of physical harm to the intended recipient.

(v) An inmate on restricted mail status may seek review of the restriction through the Administrative Remedy Program.

(d) Except for special mail processed in accordance with paragraph (c)(2) of this section, staff shall stamp the following statement directly on the back side of the inmate's outgoing special mail: ''The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has neither been opened nor inspected. If the writer raises a question or problem over which this facility has jurisdiction, you may wish to return the material for further information or clarification. If the writer encloses correspondence for forwarding to another addressee, please return the enclosure to the above address.''

[50 FR 40108, Oct. 1, 1985, as amended at 62 FR 65185, Dec. 10, 1997]

§ 540.19 Legal correspondence.

(a) Staff shall mark each envelope of incoming legal mail (mail from courts or attorneys) to show the date and time of receipt, the date and time the letter is delivered to an inmate and opened in the inmate's presence, and the name of the staff member who delivered the letter. The inmate may be asked to sign as receiving the incoming legal mail. This paragraph applies only if the sender has marked the envelope as specified in § 540.18.

(b) The inmate is responsible for advising any attorney that correspondence will be handled as special mail only if the envelope is marked with the attorney's name and an indication that the person is an attorney, and the front of the envelope is marked ''Special Mail—Open only in the presence of the inmate''. Legal mail shall be opened in accordance with special mail procedures (see § 540.18).

(c) Grounds for the limitation or denial of an attorney's correspondence rights or privileges are stated in part 543, subpart B. If such action is taken,

the Warden shall give written notice to the attorney and the inmate affected.

(d) In order to send mail to an attorney's assistant or to a legal aid student or assistant, an inmate shall address the mail to the attorney or legal aid supervisor, or the legal organization or firm, to the attention of the student or assistant.

(e) Mail to an inmate from an attorney's assistant or legal aid student or assistant, in order to be identified and treated by staff as special mail, must be properly identified on the envelope as required in paragraph (b) of this section, and must be marked on the front of the envelope as being mail from the attorney or from the legal aid supervisor.

§ 540.20 Inmate correspondence with representatives of the news media.

(a) An inmate may write through ''special mail'' to representatives of the news media specified by name or title (see § 540.2(b)).

(b) The inmate may not receive compensation or anything of value for correspondence with the news media. The inmate may not act as reporter.

(c) Representatives of the news media may initiate correspondence with an inmate. Staff shall open incoming correspondence from representatives of the media and inspect for contraband, for its qualification as media correspondence, and for content which is likely to promote either illegal activity or conduct contrary to Bureau regulations.

[50 FR 40109, Oct. 1, 1985, as amended at 75 FR 21164, Apr. 23, 2010]

§ 540.21 Payment of postage.

(a) Except as provided in paragraphs (d), (e), (f), and (i) of this section, postage charges are the responsibility of the inmate. The Warden shall ensure that the inmate commissary has postage stamps available for purchase by inmates.

(b) Writing paper and envelopes are provided at no cost to the inmate. Inmates who use their own envelopes must place a return address on the envelope (see § 540.12(d)).

(c) Inmate organizations will purchase their own postage.

(d) An inmate who has neither funds nor sufficient postage and who wishes to mail legal mail (includes courts and attorneys) or Administrative Remedy forms will be provided the postage stamps for such mailing. To prevent abuses of this provision, the Warden may impose restrictions on the free legal and administrative remedy mailings.

(e) When requested by an inmate who has neither funds nor sufficient postage, and upon verification of this status by staff, the Warden shall provide the postage stamps for mailing a reasonable number of letters at government expense to enable the inmate to maintain community ties. To prevent abuses of this provision, the Warden may impose restrictions on the free mailings.

(f) Mailing at government expense is also allowed for necessary correspondence in verified emergency situations for inmates with neither funds nor sufficient postage.

(g) Inmates must sign for all stamps issued to them by institution staff.

(h) Mail received with postage due is not ordinarily accepted by the Bureau of Prisons.

(i) Holdovers and pre-trial commitments will be provided a reasonable number of stamps for the mailing of letters at government expense.

(j) Inmates may not be permitted to receive stamps or stamped items (e.g., envelopes embossed with stamps, postal cards with postage affixed) other than by issuance from the institution or by purchase from commissary.

[50 FR 40109, Oct. 1, 1985, as amended at 64 FR 32171, June 15, 1999]

§ 540.22 Special postal services.

(a) An inmate, at no cost to the government, may send correspondence by registered, certified, or insured mail, and may request a return receipt.

(b) An inmate may insure outgoing personal correspondence (e.g., a package containing the inmate's hobbycrafts) by completing the appropriate form and applying sufficient postage.

(1) In the event of loss or damage, any claim relative to this matter is made to the U.S. Postal Service, either by the inmate or the recipient. The

U.S. Postal Service will only indemnify a piece of insured mail for the actual value of an item, regardless of declared value.

(2) Inmate packages forwarded as a result of institution administration are considered official mail, except as otherwise specified (for example, hobbycraft articles mailed out of the institution). Official mail is not insured. If such an item is subsequently lost or damaged in the mail process the inmate may file a tort claim with the Bureau of Prisons (see part 543, subpart C of this chapter).

(c) Certified mail is sent first class at the inmate's expense.

(d) An inmate may not be provided such services as express mail, COD, private carriers, or stamp collecting while confined.

§ 540.23 Inmate funds received through the mails.

Except as provided for in part 506 of this chapter, funds enclosed in inmate correspondence are to be rejected. Deposits intended for the inmate's commissary account must be mailed directly to the centralized commissary account (see 28 CFR part 506).

[69 FR 40317, July 2, 2004]

§ 540.24 Returned mail.

Staff shall open and inspect for contraband all undelivered mail returned to an institution by the Post Office before returning it to the inmate. The purpose of this inspection is to determine if the content originated with the inmate sender identified on the letter or package; to prevent the transmission of material, substances, and property which an inmate is not permitted to possess in the institution; and to determine that the mail was not opened or tampered with before its return to the institution. Any remailing is at the inmate's expense. Any returned mail qualifying as ''special mail'' is opened and inspected for contraband in the inmate's presence.

§ 540.25 Change of address and forwarding of mail for inmates.

(a) Staff shall make available to an inmate who is being released or transferred appropriate Bureau of Prisons and U.S. Postal Service forms for change of address.

(b) Inmates are responsible for informing their correspondents of a change of address.

(c) Postage for mailing change of address cards is paid by the inmate.

(d) Except as provided in paragraphs (e) through (g) of this section, all mail received for a released or transferred inmate will be returned to the U.S. Postal Service for disposition in accordance with U.S. Postal Service regulations.

(e) Staff shall use all means practicable to forward special mail.

(f) Staff shall forward inmate general correspondence to the new address for a period of 30 days.

(g) Staff shall permit an inmate released temporarily on writ to elect either to have general correspondence held at the institution for a period not to exceed 30 days, or returned to the U.S. Postal Service for disposition.

(1) If the inmate refuses to make this election, staff at the institution shall document this refusal, and any reasons, in the inmate's central file. Staff shall return to the U.S. Postal Service all general correspondence received for such as inmate after the inmate's departure.

(2) If the inmate does not return from writ within the time indicated, staff shall return to the U.S. Postal Service all general correspondence being held for that inmate for disposition in accordance with postal regulations.

Subpart C [Reserved]

Subpart D—Visiting Regulations

SOURCE: 45 FR 44232, June 30, 1980, unless otherwise noted.

§ 540.40 Purpose and scope.

The Bureau of Prisons encourages visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community. The Warden shall develop procedures consistent with this rule to permit inmate visiting. The Warden may

restrict inmate visiting when necessary to ensure the security and good order of the institution.

[45 FR 44232, June 30, 1980, as amended at 58 FR 39095, July 21, 1993]

§ 540.41 Visiting facilities.

The Warden shall have the visiting room arranged so as to provide adequate supervision, adapted to the degree of security required by the type of institution. The Warden shall ensure that the visiting area is as comfortable and pleasant as practicable, and appropriately furnished and arranged. If space is available, the Warden shall have a portion of the visiting room equipped and set up to provide facilities for the children of visitors.

(a) Institutions of minimum and low security levels may permit visits beyond the security perimeter, but always under supervision of staff.

(b) Institutions of medium and high security levels, and administrative institutions may establish outdoor visiting, but it will always be inside the security perimeter and always under supervision of staff.

[45 FR 44232, June 30, 1980, as amended at 51 FR 26127, July 18, 1986; 56 FR 4159, Feb. 1, 1991]

§ 540.42 Visiting times.

(a) Each Warden shall establish a visiting schedule for the institution. At a minimum, the Warden shall establish visiting hours at the institution on Saturdays, Sundays, and holidays. The restriction of visiting to these days may be a hardship for some families and arrangements for other suitable hours shall be made to the extent practicable. Where staff resources permit, the Warden may establish evening visiting hours.

(b) Consistent with available resources, such as space limitations and staff availability, and with concerns of institution security, the Warden may limit the visiting period. With respect to weekend visits, for example, some or all inmates and visitors may be limited to visiting on Saturday or on Sunday, but not on both days, in order to accommodate the volume of visitors. There is no requirement that every visitor has the opportunity to visit on both days of the weekend, nor that every inmate has the opportunity to have visits on both days of the weekend.

[51 FR 26127, July 18, 1986]

§ 540.43 Frequency of visits and number of visitors.

The Warden shall allow each inmate a minimum of four hours visiting time per month. The Warden may limit the length or frequency of visits only to avoid chronic overcrowding. The Warden may establish a guideline for the maximum number of persons who may visit an inmate at one time, to prevent overcrowding in the visiting room or unusual difficulty in supervising a visit. Exceptions may be made to any local guideline when indicated by special circumstances, such as distance the visitor must travel, frequency of the inmate's visits, or health problems of the inmate or visitor.

§ 540.44 Regular visitors.

An inmate desiring to have regular visitors must submit a list of proposed visitors to the designated staff. See § 540.45 for qualification as special visitor. Staff are to compile a visiting list for each inmate after suitable investigation in accordance with § 540.51(b) of this part. The list may include:

(a) *Members of the immediate family*. These persons include mother, father, step-parents, foster parents, brothers and sisters, spouse, and children. These individuals are placed on the visiting list, absent strong circumstances which preclude visiting.

(b) *Other relatives*. These persons include grandparents, uncles, aunts, in-laws, and cousins. They may be placed on the approved list if the inmate wishes to have visits from them regularly and if there exists no reason to exclude them.

(c) *Friends and associates*. The visiting privilege ordinarily will be extended to friends and associates having an established relationship with the inmate prior to confinement, unless such visits could reasonably create a threat to the security and good order of the institution. Exceptions to the prior relationship rule may be made, particularly for inmates without other visitors, when it is shown that the proposed visitor is

reliable and poses no threat to the security or good order of the institution.

(d) *Persons with prior criminal convictions.* The existence of a criminal conviction alone does not preclude visits. Staff shall give consideration to the nature, extent and recentness of convictions, as weighed against the security considerations of the institution. Specific approval of the Warden may be required before such visits take place.

(e) *Children under sixteen.* Children under the age of 16 may not visit unless accompanied by a responsible adult. Children shall be kept under supervision of a responsible adult or a children's program. Exceptions in unusual circumstances may be made by special approval of the Warden.

[45 FR 44232, June 30, 1980, as amended at 56 FR 4159, Feb. 1, 1991; 68 FR 10658, Mar. 6, 2003]

§ 540.45 Qualification as special visitor.

Persons in the categories listed in this section may qualify as special visitors rather than as regular visitors. Visits by special visitors ordinarily are for a specific purpose and ordinarily are not of a recurring nature. Except as specified, the conditions of visiting for special visitors are the same as for regular visitors.

(a) *Business visitor.* Except for pretrial inmates, an inmate is not permitted to engage actively in a business or profession. An inmate who was engaged in a business or profession prior to commitment is expected to assign authority for the operation of such business or profession to a person in the community. Pretrial inmates may be allowed special visitors for the purpose of protecting the pretrial inmate's business interests. In those instances where an inmate has turned over the operation of a business or profession to another person, there still may be an occasion where a decision must be made which will substantially affect the assets or prospects of the business. The Warden accordingly may permit a special business visit in such cases. The Warden may waive the requirement for the existence of an established relationship prior to confinement for visitors approved under this paragraph.

(b) *Consular visitors.* When it has been determined that an inmate is a citizen of a foreign country, the Warden must permit the consular representative of that country to visit on matters of legitimate business. The Warden may not withhold this privilege even though the inmate is in disciplinary status. The requirement for the existence of an established relationship prior to confinement does not apply to consular visitors.

(c) *Representatives of community groups.* The Warden may approve visits on a recurring basis to representatives from community groups (for example, civic, volunteer, or religious organizations) who are acting in their official capacity. These visits may be for the purpose of meeting with an individual inmate or with a group of inmates. The requirement for the existence of an established relationship prior to confinement for visitors does not apply to representatives of community groups.

(d) *Clergy, former or prospective employers, sponsors, and parole advisors.* Visitors in this category ordinarily provide assistance in release planning, counseling, and discussion of family problems. The requirement for the existence of an established relationship prior to confinement for visitors does not apply to visitors in this category.

[68 FR 10658, Mar. 6, 2003]

§ 540.46 Attorney visits.

Requirements for attorney visits are governed by the provisions on inmate legal activities (see §§ 543.12 through 543.16 of this chapter). Provisions pertinent to attorney visits for pretrial inmates are contained in § 551.117 of this chapter.

[68 FR 10658, Mar. 6, 2003]

§ 540.47 Media visits.

Requirements for media visits are governed by the provisions on contact with news media (see subpart E of this part). A media representative who wishes to visit outside his or her official duties, however, must qualify as a regular visitor or, if applicable, a special visitor.

[68 FR 10658, Mar. 6, 2003]

§ 540.48 [Reserved]

§ 540.49 Transportation assistance.

The Warden shall ensure that directions for transportation to and from the institution are provided for the approved visitor (see § 540.51(b)(4)). Directions for transportation to and from the institution and pay phone service, with commercial transportation phone numbers posted, are also to be made available at the institution to assist visitors.

§ 540.50 Visits to inmates not in regular population status.

(a) *Admission and holdover status.* The Warden may limit to the immediate family of the inmate visits during the admission-orientation period or for holdovers where there is neither a visiting list from a transferring institution nor other verification of proposed visitors.

(b) *Hospital patients.* (1) When visitors request to see an inmate who is hospitalized in the institution, the Chief Medical Officer (or, in his absence, the Health Services Administrator), in consultation with the Captain, shall determine whether a visit may occur, and if so, whether it may be held in the hospital.

(2) Visits to inmates hospitalized in the community may be restricted to only the immediate family and are subject to the general visiting policy of that hospital.

(c) *Detention or segregation status.* Ordinarily, an inmate retains visiting privileges while in detention or segregation status. Visiting may be restricted or disallowed, however, when an inmate, while in detention or segregation status, is charged with, or has been found to have committed, a prohibited act having to do with visiting guidelines or has otherwise acted in a way that would reasonably indicate that he or she would be a threat to the orderliness or security of the visiting room. Loss of an inmate's visiting privileges for other reasons may not occur unless the inmate is provided a hearing before the Discipline Hearing Officer (DHO) in accordance with the provisions of § 541.17 of this chapter, following those provisions which are appropriate to the circumstances, which results in a finding by the DHO that the inmate committed a prohibited act and that there is a lack of other appropriate sanctions or that imposition of an appropriate sanction previously has been ineffective. The Unit Discipline Committee (UDC) may not impose a loss of visiting privileges for inmates in detention or segregation status. The provisions of this paragraph (c) do not interrupt or delay a loss of visiting sanction imposed by the UDC or DHO prior to the inmate's placement in detention or segregation status.

[45 FR 44232, June 30, 1980, as amended at 51 FR 26128, July 18, 1986; 58 FR 39095, July 21, 1993]

§ 540.51 Procedures.

(a) *Responsibility.* The Warden of the institution shall establish and enforce local visiting guidelines in accordance with the rules and regulations of the Bureau of Prisons.

(b) *Preparation of the list of visitors.* (1) Staff shall ask each inmate to submit during the admission-orientation process a list of proposed visitors. After appropriate investigation, staff shall compile a visiting list for each inmate and distribute that list to the inmate and the visiting room officer.

(2) Staff may request background information from potential visitors who are not members of the inmate's immediate family, before placing them on the inmate's approved visiting list. When little or no information is available on the inmate's potential visitor, visiting may be denied, pending receipt and review of necessary information, including information which is available on the inmate and/or the inmate's offense, including alleged offenses.

(3) If a background investigation is necessary before approving a visitor, the inmate shall be held responsible for mailing a release authorization form to the proposed visitor. That form must be signed and returned to staff by the proposed visitor prior to any further action regarding visiting. Upon receipt of the authorization form, staff may then forward a questionnaire, along with the release authorization, to the appropriate law enforcement or crime information agency.

(4) Staff shall notify the inmate of each approval or disapproval of a requested person for the visiting list. Upon approval of each visitor, staff shall provide the inmate a copy of the visiting guidelines and with directions for transportation to and from the institution. The inmate is responsible for notifying the visitor of the approval or disapproval to visit and is expected to provide the approved visitors with a copy of the visiting guidelines and directions for transportation to and from the institution. The visiting guidelines shall include specific directions for reaching the institution and shall cite 18 U.S.C. 1791, which provides a penalty of imprisonment for not more than twenty years, a fine, or both for providing or attempting to provide to an inmate anything whatsoever without the knowledge and consent of the Warden.

(5) An inmate's visiting list may be amended at any time in accordance with the procedures of this section.

(c) *Verification of special visitor credentials.* Staff must verify the qualifications of special visitors. Staff may request background information and official assignment documentation from the potential visitor for this purpose.

(d) *Identification of visitors.* Staff shall verify the identity of each visitor (through driver's license, photo identification, etc.) prior to admission of the visitor to the institution.

(e) *Notification to visitors.* Staff shall make available to all visitors written guidelines for visiting the institution. Staff shall have the visitor sign a statement acknowledging that the guidelines were provided and declaring that the visitor does not have any articles in his/her possession which the visitor knows to be a threat to the security of the institution. Staff may deny the visiting privilege to a visitor who refuses to make such a declaration.

(f) *Searching visitors.* Staff may require a visitor to submit to a personal search, including a search of any items of personal property, as a condition of allowing or continuing a visit.

(g) *Record of visitors.* The Warden shall maintain a record of visitors to each inmate. The visitor's signature may be required on that record and shall be required on at least one visiting log or record maintained by the institution.

(h) *Supervision of visits.* Staff shall supervise each inmate visit to prevent the passage of contraband and to ensure the security and good order of the institution. The Warden may establish procedures to enable monitoring of the visiting area, including restrooms located within the visiting area. The Warden must provide notice to both visitors and inmates of the potential for monitoring the visiting area. The Warden may monitor a visitor restroom within the visiting area when there is reasonable suspicion that a visitor and/or an inmate is engaged, or attempting or about to engage, in criminal behavior or other prohibited behavior.

(1) The visiting room officer shall ensure that all visits are conducted in a quiet, orderly, and dignified manner. The visiting room officer may terminate visits that are not conducted in the appropriate manner. See 28 CFR 541.12, item 5, for description of an inmate's responsibility during visits.

(2) Staff shall permit limited physical contact, such as handshaking, embracing, and kissing, between an inmate and a visitor, unless there is clear and convincing evidence that such contact would jeopardize the safety or security of the institution. Where contact visiting is provided, handshaking, embracing, and kissing are ordinarily permitted within the bounds of good taste and only at the beginning and at the end of the visit. The staff may limit physical contact to minimize opportunity for the introduction of contraband and to maintain the orderly operation of the visiting area.

(3) The visiting room officer may not accept articles or gifts of any kind for an inmate, except packages which have had prior approval by the Warden or a designated staff member.

(4) The visiting room officer shall be aware of any articles passed between the inmate and the visitor. If there is any reasonable basis to believe that any item is being passed which constitutes contraband or is otherwise in

violation of the law or Bureau regulations, the visiting room officer may examine the item.

[45 FR 44232, June 30, 1980, as amended at 51 FR 26128, July 18, 1986; 58 FR 39095, July 21, 1993; 64 FR 25795, May 12, 1999; 68 FR 10658, Mar. 6, 2003; 69 FR 40317, July 2, 2004]

§ 540.52 Penalty for violation of visiting regulations.

Any act or effort to violate the visiting guidelines of an institution may result in disciplinary action against the inmate, which may include the denial of future visits, possibly over an extended period of time. Moreover, criminal prosecution may be initiated against the visitor, the inmate, or both, in the case of criminal violations.

Subpart E—Contact With News Media

SOURCE: 44 FR 38247, June 29, 1979, unless otherwise noted.

§ 540.60 Purpose and scope.

The Bureau of Prisons recognizes the desirability of establishing a policy that affords the public information about its operations via the news media. Representatives of the news media (see § 540.2) may visit institutions for the purpose of preparing reports about the institution, programs, and activities. It is not the intent of this rule to provide publicity for an inmate or special privileges for the news media, but rather to insure a better informed public. The Bureau of Prisons also has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, an interview in an institution must be regulated to insure the orderly and safe operation of the institution.

§ 540.61 Authorization.

(a) A news media representative who desires to make a visit or conduct an interview at an institution must make application in writing to the Warden, indicating that he or she is familiar with the rules and regulations of the institution and agrees to comply with them.

(b) As a condition of authorizing interviews and making facilities available to conduct an interview, the news media representative shall recognize a professional responsibility to make reasonable attempts to verify any allegations regarding an inmate, staff member or institution.

(c) A representative of the news media is requested to provide the Bureau of Prisons an opportunity to respond to any allegation, which might be published or broadcast prior to distribution.

(d) A representative of the news media shall collect information only from the primary source. A representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed.

(e) The Warden may be contacted concerning discussions or comments regarding applicability of any rule or order.

(f) Failure to adhere to the standards of conduct set forth by this rule for the news media representative constitutes grounds for denying that news media representative, or the news organization which he or she represents, permission to conduct an interview.

(g) Any questions as to the meaning or application of this subpart are resolved by the Director of the Bureau of Prisons.

§ 540.62 Institutional visits.

(a) A media representative shall make advance appointments for visits.

(b) When media representatives visit the institutions, photographs of programs and activities may be taken, and media representatives may meet with groups of inmates engaged in authorized programs and activities. An inmate has the right not to be photographed and not to have his or her voice recorded by the media. A visiting representative of the media is required to obtain written permission from an inmate before photographing or recording the voice of an inmate participating in authorized programs and activities.

(c) The Warden may suspend all media visits during an institutional emergency and for a reasonable time after the emergency.

(d) An inmate currently confined in an institution may not be employed or act as a reporter.

(e) Interviews by reporters and others not included in § 540.2 may be permitted only by special arrangement and with approval of the Warden.

[44 FR 38247, June 29, 1979, as amended at 75 FR 21164, Apr. 23, 2010]

§ 540.63 Personal interviews.

(a) An inmate may not receive compensation or anything of value for interviews with the news media.

(b) Either an inmate or a representative of the news media may initiate a request for a personal interview at an institution.

(c) Visits by the news media to conduct personal interviews are subject to the same conditions stated in § 540.62. A media representative shall make a request for personal interview within a reasonable time prior to the personal interview.

(d) Staff shall notify an inmate of each interview request, and shall, as a prerequisite, obtain from the inmate written consent for the interview prior to the interview taking place. The written consent or denial becomes part of the inmate's central file.

(e) As a prerequisite to granting the interview, an inmate must authorize the institutional staff to respond to comments made in the interview and to release information to the news media relative to the inmate's comments.

(f) The Warden shall normally approve or disapprove an interview request within 24 to 48 hours of the request.

(g) The Warden shall document any disapproval. A request for interview may be denied for any of the following reasons.

(1) The news media representative, or the news organization which he or she represents, does not agree to the conditions established by this subpart or has, in the past, failed to abide by the required conditions.

(2) The inmate is physically or mentally unable to participate. This must be supported by a medical officer's statement (a psychologist may be used to verify mental incapacity) to be placed in the inmate's record, substantiating the reason for disapproval.

(3) The inmate is a juvenile (under age 18) and written consent has not been obtained from the inmate's parent or guardian. If the juvenile inmate's parents or guardians are not known or their addresses are not known, the Warden of the institution shall notify the representative of the news media of the inmate's status as a juvenile, and shall then consider the request.

(4) The interview, in the opinion of the Warden, would endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution.

(5) The inmate is involved in a pending court action and the court having jurisdiction has issued an order forbidding such interviews.

(6) In the case of unconvicted persons (including competency commitments under 18 U.S.C. 4244 and 4246) held in federal institutions, interviews are not authorized until there is clearance with the court having jurisdiction, ordinarily through the U.S. Attorney's Office.

(7) The inmate is a ''protection'' case and revelation of his or her whereabouts would endanger the inmate's safety.

(h) Interviews are normally held in the institution visiting room during normal weekday business hours. The Warden may:

(1) Determine that another location is more suitable for conducting the interview;

(2) Limit interview time for the entire institution if the Warden determines that the interviews are imposing a serious drain on staff or use of the facilities;

(3) Limit to one one-hour interview per month for an inmate in segregation, restricted, holdover, control unit, or hospital status if required by special security, custodial, or supervisory needs; and

(4) Limit the amount of audio, video, and film equipment or number of media personnel entering the institution if the Warden determines that the requested equipment or personnel would create a disruption within the institution.

(i) In conjunction with the personal interview, if the member of the media wishes to tour the institution, he or she must comply with the provisions of § 540.61.

(j) Interviews are not subject to auditory supervision.

§ 540.64 Press pools.

(a) The Warden may establish a press pool whenever he or she determines that the frequency of requests for interviews and visits reaches a volume that warrants limitations.

(b) Whenever the Warden establishes a press pool, the Warden shall notify all news media representatives who have requested interviews or visits that have not been conducted. Selected representatives are admitted to the institution to conduct the interviews under the specific guidelines established by the Warden.

(c) All members of the press pool are selected by their peers and consist of not more than one representative from each of the following groups:

(1) The national and international news services;

(2) The television and radio networks and outlets;

(3) The news magazines and newspapers; and

(4) All media in the local community where the institution is located. If no interest has been expressed by one or more of these groups, no representative from such group need be selected.

(d) All news material generated by such a press pool is made available to all media without right of first publication or broadcast.

§ 540.65 Release of information.

(a) The Warden shall promptly make announcements stating the facts of unusual, newsworthy incidents to local news media. Examples are deaths, inside escapes, and institution emergencies.

(b) The Warden shall provide information about an inmate that is a matter of public record to the representatives of the media upon request. The information is limited to the inmate's:

(1) Name;

(2) Register number;

(3) Place of incarceration;

(4) Age;

(5) Race;

(6) Conviction and sentencing data: this includes the offense(s) for which convicted, the court where convicted, the date of sentencing, the length of sentence(s), the amount of good time earned, the parole eligibility date and parole release (presumptive or effective) date, and the date of expiration of sentence, and includes previous Federal, state, and local convictions;

(7) Past movement via transfers or writs;

(8) General institutional assignments.

(c) Information in paragraphs (b)(1) through (8) of this section may not be released if confidential for protection cases.

(d) A request for additional information concerning an inmate by a representative of the news media is referred to the Public Information Officer, Central Office, Washington, DC.

(e) The Public Information Officer, Central Office, Washington, DC shall release all announcements related to:

(1) Bureau of Prisons policy;

(2) Changes in an institutional mission;

(3) Type of inmate population; or

(4) Changes in executive personnel.

Subpart F—Incoming Publications

§ 540.70 Purpose and scope.

Except when precluded by statute (see § 540.72), the Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this subpart, means a book, booklet, pamphlet, or similar document, or a single issue of a magazine, periodical, newsletter, newspaper, plus such other materials addressed to a specific inmate such as advertising brochures, flyers, and catalogs.

[61 FR 57568, Nov. 6, 1996]

§ 540.71 Procedures.

(a)(1) At all Bureau institutions, an inmate may receive hardcover publications and newspaper only from the publisher, from a book club, or from a bookstore.

(2) At medium security, high security, and administrative institutions, an inmate may receive softcover publications (for example, paperback books, newspaper, clippings, magazines, and other similar items) only from the publisher, from a book club, or from a bookstore.

(3) At minimum security and low security institutions, an inmate any receive softcover publications (other than newspapers) from any source.

(4) The Unit Manager may make an exception to the provisions of paragraphs (a)(1) and (2) of this section of the publication is no longer available from the publisher, book club, or bookstore. The Unit Manager shall require that the inmate provide written documentation that the publication is no longer available from these sources. The approval or disapproval of any request for an exception is to be documented, in writing, on an Authorization to Receive a Package form which will be used to secure the item.

(b) The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity. The Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

(1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;

(2) It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;

(3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;

(4) It is written in code;

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

(c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subscription publication in its entirety.

(d) Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Program unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

(e) The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 20 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Program, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

(f) The Warden may set limits locally (for fire, sanitation or housekeeping reasons) on the number or volume of publications an inmate may receive or

retain in his quarters. The Warden may authorize an inmate additional storage space for storage of legal materials in accordance with the Bureau of Prisons procedures on personal property of inmates.

[44 FR 38260, June 29, 1979, as amended at 47 FR 55130, Dec. 7, 1982; 50 FR 411, Jan. 3, 1985; 61 FR 57568, Nov. 6, 1996; 67 FR 77164, Dec. 17, 2002]

§ 540.72 Statutory restrictions requiring return of commercially published information or material which is sexually explicit or features nudity.

(a) When commercially published information or material may not be distributed by staff or made available to inmates due to statutory restrictions (for example, a prohibition on the use of appropriated funds to distribute or make available to inmates information or material which is sexually explicit or features nudity), the Warden or designee shall return the information or material to the publisher or sender. The Warden or designee shall advise the publisher or sender that an independent review of the decision may be obtained by writing to the Regional Director within 20 days of receipt of the notification letter. Staff shall provide the inmate with written notice of the action.

(b) *Definitions*. For the purpose of this section:

(1) *Commercially published information or material* means any book, booklet, pamphlet, magazine, periodical, newsletter, photograph or other pictorial depiction, or similar document, including stationery and greeting cards, published by any individual, organization, company, or corporation which is distributed or made available through any means or media for a commercial purpose. This definition includes any portion extracted, photocopied, or clipped from such items.

(2) *Nudity* means a pictorial depiction where genitalia or female breasts are exposed.

(3) *Features* means the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition.

(4) *Sexually explicit* means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation.

[61 FR 57569, Nov. 6, 1996, as amended at 67 FR 77427, Dec. 18, 2002]

Subparts G–H [Reserved]

Subpart I—Telephone Regulations for Inmates

SOURCE: 44 FR 38249, June 29, 1979, unless otherwise noted.

§ 540.100 Purpose and scope.

(a) The Bureau of Prisons extends telephone privileges to inmates as part of its overall correctional management. Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development. An inmate may request to call a person of his or her choice outside the institution on a telephone provided for that purpose. However, limitations and conditions may be imposed upon an inmate's telephone privileges to ensure that these are consistent with other aspects of the Bureau's correctional management responsibilities. In addition to the procedures set forth in this subpart, inmate telephone use is subject to those limitations which the Warden determines are necessary to ensure the security or good order, including discipline, of the institution or to protect the public. Restrictions on inmate telephone use may also be imposed as a disciplinary sanction (see 28 CFR part 541).

(b) Except as provided in this rule, the Warden shall permit an inmate who has not been restricted from telephone use as the result of a specific institutional disciplinary sanction to make at least one telephone call each month.

[59 FR 15824, Apr. 4, 1994, as amended at 61 FR 90, Jan. 2, 1996]

§ 540.101 Procedures.

(a) *Telephone list preparation*. An inmate telephone call shall ordinarily be

made to a number identified on the inmate's official telephone list. This list ordinarily may contain up to 30 numbers. The Associate Warden may authorize the placement of additional numbers on an inmate's telephone list based on the inmate's individual situation, e.g., size of family.

(1) During the admission and orientation process, an inmate who chooses to have telephone privileges shall prepare a proposed telephone list. At the time of submission, the inmate shall acknowledge that, to the best of the inmate's knowledge, the person or persons on the list are agreeable to receiving the inmate's telephone call and that the proposed calls are to be made for a purpose allowable under Bureau policy or institution guidelines.

(2) Except as provided in paragraph (a)(3) of this section, telephone numbers requested by an inmate will ordinarily be placed on the inmate's telephone list. When an inmate requests the placement of numbers for persons other than for immediate family or those persons already approved for the inmate's visiting list, staff ordinarily will notify those persons in writing that their numbers have been placed on the inmate's telephone list. The notice advises the recipient that the recipient's number will be removed from the list if the recipient makes a written request to the institution, or upon the written request of the inmate, or as provided in paragraph (a)(3) of this section.

(3) The Associate Warden may deny placement of a telephone number on an inmate's telephone list if the Associate Warden determines that there is a threat to institution security or good order, or a threat to the public. Any disapproval must be documented in writing to both the inmate and the proposed recipient. As with concerns about any correctional issue, including any portion of these telephone regulations, an inmate may appeal the denial through the administrative remedy procedure (see 28 CFR part 542). The Associate Warden will notify the denied recipient that he or she may appeal the denial by writing to the Warden within 15 days of the receipt of the denial.

(b) *Telephone list update.* Each Warden shall establish procedures to allow an inmate the opportunity to submit telephone list changes on at least a quarterly basis.

(c) *Telephone access codes.* An inmate may not possess another inmate's telephone access code number. An inmate may not give his or her telephone access code number to another inmate, and is to report a compromised telephone access code number immediately to unit staff.

(d) *Placement and duration of telephone call.* The placement and duration of any telephone call is subject to availability of inmate funds. Ordinarily, an inmate who has sufficient funds is allowed at least three minutes for a telephone call. The Warden may limit the maximum length of telephone calling based on the situation at that institution (e.g., institution population or usage demand).

(e) *Exception.* The Warden may allow the placement of collect calls for good cause. Examples of good cause include, but are not limited to, inmates who are new arrivals to the institution, including new commitments and transfers; inmates confined at Metropolitan Correctional Centers, Metropolitan Detention Centers, or Federal Detention Centers; pretrial inmates; inmates in holdover status; inmates who are without funds (see § 540.105(b)); and in cases of family emergencies.

[59 FR 15824, Apr. 4, 1994]

§ 540.102 Monitoring of inmate telephone calls.

The Warden shall establish procedures that enable monitoring of telephone conversations on any telephone located within the institution, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. The Warden must provide notice to the inmate of the potential for monitoring. Staff may not monitor an inmate's properly placed call to an attorney. The Warden shall notify an inmate of the proper procedures to have an unmonitored telephone conversation with an attorney.

[48 FR 24622, June 1, 1983. Redesignated at 59 FR 15824, Apr. 4, 1994]

§ 540.103 Inmate telephone calls to attorneys.

The Warden may not apply frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate.

[44 FR 38249, June 29, 1979. Redesignated at 59 FR 15824, Apr. 4, 1994]

§ 540.104 Responsibility for inmate misuse of telephones.

The inmate is responsible for any misuse of the telephone. The Warden shall refer incidents of unlawful inmate telephone use to law enforcement authorities. The Warden shall advise an inmate that violation of the institution's telephone regulations may result in institutional disciplinary action (See part 541, subpart B).

[44 FR 38249, June 29, 1979. Redesignated at 59 FR 15824, Apr. 4, 1994]

§ 540.105 Expenses of inmate telephone use.

(a) An inmate is responsible for the expenses of inmate telephone use. Such expenses may include a fee for replacement of an inmate's telephone access code that is used in an institution which has implemented debit billing for inmate telephone calls. Each inmate is responsible for staying aware of his or her account balance through the automated process provided by the system. Third party billing and electronic transfer of a call to a third party are prohibited.

(b) The Warden shall provide at least one collect call each month for an inmate who is without funds. An inmate without funds is defined as an inmate who has not had a trust fund account balance of $6.00 for the past 30 days. The Warden may increase the number of collect calls based upon local institution conditions (e.g., institution population, staff resources, and usage demand). To prevent abuses of this provision (e.g., inmate shows a pattern of depleting his or her commissary funds prior to placing collect calls), the Warden may impose restrictions on the provisions of this paragraph (b).

(c) [Reserved]

(d) The Warden may direct the government to bear the expense of inmate telephone use or allow a call to be made collect under compelling circumstances such as when an inmate has lost contact with his family or has a family emergency.

[59 FR 15824, Apr. 4, 1994, as amended at 60 FR 240, Jan. 3, 1995; 61 FR 90, Jan. 2, 1996]

PART 541—INMATE DISCIPLINE AND SPECIAL HOUSING UNITS

Subpart A—Inmate Discipline Program

Sec.
541.1 Purpose.
541.2 Application.
541.3 Prohibited acts and available sanctions.
541.4 Loss of good conduct sentence credit as a mandatory sanction.
541.5 Discipline process.
541.6 Mentally ill inmates.
541.7 Unit Discipline Committee (UDC) review.
541.8 Discipline Hearing Officer (DHO) hearing.

Subpart B—Special Housing Units

541.20 Purpose.
541.21 Special Housing Units (SHUs).
541.22 Status when placed in the SHU.
541.23 Administrative detention status.
541.24 Disciplinary segregation status.
541.25 Notice received when placed in the SHU.
541.26 Review of placement in the SHU.
541.27 Protection case—placement in Administrative Detention Status.
541.28 Protection case-review of placement in the SHU.
541.29 Staff verification of need for protection.
541.30 Lack of verification of need for protection.
541.31 Conditions of confinement in the SHU.
541.32 Medical and mental health care in the SHU.
541.33 Release from the SHU.

Subpart C [Reserved]

Subpart D—Control Unit Programs

541.40 Purpose and scope.
541.41 Institutional referral.
541.42 Designation of Hearing Administrator.
541.43 Hearing procedure.
541.44 Decision of the Hearing Administrator.
541.45 Executive Panel review and appeal.

541.46 Programs and services.
541.47 Admission to control unit.
541.48 Search of control unit inmates.
541.49 Review of control unit placement.
541.50 Release from a control unit.

Subpart E—Procedures for Handling of HIV Positive Inmates Who Pose Danger to Others

541.60 Purpose and scope.
541.61 Standard for placement in controlled housing status.
541.62 Referral for placement.
541.63 Hearing procedure.
541.64 Decision of the Hearing Administrator.
541.65 Regional Director review and appeal.
541.66 Programs and services.
541.67 Review of controlled housing status.
541.68 Release from controlled housing status.

AUTHORITY: 15 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161—4166 (Repealed as to offenses committed on or after November 1, 1987), 5006—5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Subpart A—Inmate Discipline Program

SOURCE: 75 FR 76267, Dec. 8, 2010, unless otherwise noted.

§541.1 Purpose.

This subpart describes the Federal Bureau of Prisons' (Bureau) inmate discipline program. This program helps ensure the safety, security, and orderly operation of correctional facilities, and the protection of the public, by allowing Bureau staff to impose sanctions on inmates who commit prohibited acts. Sanctions will not be imposed in a capricious or retaliatory manner. The Bureau's inmate discipline program is authorized by 18 U.S.C. 4042(a)(3).

§541.2 Application.

This program applies to sentenced and unsentenced inmates in Bureau custody. It also applies to sentenced and unsentenced inmates designated to any prison, institution, or facility in which persons are held in custody by direction of, or under an agreement with, the Bureau of Prisons.

§541.3 Prohibited acts and available sanctions.

(a) *Prohibited acts.* The list of prohibited acts are divided into four separate categories based on severity: Greatest; High; Moderate; and Low. We describe the prohibited acts in Table 1—Prohibited Acts and Available Sanctions. Aiding, attempting, abetting, or making plans to commit any of the prohibited acts is treated the same as committing the act itself.

(b) *Available sanctions.* The list of available sanctions for committing prohibited acts is listed in Table 1—Prohibited Acts and Available Sanctions. If you commit repetitive prohibited acts, we can impose increased sanctions, as listed in Table 2—Additional Available Sanctions for Repeated Prohibited Acts Within the Same Severity Level.

TABLE 1—PROHIBITED ACTS AND AVAILABLE SANCTIONS

Greatest Severity Level Prohibited Acts	
100	Killing.
101	Assaulting any person, or an armed assault on the institution's secure perimeter (a charge for assaulting any person at this level is to be used only when serious physical injury has been attempted or accomplished).
102	Escape from escort; escape from any secure or non-secure institution, including community confinement; escape from unescorted community program or activity; escape from outside a secure institution.
103	Setting a fire (charged with this act in this category only when found to pose a threat to life or a threat of serious bodily harm or in furtherance of a prohibited act of Greatest Severity, *e.g.,* in furtherance of a riot or escape; otherwise the charge is properly classified Code 218, or 329).
104	Possession, manufacture, or introduction of a gun, firearm, weapon, sharpened instrument, knife, dangerous chemical, explosive, ammunition, or any instrument used as a weapon.
105	Rioting.
106	Encouraging others to riot.
107	Taking hostage(s).

TABLE 1—PROHIBITED ACTS AND AVAILABLE SANCTIONS—Continued

108	Possession, manufacture, introduction, or loss of a hazardous tool (tools most likely to be used in an escape or escape attempt or to serve as weapons capable of doing serious bodily harm to others; or those hazardous to institutional security or personal safety; *e.g.,* hack-saw blade, body armor, maps, handmade rope, or other escape paraphernalia, portable telephone, pager, or other electronic device).
109	(Not to be used).
110	Refusing to provide a urine sample; refusing to breathe into a Breathalyzer; refusing to take part in other drug-abuse testing.
111	Introduction or making of any narcotics, marijuana, drugs, alcohol, intoxicants, or related paraphernalia, not prescribed for the individual by the medical staff.
112	Use of any narcotics, marijuana, drugs, alcohol, intoxicants, or related paraphernalia, not prescribed for the individual by the medical staff.
113	Possession of any narcotics, marijuana, drugs, alcohol, intoxicants, or related paraphernalia, not prescribed for the individual by the medical staff.
114	Sexual assault of any person, involving non-consensual touching by force or threat of force.
115	Destroying and/or disposing of any item during a search or attempt to search.
196	Use of the mail for an illegal purpose or to commit or further a Greatest category prohibited act.
197	Use of the telephone for an illegal purpose or to commit or further a Greatest category prohibited act.
198	Interfering with a staff member in the performance of duties most like another Greatest severity prohibited act. This charge is to be used only when another charge of Greatest severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed Greatest severity prohibited acts.
199	Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons most like another Greatest severity prohibited act. This charge is to be used only when another charge of Greatest severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed Greatest severity prohibited acts.
	Available Sanctions for Greatest Severity Level Prohibited Acts
A.	Recommend parole date rescission or retardation.
B.	Forfeit and/or withhold earned statutory good time or non-vested good conduct time (up to 100%) and/or terminate or disallow extra good time (an extra good time or good conduct time sanction may not be suspended).
B.1.	Disallow ordinarily between 50% and 75% (27–41 days) of good conduct time credit available for year (a good conduct time sanction may not be suspended).
C.	Disciplinary segregation (up to 12 months).
D.	Make monetary restitution.
E.	Monetary fine.
F.	Loss of privileges (*e.g.,* visiting, telephone, commissary, movies, recreation).
G.	Change housing (quarters).
H.	Remove from program and/or group activity.
I.	Loss of job.
J.	Impound inmate's personal property.
K.	Confiscate contraband.
L.	Restrict to quarters.
M.	Extra duty.
	High Severity Level Prohibited Acts
200	Escape from a work detail, non-secure institution, or other non-secure confinement, including community confinement, with subsequent voluntary return to Bureau of Prisons custody within four hours.
201	Fighting with another person.
202	(Not to be used).
203	Threatening another with bodily harm or any other offense.
204	Extortion; blackmail; protection; demanding or receiving money or anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.
205	Engaging in sexual acts.
206	Making sexual proposals or threats to another.
207	Wearing a disguise or a mask.
208	Possession of any unauthorized locking device, or lock pick, or tampering with or blocking any lock device (includes keys), or destroying, altering, interfering with, improperly using, or damaging any security device, mechanism, or procedure.
209	Adulteration of any food or drink.
210	(Not to be used).
211	Possessing any officer's or staff clothing.
212	Engaging in or encouraging a group demonstration.

TABLE 1—PROHIBITED ACTS AND AVAILABLE SANCTIONS—Continued

213	Encouraging others to refuse to work, or to participate in a work stoppage.
214	(Not to be used).
215	(Not to be used).
216	Giving or offering an official or staff member a bribe, or anything of value.
217	Giving money to, or receiving money from, any person for the purpose of introducing contraband or any other illegal or prohibited purpose.
218	Destroying, altering, or damaging government property, or the property of another person, having a value in excess of $100.00, or destroying, altering, damaging life-safety devices (*e.g.,* fire alarm) regardless of financial value.
219	Stealing; theft (including data obtained through the unauthorized use of a communications device, or through unauthorized access to disks, tapes, or computer printouts or other automated equipment on which data is stored).
220	Demonstrating, practicing, or using martial arts, boxing (except for use of a punching bag), wrestling, or other forms of physical encounter, or military exercises or drill (except for drill authorized by staff).
221	Being in an unauthorized area with a person of the opposite sex without staff permission.
222	(Not to be used).
223	(Not to be used).
224	Assaulting any person (a charge at this level is used when less serious physical injury or contact has been attempted or accomplished by an inmate).
225	Stalking another person through repeated behavior which harasses, alarms, or annoys the person, after having been previously warned to stop such conduct.
226	Possession of stolen property.
227	Refusing to participate in a required physical test or examination unrelated to testing for drug abuse (*e.g.,* DNA, HIV, tuberculosis).
228	Tattooing or self-mutilation.
229	Sexual assault of any person, involving non-consensual touching without force or threat of force.
296	Use of the mail for abuses other than criminal activity which circumvent mail monitoring procedures (*e.g.,* use of the mail to commit or further a High category prohibited act, special mail abuse; writing letters in code; directing others to send, sending, or receiving a letter or mail through unauthorized means; sending mail for other inmates without authorization; sending correspondence to a specific address with directions or intent to have the correspondence sent to an unauthorized person; and using a fictitious return address in an attempt to send or receive unauthorized correspondence).
297	Use of the telephone for abuses other than illegal activity which circumvent the ability of staff to monitor frequency of telephone use, content of the call, or the number called; or to commit or further a High category prohibited act.
298	Interfering with a staff member in the performance of duties most like another High severity prohibited act. This charge is to be used only when another charge of High severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed High severity prohibited acts.
299	Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons most like another High severity prohibited act. This charge is to be used only when another charge of High severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed High severity prohibited acts.
	Available Sanctions for High Severity Level Prohibited Acts
A.	Recommend parole date rescission or retardation.
B.	Forfeit and/or withhold earned statutory good time or non-vested good conduct time up to 50% or up to 60 days, whichever is less, and/or terminate or disallow extra good time (an extra good time or good conduct time sanction may not be suspended).
B.1	Disallow ordinarily between 25% and 50% (14–27 days) of good conduct time credit available for year (a good conduct time sanction may not be suspended).
C.	Disciplinary segregation (up to 6 months).
D.	Make monetary restitution.
E.	Monetary fine.
F.	Loss of privileges (*e.g.,* visiting, telephone, commissary, movies, recreation).
G.	Change housing (quarters).
H.	Remove from program and/or group activity.
I.	Loss of job.
J.	Impound inmate's personal property.
K.	Confiscate contraband.
L.	Restrict to quarters.
M.	Extra duty.

TABLE 1—PROHIBITED ACTS AND AVAILABLE SANCTIONS—Continued

Moderate Severity Level Prohibited Acts	
300	Indecent Exposure.
301	(Not to be used).
302	Misuse of authorized medication.
303	Possession of money or currency, unless specifically authorized, or in excess of the amount authorized.
304	Loaning of property or anything of value for profit or increased return.
305	Possession of anything not authorized for retention or receipt by the inmate, and not issued to him through regular channels.
306	Refusing to work or to accept a program assignment.
307	Refusing to obey an order of any staff member (may be categorized and charged in terms of greater severity, according to the nature of the order being disobeyed, *e.g.,* failure to obey an order which furthers a riot would be charged as 105, Rioting; refusing to obey an order which furthers a fight would be charged as 201, Fighting; refusing to provide a urine sample when ordered as part of a drug-abuse test would be charged as 110).
308	Violating a condition of a furlough.
309	Violating a condition of a community program.
310	Unexcused absence from work or any program assignment.
311	Failing to perform work as instructed by the supervisor.
312	Insolence towards a staff member.
313	Lying or providing a false statement to a staff member.
314	Counterfeiting, forging, or unauthorized reproduction of any document, article of identification, money, security, or official paper (may be categorized in terms of greater severity according to the nature of the item being reproduced, *e.g.,* counterfeiting release papers to effect escape, Code 102).
315	Participating in an unauthorized meeting or gathering.
316	Being in an unauthorized area without staff authorization.
317	Failure to follow safety or sanitation regulations (including safety regulations, chemical instructions, tools, MSDS sheets, OSHA standards).
318	Using any equipment or machinery without staff authorization.
319	Using any equipment or machinery contrary to instructions or posted safety standards.
320	Failing to stand count.
321	Interfering with the taking of count.
322	(Not to be used).
323	(Not to be used).
324	Gambling.
325	Preparing or conducting a gambling pool.
326	Possession of gambling paraphernalia.
327	Unauthorized contacts with the public.
328	Giving money or anything of value to, or accepting money or anything of value from, another inmate or any other person without staff authorization.
329	Destroying, altering, or damaging government property, or the property of another person, having a value of $100.00 or less.
330	Being unsanitary or untidy; failing to keep one's person or quarters in accordance with posted standards.
331	Possession, manufacture, introduction, or loss of a non-hazardous tool, equipment, supplies, or other non-hazardous contraband (tools not likely to be used in an escape or escape attempt, or to serve as a weapon capable of doing serious bodily harm to others, or not hazardous to institutional security or personal safety) (other non-hazardous contraband includes such items as food, cosmetics, cleaning supplies, smoking apparatus and tobacco in any form where prohibited, and unauthorized nutritional/dietary supplements).
332	Smoking where prohibited.
333	Fraudulent or deceptive completion of a skills test (*e.g.,* cheating on a GED, or other educational or vocational skills test).
334	Conducting a business; conducting or directing an investment transaction without staff authorization.
335	Communicating gang affiliation; participating in gang related activities; possession of paraphernalia indicating gang affiliation.
336	Circulating a petition.
396	Use of the mail for abuses other than criminal activity which do not circumvent mail monitoring; or use of the mail to commit or further a Moderate category prohibited act.
397	Use of the telephone for abuses other than illegal activity which do not circumvent the ability of staff to monitor frequency of telephone use, content of the call, or the number called; or to commit or further a Moderate category prohibited act.

TABLE 1—PROHIBITED ACTS AND AVAILABLE SANCTIONS—Continued

398	Interfering with a staff member in the performance of duties most like another Moderate severity prohibited act. This charge is to be used only when another charge of Moderate severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed Moderate severity prohibited acts.
399	Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons most like another Moderate severity prohibited act. This charge is to be used only when another charge of Moderate severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed Moderate severity prohibited acts.
	Available Sanctions for Moderate Severity Level Prohibited Acts
A.	Recommend parole date rescission or retardation.
B.	Forfeit and/or withhold earned statutory good time or non-vested good conduct time up to 25% or up to 30 days, whichever is less, and/or terminate or disallow extra good time (an extra good time or good conduct time sanction may not be suspended).
B.1	Disallow ordinarily up to 25% (1–14 days) of good conduct time credit available for year (a good conduct time sanction may not be suspended).
C.	Disciplinary segregation (up to 3 months).
D.	Make monetary restitution.
E.	Monetary fine.
F.	Loss of privileges (*e.g.,* visiting, telephone, commissary, movies, recreation).
G.	Change housing (quarters).
H.	Remove from program and/or group activity.
I.	Loss of job.
J.	Impound inmate's personal property.
K.	Confiscate contraband.
L.	Restrict to quarters.
M.	Extra duty.
	Low Severity Level Prohibited Acts
400	(Not to be used).
401	(Not to be used).
402	Malingering, feigning illness.
403	(Not to be used).
404	Using abusive or obscene language.
405	(Not to be used).
406	(Not to be used).
407	Conduct with a visitor in violation of Bureau regulations.
408	(Not to be used).
409	Unauthorized physical contact (*e.g.,* kissing, embracing).
498	Interfering with a staff member in the performance of duties most like another Low severity prohibited act. This charge is to be used only when another charge of Low severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed Low severity prohibited acts.
499	Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons most like another Low severity prohibited act. This charge is to be used only when another charge of Low severity is not accurate. The offending conduct must be charged as ''most like'' one of the listed Low severity prohibited acts.
	Available Sanctions for Low Severity Level Prohibited Acts
B.1	Disallow ordinarily up to 12.5% (1–7 days) of good conduct time credit available for year (to be used only where inmate found to have committed a second violation of the same prohibited act within 6 months); Disallow ordinarily up to 25% (1–14 days) of good conduct time credit available for year (to be used only where inmate found to have committed a third violation of the same prohibited act within 6 months) (a good conduct time sanction may not be suspended).
D.	Make monetary restitution.
E.	Monetary fine.
F.	Loss of privileges (*e.g.,* visiting, telephone, commissary, movies, recreation).
G.	Change housing (quarters).
H.	Remove from program and/or group activity.
I.	Loss of job.
J.	Impound inmate's personal property.
K.	Confiscate contraband.
L.	Restrict to quarters.
M.	Extra duty.

TABLE 2—ADDITIONAL AVAILABLE SANCTIONS FOR REPEATED PROHIBITED ACTS WITHIN THE SAME SEVERITY LEVEL

Prohibited act severity level	Time period for prior offense (same code)	Frequency of repeated offense	Additional available sanctions
Low Severity (400 level)	6 months	2nd offense	1. Disciplinary segregation (up to 1 month). 2. Forfeit earned SGT or non-vested GCT up to 10% or up to 15 days, whichever is less, and/or terminate or disallow extra good time (EGT) (an EGT sanction may not be suspended).
		3rd or more offense	Any available Moderate severity level sanction (300 series).
Moderate Severity (300 level)	12 months	2nd offense	1. Disciplinary segregation (up to 6 months). 2. Forfeit earned SGT or non-vested GCT up to 37½% or up to 45 days, whichever is less, and/or terminate or disallow EGT (an EGT sanction may not be suspended).
		3rd or more offense.	Any available High severity level sanction (200 series).
High Severity (200 level)	18 months	2nd offense	1. Disciplinary segregation (up to 12 months). 2. Forfeit earned SGT or non-vested GCT up to 75% or up to 90 days, whichever is less, and/or terminate or disallow EGT (an EGT sanction may not be suspended).
		3rd or more offense	Any available Greatest severity level sanction (100 series).
Greatest Severity (100 level)	24 months	2nd or more offense.	Disciplinary Segregation (up to 18 months).

[75 FR 76267, Dec. 8, 2010; 75 FR 81854, Dec. 29, 2010]

§ 541.4 Loss of good conduct sentence credit as a mandatory sanction.

(a) You will lose good conduct sentence credit as a mandatory disciplinary sanction if you are in one of the following two groups:

(1) *VCCLEA-violent inmates*. The date of your U.S. Code offense was on or after September 13, 1994, but before April 26, 1996, and you committed a ''crime of violence'' as defined by the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA); or

(2) *PLRA inmates and DC Code offenders*. The date of your U.S. Code offense was on or after April 26, 1996, and, therefore, under the Prison Litigation Reform Act (PLRA), or the date of your District of Columbia (DC) Code offense was on or after August 5, 2000.

(b) If you are an inmate in one of the above groups and commit a prohibited act, you will lose good conduct sentence credit as a mandatory disciplinary sanction. The amount of good conduct sentence credit you will lose depends on the severity level of the prohibited act(s) committed, as follows:

(1) *Greatest Severity Level Offenses*. You will lose at least 41 days, or 75% of available credit if less than 54 days are available for the prorated period, for each act committed.

(2) *High Severity Level Offenses*. You will lose at least 27 days, or 50% of available credit if less than 54 days are available for the prorated period, for each act committed.

(3) *Moderate Severity Level Offenses*. You will lose at least 14 days, or 25% of available credit if less than 54 days are available for the prorated period, after committing two or more Moderate severity acts during the current year of your good conduct sentence credit availability.

(4) *Low Severity Level Offenses*. You will lose at least 7 days, or 12.5% of available credit if less than 54 days are available for the prorated period, after committing three or more Low severity acts during the current year of your good conduct sentence credit availability.

§ 541.5 Discipline process.

(a) *Incident report*. The discipline process starts when staff witness or reasonably believe that you committed a prohibited act. A staff member will issue you an incident report describing

the incident and the prohibited act(s) you are charged with committing. You will ordinarily receive the incident report within 24 hours of staff becoming aware of your involvement in the incident.

(b) *Investigation*. After you receive an incident report, a Bureau staff member will investigate it.

(1) *Information:* The investigator will specifically inform you:

(A) of the charge(s) against you; and

(B) that you may remain silent at all stages of the discipline process, but that your silence may be used to draw an adverse inference against you at any stage of the process. Your silence alone, however, cannot be the basis for finding you committed the prohibited act(s).

(2) *Statement:* When the investigator asks for your statement, you may give an explanation of the incident, request any witnesses be interviewed, or request that other evidence be obtained and reviewed. However, the staff investigation of the incident report may be suspended before requesting your statement if it is being investigated for possible criminal prosecution.

(3) *Informally resolving the incident report*. The incident report may be informally resolved at any stage of the disciplinary process, except for prohibited acts in the Greatest and High severity levels, or as otherwise required by law or these regulations. If the incident report is informally resolved, it will be removed from your records.

§541.6 Mentally ill inmates.

If it appears you are mentally ill at any stage of the discipline process, you will be examined by mental health staff.

(a) *Competency to Participate in Disciplinary Proceedings*. If evidence indicates that you cannot understand the nature of the disciplinary proceedings, or cannot help in your own defense, disciplinary proceedings may be postponed until you are competent to participate. The Unit Disciplinary Committee or Discipline Hearing Officer will make this decision based on evidence, including evidence presented by mental health staff.

(b) *Responsibility for Conduct*. You will not be disciplined for conduct committed when, as the result of a severe mental disease or defect, you were unable to appreciate the nature and quality, or wrongfulness of the act. The UDC or DHO will make this decision based on evidence, including evidence presented by mental health staff.

§541.7 Unit Discipline Committee (UDC) review of the incident report.

A Unit Discipline Committee (UDC) will review the incident report once the staff investigation is complete. The UDC's review involves the following:

(a) *Available dispositions*. The UDC will make one of the following decisions after reviewing the incident report:

(1) You committed the prohibited act(s) charged, and/or a similar prohibited act(s) as described in the incident report;

(2) You did not commit the prohibited act(s) charged; or

(3) The incident report will be referred to the Discipline Hearing Officer (DHO) for further review, based on the seriousness of the prohibited act(s) charged.

(4) If you are charged with a Greatest or High severity prohibited act, or are an inmate covered by §541.4, the UDC will automatically refer the incident report to the DHO for further review.

(b) *UDC members*. The UDC ordinarily consists of two or more staff. UDC members will not be victims, witnesses, investigators, or otherwise significantly involved in the incident.

(c) *Timing*. The UDC will ordinarily review the incident report within five work days after it is issued, not counting the day it was issued, weekends, and holidays. UDC review of the incident report may also be suspended if it is being investigated for possible criminal prosecution.

(d) *Inmate appearance*. You are permitted to appear before the UDC during its review of the incident report, except during UDC deliberations or when your presence would jeopardize institution security, at the UDC's discretion. Also:

(1) You may appear either in person or electronically (for example, by video or telephone conferencing) at the UDC's discretion.

(2) You may waive your appearance before the UDC. If you waive your appearance, the UDC will review the incident report in your absence.

(3) If you escape or are otherwise absent from custody, the UDC will conduct a review in your absence at the institution where you were last confined.

(e) *Evidence*. You are entitled to make a statement and present documentary evidence to the UDC on your own behalf. The UDC will consider all evidence presented during its review. The UDC's decision will be based on at least some facts and, if there is conflicting evidence, on the greater weight of the evidence.

(f) *Sanctions*. If you committed a prohibited act(s), the UDC can impose any of the available sanctions listed in Tables 1 and 2, except loss of good conduct sentence credit, disciplinary segregation, or monetary fines.

(g) *Referral to the DHO*. If the UDC refers the incident report to the DHO for further review, the UDC will advise you of your rights at the upcoming DHO hearing, as detailed in § 541.8.

(h) *Written report*. You will receive a written copy of the UDC's decision following its review of the incident report.

(i) *Appeals*. You may appeal the UDC's action(s) through the Administrative Remedy Program, 28 CFR part 542, subpart B.

[75 FR 76267, Dec. 8, 2010; 75 FR 81854, Dec. 29, 2010]

§ 541.8 Discipline Hearing Officer (DHO) hearing.

The Discipline Hearing Officer (DHO) will only conduct a hearing on the incident report if referred by the UDC. The DHO's hearing involves the following:

(a) *Available dispositions*. The DHO will make one of the following decisions after a hearing on the incident report:

(1) You committed the prohibited act(s) charged, and/or a similar prohibited act(s) as described in the incident report;

(2) You did not commit the prohibited act(s) charged; or

(3) The incident report will be referred back for further investigation, review, and disposition.

(b) *Discipline Hearing Officer*. The DHO will be an impartial decision maker who was not a victim, witness, investigator, or otherwise significantly involved in the incident.

(c) *Timing*. You will receive written notice of the charge(s) against you at least 24 hours before the DHO's hearing. You may waive this requirement, in which case the DHO's hearing can be conducted sooner.

(d) *Staff Representative*. You are entitled to have a staff representative during the DHO hearing process as follows:

(1) *How to get a staff representative*. You may request the staff representative of your choice, so long as that person was not a victim, witness, investigator, or otherwise significantly involved in the incident. If your request(s) cannot be fulfilled, and you still want a staff representative, the Warden will appoint one. The Warden will also appoint a staff representative if it appears you are unable to adequately represent yourself before the DHO, for example, if you are illiterate or have difficulty understanding the charges against you.

(2) *How the staff representative will help you*. Prior to the DHO's hearing, the staff representative will be available to help you understand the incident report charges and potential consequences. The staff representative may also assist you by speaking with and scheduling witnesses, obtaining written statements, and otherwise helping you prepare evidence for presentation at the DHO's hearing. During the DHO's hearing, you are entitled to have the staff representative appear and assist you in understanding the proceedings. The staff representative can also assist you in presenting evidence during the DHO's hearing.

(3) *How the staff representative may appear*. Your staff representative may appear either in person or electronically (for example, by video or telephone conferencing) at the DHO's discretion. If your staff representative is not available for the scheduled hearing, you may either select another staff representative, request the hearing be postponed for a reasonable amount of time until your staff representative can appear, or proceed without a staff representative.

(e) *Inmate appearance*. You are permitted to appear before the DHO during the hearing on the incident report as follows:

(1) You may appear either in person or electronically (for example, by video or telephone conferencing), at the DHO's discretion.

(2) Your appearance may be prohibited during DHO deliberations or when your presence would jeopardize institution security, at the DHO's discretion.

(3) You may waive your appearance before the DHO. If you waive your appearance, the DHO hearing will be conducted in your absence.

(4) If you escape or are otherwise absent from custody, the DHO will conduct a hearing in your absence at the institution where you were last confined.

(f) *Evidence and witnesses*. You are entitled to make a statement and present documentary evidence to the DHO on your own behalf. The DHO will consider all evidence presented during the hearing. The DHO's decision will be based on at least some facts and, if there is conflicting evidence, on the greater weight of the evidence. Witnesses may appear at the DHO's hearing as follows:

(1) Witnesses may appear before the DHO either in person or electronically (for example, by video or telephone conferencing) at the DHO's discretion.

(2) The DHO will call witnesses who have information directly relevant to the charge(s) and who are reasonably available. However, the DHO need not call witnesses adverse to you if their testimony is adequately summarized in the incident report or other investigation materials.

(3) You or your staff representative may request witnesses appear at the hearing to testify on your behalf. Your requested witnesses may not appear if, in the DHO's discretion, they are not reasonably available, their presence at the hearing would jeopardize institution security, or they would present repetitive evidence.

(4) If your requested witnesses are unavailable to appear, written statements can be requested by either the DHO or staff representative. The written statements can then be considered during the DHO's hearing.

(5) Only the DHO may directly question witnesses at the DHO's hearing. Any questions by you or your staff representative must be submitted to the DHO, who will present the question to the witness in his/her discretion.

(6) The DHO may consider evidence provided by a confidential informant (CI) that the DHO finds reliable. You will not be informed of the CI's identity. You will be informed of the CI's testimony to the extent it will not jeopardize institution security, at the DHO's discretion.

(g) *Sanctions*. If you committed a prohibited act(s), the DHO can impose any of the available sanctions listed in Tables 1 and 2.

(h) *Written Report*. You will receive a written copy of the DHO's decision following the hearing. The DHO is not required to prepare a verbatim record of the hearing. The DHO's written report will document the following:

(1) Whether you were advised of your rights during the DHO process;

(2) The evidence relied on by the DHO;

(3) The DHO's decision;

(4) The sanction imposed by the DHO; and

(5) The reason(s) for the sanction(s) imposed.

(i) *Appeals*. You may appeal the DHO's action(s) through the Administrative Remedy Program, 28 CFR part 542, subpart B.

Subpart B—Special Housing Units

SOURCE: 75 FR 76267, Dec. 8, 2010, unless otherwise noted.

§ 541.20 Purpose.

This subpart describes the Federal Bureau of Prisons' (Bureau) operation of special housing units (SHU) at Bureau institutions. The Bureau's operation of SHUs is authorized by 18 U.S.C. 4042(a)(2) and (3).

§ 541.21 Special Housing Units (SHUs).

Special Housing Units (SHUs) are housing units in Bureau institutions where inmates are securely separated from the general inmate population, and may be housed either alone or with other inmates. Special housing units help ensure the safety, security, and

orderly operation of correctional facilities, and protect the public, by providing alternative housing assignments for inmates removed from the general population.

§ 541.22 Status when placed in the SHU.

When placed in the SHU, you are either in administrative detention status or disciplinary segregation status.

(a) *Administrative detention status.* Administrative detention status is an administrative status which removes you from the general population when necessary to ensure the safety, security, and orderly operation of correctional facilities, or protect the public. Administrative detention status is non-punitive, and can occur for a variety of reasons.

(b) *Disciplinary segregation status.* Disciplinary segregation status is a punitive status imposed only by a Discipline Hearing Officer (DHO) as a sanction for committing a prohibited act(s).

§ 541.23 Administrative detention status.

You may be placed in administrative detention status for the following reasons:

(a) *Pending Classification or Reclassification.* You are a new commitment pending classification or under review for Reclassification.

(b) *Holdover Status.* You are in holdover status during transfer to a designated institution or other destination.

(c) *Removal from general population.* Your presence in the general population poses a threat to life, property, self, staff, other inmates, the public, or to the security or orderly running of the institution and:

(1) *Investigation.* You are under investigation or awaiting a hearing for possibly violating a Bureau regulation or criminal law;

(2) *Transfer.* You are pending transfer to another institution or location;

(3) *Protection cases.* You requested, or staff determined you need, administrative detention status for your own protection; or

(4) *Post-disciplinary detention.* You are ending confinement in disciplinary segregation status, and your return to the general population would threaten the safety, security, and orderly operation of a correctional facility, or public safety.

[75 FR 76273, Dec. 8, 2010; 75 FR 81854, Dec. 29, 2010]

§ 541.24 Disciplinary segregation status.

You may be placed in disciplinary segregation status only by the DHO as a disciplinary sanction.

§ 541.25 Notice received when placed in the SHU.

You will be notified of the reason(s) you are placed in the SHU as follows:

(a) *Administrative detention status.* When placed in administrative detention status, you will receive a copy of the administrative detention order, ordinarily within 24 hours, detailing the reason(s) for your placement. However, when placed in administrative detention status pending classification or while in holdover status, you will not receive an administrative detention order.

(b) *Disciplinary segregation status.* When you are to be placed in disciplinary segregation status as a sanction for violating Bureau regulations, you will be informed by the DHO at the end of your discipline hearing.

§ 541.26 Review of placement in the SHU.

Your placement in the SHU will be reviewed by the Segregation Review Official (SRO) as follows:

(a) *Three day review.* Within three work days of your placement in administrative detention status, not counting the day you were admitted, weekends, and holidays, the SRO will review the supporting records. If you are in disciplinary segregation status, this review will not occur.

(b) *Seven day reviews.* Within seven continuous calendar days of your placement in either administrative detention or disciplinary segregation status, the SRO will formally review your status at a hearing you can attend. Subsequent reviews of your records will be performed in your absence by the SRO every seven continuous calendar days thereafter.

(c) *Thirty day reviews*. After every 30 calendar days of continuous placement in either administrative detention or disciplinary segregation status, the SRO will formally review your status at a hearing you can attend.

(d) *Administrative remedy program*. You can submit a formal grievance challenging your placement in the SHU through the Administrative Remedy Program, 28 CFR part 542, subpart B.

§ 541.27 Protection case—placement in Administrative Detention status.

You may be placed in administrative detention status as a protection case in the following circumstances.

(a) *Victim of inmate assault or threats*. You were the victim of an inmate assault, or are being threatened by other inmates, including threats of harm if you do not act in a certain way, for example, threats of harm unless you engage in sexual activity.

(b) *Inmate informant*. Your safety is threatened because you provided, or are perceived as having provided, information to staff or law enforcement authorities regarding other inmates or persons in the community.

(c) *Inmate refusal to enter general population*. You refuse to enter the general population because of alleged pressures or threats from unidentified inmates, or for no expressed reason.

(d) *Staff concern*. Based on evidence, staff believe your safety may be seriously jeopardized by placement in the general population.

§ 541.28 Protection case—review of placement in the SHU.

(a) *Staff investigation*. Whenever you are placed in the SHU as a protection case, whether requested by you or staff, an investigation will occur to verify the reasons for your placement.

(b) *Hearing*. You will receive a hearing according to the procedural requirements of § 541.26(b) within seven calendar days of your placement. Additionally, if you feel at any time your placement in the SHU as a protection case is unnecessary, you may request a hearing under this section.

(c) *Periodic review*. If you remain in administrative detention status following such a hearing, you will be periodically reviewed as an ordinary administrative detention case under § 541.26.

§ 541.29 Staff verification of need for protection.

If a staff investigation verifies your need for placement in the SHU as a protection case, you may remain in the SHU or be transferred to another institution where your status as a protection case may not be necessary, at the Warden's discretion.

§ 541.30 Lack of verification of need for protection.

If a staff investigation fails to verify your need for placement in the SHU as a protection case, you will be instructed to return to the general population. If you refuse to return to the general population under these circumstances, you may be subject to disciplinary action.

§ 541.31 Conditions of confinement in the SHU.

Your living conditions in the SHU will meet or exceed standards for healthy and humane treatment, including, but not limited to, the following specific conditions:

(a) *Environment*. Your living quarters will be well-ventilated, adequately lighted, appropriately heated, and maintained in a sanitary condition.

(b) *Cell Occupancy*. Your living quarters will ordinarily house only the amount of occupants for which it is designed. The Warden, however, may authorize more occupants so long as adequate standards can be maintained.

(c) *Clothing*. You will receive adequate institution clothing, including footwear, while housed in the SHU. You will be provided necessary opportunities to exchange clothing and/or have it washed.

(d) *Bedding*. You will receive a mattress, blankets, a pillow, and linens for sleeping. You will receive necessary opportunities to exchange linens.

(e) *Food*. You will receive nutritionally adequate meals.

(f) *Personal hygiene*. You will have access to a wash basin and toilet. You will receive personal items necessary to maintain an acceptable level of personal hygiene, for example, toilet tissue, soap, toothbrush and cleanser,

shaving utensils, *etc.* You will ordinarily have an opportunity to shower and shave at least three times per week. You will have access to hair care services as necessary.

(g) *Exercise.* You will receive the opportunity to exercise outside your individual quarters at least five hours per week, ordinarily on different days in one-hour periods. You can be denied these exercise periods for a week at a time by order of the Warden if it is determined that your use of exercise privileges threatens safety, security, and orderly operation of a correctional facility, or public safety.

(h) *Personal property.* In either status, your amount of personal property may be limited for reasons of fire safety or sanitation.

(1) In administrative detention status you are ordinarily allowed a reasonable amount of personal property and reasonable access to the commissary.

(2) In disciplinary segregation status your personal property will be impounded, with the exception of limited reading/writing materials, and religious articles. Also, your commissary privileges may be limited.

(i) *Correspondence.* You will receive correspondence privileges according to part 540, subpart B.

(j) *Telephone.* You will receive telephone privileges according to part 540, subpart I.

(k) *Visiting.* You will receive visiting privileges according to part 540, subpart D.

(l) *Legal Activities.* You will receive an opportunity to perform personal legal activities according to part 543, subpart B.

(m) *Staff monitoring.* You will be monitored by staff assigned to the SHU, including program and unit team staff.

(n) *Programming Activities.* In administrative detention status, you will have access to programming activities to the extent safety, security, orderly operation of a correctional facility, or public safety are not jeopardized. In disciplinary segregation status, your participation in programming activities, *e.g.*, educational programs, may be suspended.

(o) *Administrative remedy program.* You can submit a formal grievance challenging any aspect of your confinement in the SHU through the Administrative Remedy Program, 28 CFR part 542, subpart B.

§ 541.32 Medical and mental health care in the SHU.

(a) *Medical Care.* A health services staff member will visit you daily to provide necessary medical care. Emergency medical care is always available.

(b) *Mental Health Care.* After every 30 calendar days of continuous placement in either administrative detention or disciplinary segregation status, mental health staff will examine you, including a personal interview. Emergency mental health care is always available.

§ 541.33 Release from the SHU.

(a) *Administrative detention status.* You will be released from administrative detention status when the reasons for your placement no longer exist.

(b) *Disciplinary segregation status.* You will be released from disciplinary segregation status after satisfying the sanction imposed by the DHO. The SRO may release you earlier if it is determined you no longer require disciplinary segregation status.

Subpart C [Reserved]

Subpart D—Control Unit Programs

SOURCE: 49 FR 32991, Aug. 17, 1984, unless otherwise noted.

§ 541.40 Purpose and scope.

(a) In an effort to maintain a safe and orderly environment within its institutions, the Bureau of Prisons operates control unit programs intended to place into a separate unit those inmates who are unable to function in a less restrictive environment without being a threat to others or to the orderly operation of the institution. The Bureau of Prisons provides written criteria for the:

(1) Referral of an inmate for possible placement within a control unit;

(2) Selection of an inmate for placement within a control unit;

(3) Regular review of an inmate while housed in a control unit; and

(4) Release of an inmate from a control unit.

(b) The Bureau of Prisons provides an inmate confined within a control unit the opportunity to participate in programs and activities restricted as necessary to protect the security, good order, or discipline of the unit.

§ 541.41 Institutional referral.

(a) The Warden shall submit a recommendation for referral of an inmate for placement in a control unit to the Regional Director in the region where the inmate is located.

(b) The Warden shall consider the following factors in a recommendation for control unit placement.

(1) Any incident during confinement in which the inmate has caused injury to other persons.

(2) Any incident in which the inmate has expressed threats to the life or well-being of other persons.

(3) Any incident involving possession by the inmate of deadly weapons or dangerous drugs.

(4) Any incident in which the inmate is involved in a disruption of the orderly operation of a prison, jail or other correctional institution.

(5) An escape from a correctional institution.

(6) An escape attempt. Depending on the circumstances, an escape attempt, considered alone or together with an inmate's prior history, may warrant consideration for a control unit placement.

(7) The nature of the offense for which committed. An inmate may not be considered solely on the nature of the crime which resulted in that inmate's incarceration; however, the nature of the crime may be considered in combination with other factor(s) as described in paragraph (b) of this section.

(c) The Warden may not refer an inmate for placement in a control unit:

(1) If the inmate shows evidence of significant mental disorder or major physical disabilities as documented in a mental health evaluation or a physical examination;

(2) On the basis that the inmate is a protection case, e.g., a homosexual, an informant, etc., unless the inmate meets other criteria as described in paragraph (b) of this section.

§ 541.42 Designation of Hearing Administrator.

(a) The Regional Director in the region where the inmate is located shall review the institution's recommendation for referral of an inmate for placement in a control unit. If the Regional Director concurs with the recommendation, the Regional Director shall forward a written request, together with the institution's referral material, to the Regional Director of the region where the control unit is located. The Regional Director of the region where the control unit is located shall designate a person in the Regional Office to review the referral material and to conduct a hearing on the appropriateness of an inmate's placement in a control unit.

(b) The Hearing Administrator shall have the following qualifications:

(1) Correctional experience, including institutional work with inmates, processing of inmate disciplinary actions, significant institutional experience in observing and evaluating inmate adjustment and disruptive behavior, and knowledge of the options available in the Bureau of Prisons for dealing with such conduct;

(2) Lack of former personal involvement in an Institution Discipline Committee action involving the particular inmate in incident(s) referred; and

(3) Familiarity with Bureau of Prisons policies and operations, including the criteria for placement of inmates in different institutions and in a control unit.

§ 541.43 Hearing procedure.

(a) The Hearing Administrator shall provide a hearing to an inmate recommended for placement in a control unit. The hearing ordinarily shall take place at the recommending or sending institution.

(b) The hearing shall proceed as follows.

(1) Staff shall provide an inmate with an advance written notice of the hearing and a copy of this rule at least 24 hours prior to the hearing. The notice will advise the inmate of the specific act(s) or other evidence which forms the basis for a recommendation that the inmate be transferred to a control unit, unless such evidence would likely

endanger staff or others. If an inmate is illiterate, staff shall explain the notice and this rule to the inmate and document that this explanation has occurred.

(2) The Hearing Administrator shall provide an inmate the service of a full-time staff member to represent the inmate, if the inmate so desires. The Hearing Administrator shall document in the record of the hearing an inmate's request for, or refusal of staff representation. The inmate may select a staff representative from the local institution. If the selected staff member declines or is unavailable, the inmate has the option of selecting another representative or, in the case of an absent staff member, of waiting a reasonable period (determined by the Hearing Administrator) for the staff member's return, or of proceeding without a staff representative. When an inmate is illiterate, the Warden shall provide a staff representative. The staff representative shall be available to assist the inmate and, if the inmate desires, shall contact witnesses and present favorable evidence at the hearing. The Hearing Administrator shall afford the staff representative adequate time to speak with the inmate and to interview available witnesses.

(3) The inmate has the right to be present throughout the hearing, except where institutional security or good order is jeopardized. The Hearing Administrator may conduct a hearing in the absence of the inmate when the inmate refuses to appear. The Hearing Administrator shall document an inmate's refusal to appear, or other reason for non-appearance, in the record of the hearing.

(4) The inmate is entitled to present documentary evidence and to have witnesses appear, provided that calling witnesses would not jeopardize or threaten institutional security or individual safety, and further provided that the witnesses are available at the institution where the hearing is being conducted.

(i) The evidence to be presented must be material and relevant to the issue as to whether the inmate can and would function in a general prison population without being or posing a threat to staff or others or to the orderly operation of the institution. The Hearing Administrator may not consider an attempt to reverse or repeal a prior finding of a disciplinary violation.

(ii) Repetitive witnesses need not be called. Staff who recommend placement in a control unit are not required to appear, provided their recommendation is fully explained in the record. Staff who were involved, in any capacity, in former disciplinary proceedings need not be called as to their involvement in those proceedings, since this hearing is not to go over the factual basis for prior actions which have been decided.

(iii) When a witness is not available within the institution, or not permitted to appear, the inmate may submit a written statement by that witness. The Hearing Administrator shall, upon the inmate's request, postpone any decision following the hearing for a reasonable time to permit the obtaining and forwarding of written statements.

(iv) The Hearing Administrator shall document in the record of the hearing the reasons for declining to permit a witness or to receive documentary evidence.

§ 541.44 Decision of the Hearing Administrator.

(a) At the conclusion of the hearing and following review of all material related to the recommendation for placement of an inmate in a control unit, the Hearing Administrator shall prepare a written decision as to whether this placement is warranted. The Hearing Administrator shall:

(1) Prepare a summary of the hearing and of all information presented upon which the decision is based; and

(2) Indicate the specific reasons for the decision, to include a description of the act, or series of acts, or evidence on which the decision is based.

(b) The Hearing Administrator shall advise the inmate in writing of the decision. The inmate shall receive the information described in paragraph (a) of this section unless it is determined that the release of this information could pose a threat to individual safety, or institutional security, in which case that limited information may be withheld. The Hearing Administrator

shall advise the inmate that the decision will be submitted for review of the Executive Panel. The Hearing Administrator shall advise the inmate that, if the inmate so desires, the inmate may submit an appeal of the Hearing Administrator's decision to the Executive Panel. This appeal, with supporting documentation and reasons, must be filed within five working days of the inmate's receipt of the Hearing Administrator's decision.

(c) The Hearing Administrator shall send the decision, whether for or against placement in a control unit, and supporting documentation to the Executive Panel. Ordinarily this is done within 20 working days after conclusion of the hearing. Any reason for extension is to be documented.

§ 541.45 Executive Panel review and appeal.

The Executive Panel is composed of the Regional Director of the region where a control unit is located to which referral is being considered and the Assistant Director, Correctional Programs Division.

(a) The Executive Panel shall review the decision and supporting documentation of the Hearing Administrator and, if submitted, the information contained in an inmate's appeal. The Panel shall accept or reject the Hearing Administrator's decision within 30 working days of its receipt, unless for good cause there is reason for delay, which shall be documented in the record.

(b) The Executive Panel shall provide a copy of its decision to the Warden at the institution to which the inmate is to be transferred, to the inmate, to the referring Warden and region, and to the Hearing Administrator.

(c) An inmate may appeal a decision of the Executive Panel, through the Administrative Remedy Procedure, directly to the Office of General Counsel, Bureau of Prisons, within 30 calendar days of the inmate's receipt of the Executive Panel's decision.

§ 541.46 Programs and services.

The Warden shall provide the following services to a control unit inmate. These services must be provided unless compelling security or safety reasons dictate otherwise. These reasons will be documented and signed by the Warden, indicating the Warden's review and approval.

(a) *Education*. The Warden shall assign a member of the education staff to the control unit on at least a part-time basis to assist in developing an educational program to fulfil each inmate's academic needs. The education staff member is ordinarily a member of the control unit team.

(b) *Work assignments*. Staff may assign inmates to a work assignment, such as range orderly. The manner in which these duties are carried out will reflect the inmate's unit adjustment, and will assist staff in evaluating the inmate.

(c) *Industries (UNICOR)*. If an industry program exists in a control unit each inmate participating in this program may earn industrial pay, subject to the regulations of Federal Prison Industries, Inc. (UNICOR). The industry program is supervised by an industry foreman. The control unit team will determine when or if an industry assignment is appropriate for each inmate who submits a request for possible assignment to industries work.

(d) *Legal*. An inmate assigned to a control unit may use that unit's inmate basic law library, upon request and in rotation. Consistent with security considerations, the law library is to include basic legal reference books, and ordinarily a table and chair, typewriter, paper and carbon. Abuse of materials in the inmate law library (for example, a typewriter) may result in a decision by the Warden to limit the use of legal materials. A decision to limit materials due to abuse must be documented in writing and signed by the Warden.

(e) *Recreation*. The recreation program in a control unit shall include the following requirements:

(1) Each inmate shall have the opportunity to receive a minimum of seven hours weekly recreation and exercise out of the cell.

(2) Staff shall provide various games and exercise materials as consistent with security considerations and orderly operation of the unit. Inmates who alter or intentionally damage recreation equipment may be deprived

of the use of that equipment in the future.

(f) *Case management services.* The case manager is responsible for all areas of case management. This ordinarily includes preparation of the visiting list, notarizing documents, preparation of various reports, and other case management duties. The case manager is ordinarily a member of the control unit team.

(g) *Counselor services.* The unit counselor ordinarily handles phone call requests, special concerns and requests of inmates, and requests for administrative remedy forms. The unit counselor is also available for consultation and for counseling as recommended in the mental health evaluation (see paragraph (i) of this section—Mental Health Services).

(h) *Medical services.* A member of the medical staff shall visit control unit inmates daily. A physician will visit the unit as the need arises.

(i) *Mental health services.* During the first 30-day period in a control unit, staff shall schedule the control unit inmate for a psychological evaluation conducted by a psychologist. Additional individual evaluations shall occur every 30 days. The psychologist shall perform and/or supervise needed psychological services. Psychiatric services will be provided when necessary. Inmates requiring prescribed psychotropic medication are not ordinarily housed in a control unit.

(j) *Religion.* Staff shall issue religious materials upon request, limited by security consideration and housekeeping rules in the unit. This material may come from an inmate's personal property or from the chaplain's office. The institutional chaplains shall make at least weekly visits to the control unit. While individual prayer and/or worship is allowed in a control unit, religious assemblies or group meetings are not allowed.

(k) *Food service and personal hygiene.* Staff shall provide food services and personal hygiene care consistent with the requirements of the current rule regarding Special Housing Units.

(l) *Correspondence.* Inmates confined in a control unit are provided correspondence privileges in accordance with the Bureau of Prisons' rule on Inmate Correspondence (see 28 CFR part 540).

(m) *Visiting.* Visits for inmates confined in a control unit are conducted in a controlled visiting area, separated from regular visiting facilities. Staff shall allot a minimum of four hours per month visiting time to a control unit inmate. The number of consecutive hours visiting on a particular day may be limited by the number of visitors waiting to visit. All visitors must be on the inmate's approved visiting list.

(n) *Commissary.* Staff shall establish a commissary purchase schedule. The amount of money which control unit inmates spend per month is comparable to the spending limitation for inmates residing in the general population. Staff may limit commissary items to ensure the safety and security of the unit.

(o) *Personal property.* Personal property retained by an inmate in a control unit is to be stored in the space provided. Personal property items shall be limited in number and type to ensure the safety and good order of the unit.

[49 FR 32991, Aug. 17, 1984, as amended at 60 FR 46484, Sept. 6, 1995]

§ 541.47 Admission to control unit.

Staff shall provide an inmate admitted to a control unit with:

(a) Notice of the projected duration of the inmate's confinement in a control unit;

(b) Notice of the type of personal property which is allowable in the unit (items made of glass or metal will not be permitted);

(c) A summary of the guidelines and disciplinary procedures applicable in the unit;

(d) An explanation of the activities in a control unit;

(e) The expectations of the inmate's involvement in control unit activities; and

(f) The criteria for release from the unit, and how those criteria specifically relate to this confinement period in the unit and any specific requirements in the inmate's individual case.

§ 541.48 Search of control unit inmates.

(a) The Warden at an institution housing a control unit may order a digital or simple instrument search for all new admissions to the control unit. The Warden may also order a digital or simple instrument search for any inmate who is returned to the control unit following contact with the public. Authorization for a digital or simple instrument search must be in writing, signed by the Warden, with a copy placed in the inmate central file. The Warden's authority may not be delegated below the level of Acting Warden.

(b) An inmate in a control unit may request in writing that an X-ray be taken in lieu of the digital search discussed in paragraph (a) of this section. The Warden shall approve this request, provided it is determined and stated in writing by the institution's Clinical Director or Acting Clinical Director (may not be further delegated) that the amount of X-ray exposure previously received by the inmate, or anticipated to be given the inmate in the immediate future, does not make the proposed X-ray medically unwise. Staff are to place documentation of the X-ray, and the inmate's signed request for it, in the inmate's central and medical files. The Warden's authority may not be delegated below the level of Acting Warden.

(c) Staff may not conduct a digital or simple instrument search if it is likely to result in physical injury to the inmate. In this situation, the Warden, upon approval of the Regional Director, may authorize the institution physician to order a non-repetitive X-ray for the purpose of determining if contraband is concealed in or on the inmate. The X-ray examination may not be performed if it is determined by the institution physician that such an examination is likely to result in serious or lasting medical injury or harm to the inmate. Staff are to place documentation of the X-ray examination in the inmate's central file and medical file. The authority of the Warden and Regional Director may not be delegated below the level of Acting Warden and Acting Regional Director respectively. If neither a digital or simple instrument search, nor an X-ray examination may be used, the inmate is to be placed in a dry cell until sufficient time has passed to allow excretion.

(d) Staff shall solicit the inmate's written consent prior to conducting a digital or simple instrument search, or, as specified in paragraph (c) of this section, an X-ray examination. However, the inmate's consent is not required.

[50 FR 25662, June 20, 1985, as amended at 60 FR 46484, Sept. 6, 1995]

§ 541.49 Review of control unit placement.

(a) Unit staff shall evaluate informally and daily an inmate's adjustment within the control unit. Once every 30 days, the control unit team, comprised of the control unit manager and other members designated by the Warden (ordinarily to include the officer-in-charge or lieutenant, case manager, and education staff member assigned to the unit), shall meet with an inmate in the control unit. The inmate is required to attend the team meeting in order to be eligible for the previous month's stay in the control unit to be credited towards the projected duration of confinement in that unit. The unit team shall make an assessment of the inmate's progress within the unit and may make a recommendation as to readiness for release after considering the inmate's:

(1) Unit status;

(2) Adjustment; and

(3) Readiness for release from the unit. (See § 541.50(a))

(b) The Warden shall serve as the review authority at the institutional level for unit team actions.

(c) An inmate may appeal the Warden's decision to the Executive Panel within five working days of receipt of that decision. The inmate will receive a response to this appeal at the inmate's next appearance before the Executive Panel.

(d) At least once every 60 to 90 days, the Executive Panel shall review the status of an inmate in a control unit to determine the inmate's readiness for release from the Unit. The Executive Panel shall consider those factors specified in § 541.50(a), along with any recommendations by the unit team and Warden.

The decision of the Executive Panel is communicated to the inmate. Ordinarily, the inmate is interviewed in person at this review. If the inmate refuses to appear for this review, or if there is other reason for not having an in-person review, this will be documented.

(e) An inmate may appeal a decision of the Executive Panel, through the Administrative Remedy Procedure, directly to the Office of General Counsel, Bureau of Prisons within 30 calendar days from the date of the Executive Panel's response.

[49 FR 32991, Aug. 17, 1984, as amended at 60 FR 46484, Sept. 6, 1995]

§ 541.50 Release from a control unit.

(a) Only the Executive Panel may release an inmate from a control unit. The following factors are considered in the evaluation of an inmate's readiness for release from a control unit:

(1) Relationship with other inmates and staff members, which demonstrates that the inmate is able to function in a less restrictive environment without posing a threat to others or to the orderly operation of the institution;

(2) Involvement in work and recreational activities and assignments;

(3) Adherence to institution guidelines and Bureau of Prisons rules and policy;

(4) Personal grooming and cleanliness; and

(5) Quarters sanitation.

(b) An inmate released from a control unit may be returned:

(1) To the institution from which the inmate was originally transferred;

(2) To another federal or non-federal institution; or

(3) Into the general population of the institution which has a control unit.

[49 FR 32991, Aug. 17, 1984, as amended at 60 FR 46485, Sept. 6, 1995]

Subpart E—Procedures for Handling of HIV Positive Inmates Who Pose Danger to Others

SOURCE: 54 FR 11323, Mar. 17, 1989, unless otherwise noted.

§ 541.60 Purpose and scope.

In an effort to maintain a safe and orderly environment within its institutions, the Bureau of Prisons may place in controlled housing status an inmate who tests HIV positive when there is reliable evidence that the inmate may engage in conduct posing a health risk to another person.

§ 541.61 Standard for placement in controlled housing status.

An inmate may be placed in a controlled housing status when there is reliable evidence causing staff to believe that the inmate engages in conduct posing a health risk to others. This evidence may be the inmate's behavior, or statements of the inmate, or other reliable evidence.

§ 541.62 Referral for placement.

(a) The Warden shall consider an inmate for controlled housing status when the inmate has been confirmed as testing HIV positive and when there is reliable evidence indicating that the inmate may engage in conduct posing a health risk to others. This evidence may come from the statements of the individual, repeated misconduct (including disciplinary actions), or other behavior suggesting that the inmate may engage in predatory or promiscuous sexual behavior, assaultive behavior where body fluids may be transmitted to another, or the sharing of needles.

(b) The Warden shall submit a recommendation for referral of an inmate for placement in a controlled housing status to the Regional Director in the region where the inmate is located.

(c) Based on the perceived health risk to others posed by the inmate's threatened or actual actions, the Warden may, with the telephonic approval of the Regional Director, temporarily (not to exceed 20 work days) place an inmate in a special housing status (e.g., administrative detention, or a secure health service unit room) pending the inmate's appearance before the Hearing Administrator. Reasons for this placement, and the approval of the Regional Director, shall be documented in the inmate central file. The inmate should be seen daily by case management and medical staff while in this

temporary status, and a psychological or psychiatric assessment report should be prepared during this temporary placement period.

[54 FR 11323, Mar. 17, 1989, as amended at 56 FR 31530, July 10, 1991]

§ 541.63 Hearing procedure.

(a) The Regional Director in the region where the inmate is located shall review the institution's recommendation for referral of an inmate for controlled housing status. If the Regional Director concurs with the recommendation, the Regional Director shall designate a person in the Regional Office or a person at department head level or above in the institution to conduct a hearing on the appropriateness of an inmate's placement in controlled housing status. This Hearing Administrator shall have correctional experience, no former personal involvement in the instant situation, and a knowledge of the type of behavior that poses a health risk to others, and of the options available for dealing with an inmate who poses such a health risk to others.

(b) The Hearing Administrator shall provide a hearing to an inmate recommended for controlled housing status. The hearing ordinarily shall take place at the institution housing the inmate.

(c) The hearing shall proceed as follows:

(1) Staff shall provide an inmate with an advance written notice of the hearing and a copy of this rule at least 24 hours prior to the hearing. The notice will advise the inmate of the specific act(s) or other evidence which forms the basis for a recommendation that the inmate be placed in a controlled housing status, unless such evidence would likely endanger staff or others. If an inmate is illiterate, staff shall explain the notice and this rule to the inmate and document that this explanation has occurred.

(2) The Hearing Administrator shall upon request of the inmate provide an inmate the service of a full-time staff member to represent the inmate. The Hearing Administrator shall document in the record of the hearing an inmate's request for, or refusal of staff representation. The inmate may select a staff representative from the local institution. If the selected staff member declines for good reason or is unavailable, the inmate has the option of selecting another representative or, in the case of an absent staff member, of waiting a reasonable period (determined by the Hearing Administrator) for the staff member's return, or of proceeding without a staff representative. When an inmate is illiterate, the Warden shall provide a staff representative. The staff representative shall be available to assist the inmate and, if the inmate desires, shall contact witnesses and present favorable evidence at the hearing. The Hearing Administrator shall afford the staff representative adequate time to speak with the inmate and to inteview available witnesses.

(3) The inmate has the right to be present throughout the hearing, except where institutional security or good order is jeopardized. The Hearing Adminstrator may conduct a hearing in the absence of the inmate when the inmate refuses to appear. The Hearing Administrator shall document an inmate's refusal to appear, or other reason for nonappearance, in the record of the hearing.

(4) The inmate is entitled to present documentary evidence and to have witnesses appear, provided that calling witnesses would not jeopardize or threaten institutional security or individual safety, and further provided that the witnesses are available at the institution where the hearing is being conducted.

(i) The evidence to be presented must be material and relevant to the issue as to whether the inmate can and would pose a health risk to others, if allowed to remain in general prison population. This evidence may come from the statements of the individual, repeated misconduct (including disciplinary actions), or other behavior suggesting that the inmate may engage in predatory or promiscuous sexual behavior, assaultive behavior where body fluids may be transmitted to others, or the sharing of needles.

(ii) Repetitive witnesses need not be called. Staff who recommend placement in a controlled housing status are not required to appear, provided their

recommendation is fully explained in the record.

(iii) When a witness is not available within the institution, or not permitted to appear, the inmate may submit a written statement by that witness. The Hearing Administrator shall, upon the inmate's request, postpone any decision following the hearing for a reasonable time to permit the obtaining and forwarding of written statements.

(iv) The Hearing Administrator shall document in the record of the hearing the reasons for declining to hear a witness or to receive documentary evidence.

[54 FR 11323, Mar. 17, 1989, as amended at 63 FR 5218, Jan. 30, 1998]

§ 541.64 Decision of the Hearing Administrator.

(a) At the conclusion of the hearing and following review of all material related to the recommendation for placement of an inmate in a controlled housing status, the Hearing Administrator shall prepare a written decision as to whether this placement is warranted. The Hearing Administrator shall:

(1) Prepare a summary of the hearing and of all information presented upon which the decision is based; and

(2) Indicate the specific reasons for the decision, to include a description of the act, or series of acts, or other reliable evidence on which the decision is based, along with evidence of the inmate's HIV positive status.

(b) The Hearing Administrator shall advise the inmate in writing of the decision. The inmate shall receive the information described in paragraph (a) of this section unless it is determined that the release of this information could pose a threat to individual safety, or institutional security, in which case that limited information may be withheld. The Hearing Administrator shall advise the inmate that the decision will be submitted for review of the Regional Director in the region where the inmate is located. The Hearing Administrator shall advise the inmate that, if the inmate so desires, the inmate may submit an appeal of the Hearing Administrator's decision to the Regional Director. This appeal, with supporting documentation and reasons, must be filed within five working days of the inmate's receipt of the Hearing Administrator's decision.

(c) The Hearing Administrator may order the continuation of the inmate in special housing pending review by the Regional Director. The Hearing Administrator should state the reasons for this order in the record of the Hearing.

(d) The Hearing Administrator shall send the decision, whether for or against placement in a controlled housing status, and supporting documentation to the Regional Director. Ordinarily, this is done within 20 working days after conclusion of the hearing. Any reason for extension is to be documented.

§ 541.65 Regional Director review and appeal.

(a) The Regional Director shall review the decision and supporting documentation of the Hearing Administrator and, if submitted, the information contained in an inmate's appeal. The Regional Director shall accept or reject the Hearing Administrator's decision within 30 working days of its receipt, unless for good cause there is reason for delay, which shall be documented in the record. The authority of the Regional Director may not be delegated below the level of acting Regional Director.

(b) The Regional Director shall provide a copy of his decision to the Warden at the institution housing the inmate, to the inmate, and to the Hearing Administrator.

(c) An inmate may appeal a decision of the Regional Director, through the Administrative Remedy Program, directly to the National Inmate Appeals Administrator, Office of General Counsel, within 30 calendar days of the Regional Director's decision (see 28 CFR 542.15).

[54 FR 11323, Mar. 17, 1989, as amended at 63 FR 5218, Jan. 30, 1998]

§ 541.66 Programs and services.

To the extent consistent with available resources and the security needs of the institution, an inmate in controlled housing status is to be considered for activities and privileges afforded to the general population. This

includes, but is not limited to, providing an inmate with the opportunity for participation in an education program, library services, counseling, and religious guidance, as well as access to case management, medical and mental health assistance, and legal services, including access to the institution's law libraries. An inmate in controlled housing status should be afforded at least five hours weekly recreation and exercise out of the cell. The recreation shall be by himself or under close supervision. Unless there are compelling reasons to the contrary, institutions shall provide commissary privileges and reasonable amounts of personal property. The Warden may restrict for reasons of security, fire safety, or housekeeping the amount of personal property that an inmate may retain while in controlled housing status. An inmate shall be permitted to have a radio, provided it is equipped with ear plugs. Visits shall be carefully monitored.

§ 541.67 Review of controlled housing status.

(a) Staff designated by the Warden shall evaluate regularly an inmate's adjustment while in controlled housing status. A medical staff member shall see the inmate daily, and regularly record medical and behavioral impressions. Once every 90 days, staff, comprised of a correctional and case management supervisor, and a member of the medical staff, shall meet with the inmate. The inmate is required to attend this meeting in order to be considered for release to the general population. Any refusal by the inmate to attend this meeting will be documented. Staff, at this meeting, shall make an assessment of the inmate's adjustment while in controlled housing and the likely health threat the inmate poses to others by his actions.

(b) The Warden shall serve as the review authority at the institutional level, and shall make a recommendation to the Regional Director when he believes the inmate should be considered for release from controlled housing.

(c) An inmate may appeal a Warden's decision not to recommend release from controlled housing to the Regional Director within five working days of receipt of that decision.

(d) Upon recommendation of the Warden, or upon appeal from the inmate, the Regional Director may decide whether or not to release the inmate to general population from controlled housing status.

(e) An inmate may appeal a decision of the Regional Director, through the Administrative Remedy Program, directly to the National Inmate Appeals Administrator, Office of General Counsel, within 30 calendar days of the Regional Director's decision (see 28 CFR 542.15).

[54 FR 11323, Mar. 17, 1989; 54 FR 18198, Apr. 27, 1989, as amended at 63 FR 5218, Jan. 30, 1998]

§ 541.68 Release from controlled housing status.

(a) Only the Regional Director may release an inmate from controlled housing status. The following factors are considered in the evaluation of an inmate's readiness for return to the general population:

(1) Relationship with other inmates and staff members, which demonstrate that the inmate is able to function in a less restrictive environment without posing a health threat to others or to the orderly operation of the institution;

(2) Involvement in work and recreational activities and assignments or other programs; and

(3) Adherence to institution guidelines and Bureau of Prisons rules and policy.

(b) An inmate released from a controlled housing status may be returned to the general population of that institution, or to another federal or nonfederal institution.

PART 542—ADMINISTRATIVE REMEDY

Subpart A [Reserved]

Subpart B—Administrative Remedy Program

Sec.
542.10 Purpose and scope.
542.11 Responsibility.
542.12 [Reserved]
542.13 Informal resolution.

542.14 Initial filing.
542.15 Appeals.
542.16 Assistance.
542.17 Resubmission.
542.18 Response time.
542.19 Access to indexes and responses.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

SOURCE: 61 FR 88, Jan. 2, 1996, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Administrative Remedy Program

§ 542.10 Purpose and scope.

(a) *Purpose.* The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. An inmate may not submit a Request or Appeal on behalf of another inmate.

(b) *Scope.* This Program applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement. This Program does not apply to inmates confined in other non-federal facilities.

(c) *Statutorily-mandated procedures.* There are statutorily-mandated procedures in place for tort claims (28 CFR part 543, subpart C), Inmate Accident Compensation claims (28 CFR part 301), and Freedom of Information Act or Privacy Act requests (28 CFR part 513, subpart D). If an inmate raises an issue in a request or appeal that cannot be resolved through the Administrative Remedy Program, the Bureau will refer the inmate to the appropriate statutorily-mandated procedures.

[67 FR 50805, Aug. 6, 2002]

§ 542.11 Responsibility.

(a) The Community Corrections Manager (CCM), Warden, Regional Director, and General Counsel are responsible for the implementation and operation of the Administrative Remedy Program at the Community Corrections Center (CCC), institution, regional and Central Office levels, respectively, and shall:

(1) Establish procedures for receiving, recording, reviewing, investigating, and responding to Administrative Remedy Requests (Requests) or Appeals (Appeals) submitted by an inmate;

(2) Acknowledge receipt of a Request or Appeal by returning a receipt to the inmate;

(3) Conduct an investigation into each Request or Appeal;

(4) Respond to and sign all Requests or Appeals filed at their levels. At the regional level, signatory authority may be delegated to the Deputy Regional Director. At the Central Office level, signatory authority may be delegated to the National Inmate Appeals Administrator. Signatory authority extends to staff designated as acting in the capacities specified in this § 542.11, but may not be further delegated without the written approval of the General Counsel.

(b) Inmates have the responsibility to use this Program in good faith and in an honest and straightforward manner.

§ 542.12 [Reserved]

§ 542.13 Informal resolution.

(a) *Informal resolution.* Except as provided in § 542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall establish procedures to allow for the informal resolution of inmate complaints.

(b) *Exceptions.* Inmates in CCCs are not required to attempt informal resolution. An informal resolution attempt is not required prior to submission to the Regional or Central Office as provided for in § 542.14(d) of this part. An informal resolution attempt may be waived in individual cases at the Warden or institution Administrative Remedy Coordinator's discretion when the inmate demonstrates an acceptable reason for bypassing informal resolution.

§ 542.14 Initial filing.

(a) *Submission*. The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP–9), is 20 calendar days following the date on which the basis for the Request occurred.

(b) *Extension*. Where the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed. In general, valid reason for delay means a situation which prevented the inmate from submitting the request within the established time frame. Valid reasons for delay include the following: an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal; an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal; an unusually long period taken for informal resolution attempts; indication by an inmate, verified by staff, that a response to the inmate's request for copies of dispositions requested under § 542.19 of this part was delayed.

(c) *Form*. (1) The inmate shall obtain the appropriate form from CCC staff or institution staff (ordinarily, the correctional counselor).

(2) The inmate shall place a single complaint or a reasonable number of closely related issues on the form. If the inmate includes on a single form multiple unrelated issues, the submission shall be rejected and returned without response, and the inmate shall be advised to use a separate form for each unrelated issue. For DHO and UDC appeals, each separate incident report number must be appealed on a separate form.

(3) The inmate shall complete the form with all requested identifying information and shall state the complaint in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8½'' by 11'') continuation page. The inmate must provide an additional copy of any continuation page. The inmate must submit one copy of supporting exhibits. Exhibits will not be returned with the response. Because copies of exhibits must be filed for any appeal (see § 542.15(b)(3)), the inmate is encouraged to retain a copy of all exhibits for his or her personal records.

(4) The inmate shall date and sign the Request and submit it to the institution staff member designated to receive such Requests (ordinarily a correctional counselor). CCC inmates may mail their Requests to the CCM.

(d) *Exceptions to initial filing at institution*—(1) *Sensitive issues*. If the inmate reasonably believes the issue is sensitive and the inmate's safety or well-being would be placed in danger if the Request became known at the institution, the inmate may submit the Request directly to the appropriate Regional Director. The inmate shall clearly mark ''Sensitive'' upon the Request and explain, in writing, the reason for not submitting the Request at the institution. If the Regional Administrative Remedy Coordinator agrees that the Request is sensitive, the Request shall be accepted. Otherwise, the Request will not be accepted, and the inmate shall be advised in writing of that determination, without a return of the Request. The inmate may pursue the matter by submitting an Administrative Remedy Request locally to the Warden. The Warden shall allow a reasonable extension of time for such a resubmission.

(2) *DHO appeals*. DHO appeals shall be submitted initially to the Regional Director for the region where the inmate is currently located.

(3) *Control Unit appeals*. Appeals related to Executive Panel Reviews of Control Unit placement shall be submitted directly to the General Counsel.

(4) *Controlled housing status appeals*. Appeals related to the Regional Director's review of controlled housing status placement may be filed directly with the General Counsel.

(5) *Other requests for formal review of decisions not originating from the Warden*. Other than the exceptions listed above, formal administrative remedy requests regarding initial decisions that did not originate with the Warden, or his/her staff, may be initially filed with the Bureau office which made the original decision, and appealed directly to the General Counsel.

[61 FR 88, Jan. 2, 1996, as amended at 75 FR 34626, June 18, 2010]

§ 542.15 Appeals.

(a) *Submission.* An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP–10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP–11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate demonstrates a valid reason for delay, these time limits may be extended. Valid reasons for delay include those situations described in § 542.14(b) of this part. Appeal to the General Counsel is the final administrative appeal.

(b) *Form.* (1) Appeals to the Regional Director shall be submitted on the form designed for regional Appeals (BP–10) and accompanied by one complete copy or duplicate original of the institution Request and response. Appeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP–11) and accompanied by one complete copy or duplicate original of the institution and regional filings and their responses. Appeals shall state specifically the reason for appeal.

(2) An inmate may not raise in an Appeal issues not raised in the lower level filings. An inmate may not combine Appeals of separate lower level responses (different case numbers) into a single Appeal.

(3) An inmate shall complete the appropriate form with all requested identifying information and shall state the reasons for the Appeal in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8½″ × 11″) continuation page. The inmate shall provide two additional copies of any continuation page and exhibits with the regional Appeal, and three additional copies with an Appeal to the Central Office (the inmate is also to provide copies of exhibits used at the prior level(s) of appeal). The inmate shall date and sign the Appeal and mail it to the appropriate Regional Director, if a Regional Appeal, or to the National Inmate Appeals Administrator, Office of General Counsel, if a Central Office Appeal (see 28 CFR part 503 for information on locating Bureau addresses).

[61 FR 88, Jan. 2, 1996, as amended at 70 FR 67091, Nov. 4, 2005]

§ 542.16 Assistance.

(a) An inmate may obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal. An inmate may also obtain assistance from outside sources, such as family members or attorneys. However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit for submission unless the delay was caused by staff.

(b) Wardens shall ensure that assistance is available for inmates who are illiterate, disabled, or who are not functionally literate in English. Such assistance includes provision of reasonable accommodation in order for an inmate with a disability to prepare and process a Request or an Appeal.

§ 542.17 Resubmission.

(a) *Rejections.* The Coordinator at any level (CCM, institution, region, Central Office) may reject and return to the inmate without response a Request or an Appeal that is written by an inmate in a manner that is obscene or abusive, or does not meet any other requirement of this part.

(b) *Notice.* When a submission is rejected, the inmate shall be provided a written notice, signed by the Administrative Remedy Coordinator, explaining the reason for rejection. If the defect on which the rejection is based is correctable, the notice shall inform the inmate of a reasonable time extension within which to correct the defect and resubmit the Request or Appeal.

(c) *Appeal of rejections.* When a Request or Appeal is rejected and the inmate is not given an opportunity to correct the defect and resubmit, the inmate may appeal the rejection, including a rejection on the basis of an exception as described in § 542.14(d), to the next appeal level. The Coordinator at that level may affirm the rejection, may direct that the submission be accepted at the lower level (either upon

the inmate's resubmission or direct return to that lower level), or may accept the submission for filing. The inmate shall be informed of the decision by delivery of either a receipt or rejection notice.

§ 542.18 Response time.

If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.

§ 542.19 Access to indexes and responses.

Inmates and members of the public may request access to Administrative Remedy indexes and responses, for which inmate names and Register Numbers have been removed, as indicated below. Each institution shall make available its index, and the indexes of its regional office and the Central Office. Each regional office shall make available its index, the indexes of all institutions in its region, and the index of the Central Office. The Central Office shall make available its index and the indexes of all institutions and regional offices. Responses may be requested from the location where they are maintained and must be identified by Remedy ID number as indicated on an index. Copies of indexes or responses may be inspected during regular office hours at the locations indicated above, or may be purchased in accordance with the regular fees established for copies furnished under the Freedom of Information Act (FOIA).

PART 543—LEGAL MATTERS

Subpart A [Reserved]

Subpart B—Inmate Legal Activities

Sec.
543.10 Purpose and scope.
543.11 Legal research and preparation of legal documents.
543.12 Retention of attorneys.
543.13 Visits by attorneys.
543.14 Limitation or denial of attorney visits and correspondence.
543.15 Legal aid program.
543.16 Other paralegals, clerks, and legal assistants.

Subpart C—Federal Tort Claims Act

543.30 Purpose and scope.
543.31 Filing a claim.
543.32 Processing the claim.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to Offenses committed after that date), 5039; 28 U.S.C. 509, 510, 1346(b), 2671–80; 28 CFR 0.95–0.99, 0.172, 14.1–11.

Subpart A [Reserved]

Subpart B—Inmate Legal Activities

SOURCE: 44 FR 38263, June 29, 1979, unless otherwise noted.

§ 543.10 Purpose and scope.

The Bureau of Prisons affords an inmate reasonable access to legal materials and counsel, and reasonable opportunity to prepare legal documents. The Warden shall establish an inmate law library, and procedures for access to legal reference materials and to legal counsel, and for preparation of legal documents.

[46 FR 59509, Dec. 4, 1981]

§ 543.11 Legal research and preparation of legal documents.

(a) The Warden shall make materials in the inmate law library available whenever practical, including evening

and weekend hours. The Warden shall allow an inmate a reasonable amount of time, ordinarily during the inmate's leisure time (that is, when the inmate is not participating in a scheduled program or work assignment), to do legal research and to prepare legal documents. Where practical, the Warden shall allow preparation of documents in living quarters during an inmate's leisure time.

(b) The Warden shall periodically ensure that materials in each inmate law library are kept intact and that lost or damaged materials are replaced.

(c) Staff shall advise an inmate of rules and local procedures governing use of the inmate law library. Unauthorized possession of library materials by an inmate constitutes a prohibited act, generally warranting disciplinary action (see part 541 of this chapter).

(d) An inmate's legal materials include but are not limited to the inmate's pleadings and documents (such as a presentence report) that have been filed in court or with another judicial or administrative body, drafts of pleadings to be submitted by the inmate to a court or with other judicial or administrative body which contain the inmate's name and/or case caption prominently displayed on the first page, documents pertaining to an inmate's administrative case, photocopies of legal reference materials, and legal reference materials which are not available in the institution main law library (or basic law library in a satellite camp).

(1) An inmate may solicit or purchase legal materials from outside the institution. The inmate may receive the legal materials in accordance with the provisions on incoming publications or correspondence (see 28 CFR part 540, subparts B and F) or through an authorized attorney visit from a retained attorney. The legal materials are subject to inspection and may be read or copied unless they are received through an authorized attorney visit from a retained attorney or are properly sent as special mail (for example, mail from a court or from an attorney), in which case they may be inspected for contraband or for the purpose of verifying that the mail qualifies as special mail.

(2) Staff may allow an inmate to possess those legal materials which are necessary for the inmate's own legal actions. Staff may also allow an inmate to possess the legal materials of another inmate subject to the limitations of paragraph (f)(2) of this section. The Warden may limit the amount of legal materials an inmate may accumulate for security or housekeeping reasons.

(e) An inmate is responsible for submitting his documents to court. Institution staff who are authorized to administer oaths shall be available to provide necessary witnessing of these documents, as requested by inmates and at times scheduled by staff.

(f)(1) Except as provided for in paragraph (f)(4) of this section, an inmate may assist another inmate in the same institution during his or her leisure time (as defined in paragraph (a) of this section) with legal research and the preparation of legal documents for submission to a court or other judicial body.

(2) Except as provided for in paragraph (f)(4) of this section, an inmate may possess another inmate's legal materials while assisting the other inmate in the institution's main law library and in another location if the Warden so designates.

(i) The assisting inmate may not remove another inmate's legal materials, including copies of the legal materials, from the law library or other designated location. An assisting inmate is permitted to make handwritten notes and to remove those notes from the library or other designated location if the notes do not contain a case caption or document title or the name(s) of any inmate(s). The assisting inmate may also develop and possess handwritten drafts of pleadings, so long as the draft pleadings do not contain a case caption or document title or the name(s) of any inmate(s). These notes and drafts are not considered to be the assisting inmate's legal property, and when the assisting inmate has these documents outside the law library or other designated location, they are subject to the property limitations in § 553.11(a) of this chapter.

(ii) Although the inmate being assisted need not remain present in the

law library or other designated location while the assistance is being rendered, that inmate is responsible for providing and retrieving his or her legal materials from the library or other designated location. Ordinarily, the inmate must provide and retrieve his or her legal materials during his or her leisure time. An inmate with an imminent court deadline may request a brief absence from a scheduled program or work assignment in order to provide or retrieve legal materials from an assisting inmate.

(3) The Warden may give special consideration to the legal needs of inmates in mental health seclusion status in federal medical centers or to inmates in controlled housing.

(4) The Warden at any institution may impose limitations on an inmate's assistance to another inmate in the interest of institution security, good order, or discipline.

(g) The institution staff shall, upon an inmate's request and at times scheduled by staff, duplicate legal documents if the inmate demonstrates that more than one copy must be submitted to court and that the duplication cannot be accomplished by use of carbon paper. The inmate shall bear the cost, and the duplication shall be done so as not to interfere with regular institution operations. Staff may waive the cost if the inmate is without funds or if the material to be duplicated is minimal, and the inmate's requests for duplication are not large or excessive.

(h) Unless clearly impractical, the Warden shall allow an inmate preparing legal documents to use a typewriter, or, if the inmate cannot type, to have another inmate type his documents. The Warden may allow the inmate to hire a public stenographer to type documents outside the institution, but the institution may not assume the expense of hiring the public stenographer. Staff shall advise the inmate of any delay in the typing of which they have received notice from the stenographer.

(i) The Warden shall give special time allowance for research and preparation of documents to an inmate who demonstrates a requirement to meet an imminent court deadline. Otherwise, each inmate shall continue his regular institutional activities without undue disruption by legal activities.

(j) With consideration of the needs of other inmates and the availability of staff and other resources, the Warden shall provide an inmate confined in disciplinary segregation or administrative detention a means of access to legal materials, along with an opportunity to prepare legal documents. The Warden shall allow an inmate in segregation or detention a reasonable amount of personal legal materials. In no case shall the amount of personal legal materials be such as to pose a fire, sanitation, security, or housekeeping hazard.

[44 FR 38263, June 29, 1979, as amended at 62 FR 4893, Jan. 31, 1997]

§ 543.12 Retention of attorneys.

(a) The Warden shall allow an inmate to contact and retain attorneys. With the written consent of the inmate, staff may advise an attorney of the inmate's available funds. Staff may not interfere with selection and retention of attorneys if the inmate has attained majority and is mentally competent. If the inmate is a mental incompetent or a minor, the Warden shall refer to the inmate's guardian or to the appropriate court all matters concerning the retention and payment of attorneys.

(b) The Bureau of Prisons may not act as guarantor or collector of fees. As to correspondence with attorneys and telephone calls to attorneys, see part 540 of this chapter.

§ 543.13 Visits by attorneys.

(a) The Warden shall, under the conditions of this section, permit visits by the retained, appointed, or prospective attorney of an inmate or by an attorney who wishes to interview an inmate as a witness.

(b) The Warden generally may not limit the frequency of attorney visits since the number of visits necessary is dependent upon the nature and urgency of the legal problems involved. The Warden shall set the time and place for visits, which ordinarily take place during regular visiting hours. Attorney visits shall take place in a private conference room, if available, or in a regular visiting room in an area and at a

time designed to allow a degree of privacy. The Warden may make exceptions according to local conditions or for an emergency situation demonstrated by the inmate or visiting attorney.

(c) The attorney shall make an advance appointment for the visit through the Warden prior to each visit; however, the Warden shall make every effort to arrange for a visit when prior notification is not practical.

(d) The Warden may require an attorney to indicate where he is licensed as an attorney and how that fact may be verified. Prior to each appointment or visit, the Warden shall require each attorney to identify himself and to confirm that he wishes to visit an inmate who has requested his visit or whom he represents or whom he wishes to interview as a witness. The Warden may not ask the attorney to state the subject matter of the law suit or interview. If there is any question about the identity of the visitor or his qualification as an attorney in good standing, the Warden shall refer the matter to the Regional Counsel.

(e) Staff may not subject visits between an attorney and an inmate to auditory supervision. The Warden may permit tape recordings to be used by an attorney during the course of a visit only if the attorney states in writing in advance of the interview that the sole purpose of the recording is to facilitate the attorney-client or attorney-witness relationship.

(f) The Warden may, at any time, subject an attorney to a search of his person and belongings for the purpose of ascertaining if contraband is present, as a condition of visiting an inmate.

§ 543.14 Limitation or denial of attorney visits and correspondence.

(a) An act by an attorney which violates Bureau regulations or institution guidelines and which threatens the security, good order, or discipline of the institution is grounds for limitation or denial by the Warden of the attorney's privileged visitation and correspondence rights. Acts by an attorney which may warrant such limitation or denial include, for example the following:

(1) A false statement as to the attorney's identity or qualifications;

(2) A plan, attempt, or act to introduce contraband into the institution;

(3) A conspiracy to commit, an attempt to commit, or the actual commission of an act of violence within an institution; and

(4) Encouraging an inmate to violate the law, Bureau of Prisons rules, or local implementing guidelines.

(b) Unless the breach of regulations is extreme or repeated, limitation rather than a denial of visitation or correspondence rights is proper, especially where the inmate is represented by the attorney and is confronted with a court deadline. For example, the Warden may subject an attorney to a search of his person and belongings or may permit the attorney only nonprivileged correspondence. The Warden shall also consider referral of the matter to the state agency regulating the attorney's professional conduct.

(c) An act by an inmate in violation of Bureau regulations or institution guidelines warrants a limitation by the Warden of the inmate's correspondence or visiting rights with attorneys only if necessary to protect institution security, good order, or discipline. The Warden may not deny correspondence or visiting rights with attorneys generally.

(d) The attorney may appeal any limitation or denial by the Warden of attorney visits or correspondence rights to the Regional Director. The inmate affected may appeal through the Administrative Remedy Procedures.

§ 543.15 Legal aid program.

(a) A legal aid program which is funded or approved by the Bureau is expected to provide a broad range of legal assistance to inmates. Staff shall allow these programs generally to operate with the same independence as privately retained attorneys. The Warden shall refer a request or decision to terminate or restrict a program, or individual participants in a program, to the Regional Counsel.

(b) In order to promote the inmate-program relationship, the Warden shall give those students or legal assistants working in legal aid programs the same

status as attorneys with respect to visiting and correspondence except where specific exceptions are made in this section and in part 540 of this chapter.

(c) An attorney or law school professor shall supervise students and legal assistants participating in the program. The supervisor shall provide the Warden with a signed statement accepting professional responsibility for acts of each student or legal assistant affecting the institution. The Warden may require each student or legal assistant to complete and sign a personal history statement and a pledge to abide by Bureau regulations and institution guidelines. If necessary to maintain security or good order in the institution, the Warden may prohibit a student or legal assistant from visiting or corresponding with an inmate.

§ 543.16 Other paralegals, clerks, and legal assistants.

(a) The Bureau of Prisons recognizes the use of assistants by attorneys to perform legal tasks and, with proper controls and exceptions enumerated in this section and in part 540 of this chapter, accords such assistants the same status as attorneys with respect to visiting and correspondence.

(b) The attorney who employs an assistant and who wishes the assistant to visit or correspond with an inmate on legal matters shall provide the Warden with a signed statement including:

(1) Certification of the assistant's ability to perform in this role and awareness of the responsibility of this position;

(2) A pledge to supervise the assistant's activities; and

(3) Acceptance of personal and professional responsibility for all acts of the assistant which may affect the institution, its inmates, and staff. The Warden may require each assistant to fill out and sign a personal history statement and a pledge to abide by Bureau regulations and institution guidelines. If necessary to maintain security or good order in the institution, the Warden may prohibit a legal assistant from visiting or corresponding with an inmate.

Subpart C—Federal Tort Claims Act

SOURCE: 65 FR 34364, May 26, 2000, unless otherwise noted.

§ 543.30 Purpose and scope.

Pursuant to the Federal Tort Claims Act, a claim for money damages for personal injury or death and/or damage to or loss of property must be filed against the United States by the injured party with the appropriate Federal agency for administrative action. General provisions for processing administrative claims under the Federal Tort Claims Act are contained in 28 CFR part 14. The provisions in this subpart describe the procedures to follow when filing an administrative tort claim with the Bureau of Prisons.

§ 543.31 Filing a claim.

(a) *Who may file a claim?* You may file a claim if you are the injured person or the owner of the damaged or lost property. A person acting on your behalf as an agent, executor, administrator, parent, guardian, or other representative may file a claim for you if the person provides a written statement signed by you giving that person permission to act for you. A representative may also file a claim for wrongful death. If you hire a lawyer or authorize a representative to act on your behalf, the agency will correspond only with that representative, and will not continue to correspond with you.

(b) *Where do I obtain a form for filing a claim?* You may obtain a form from staff in the Central Office, Regional Offices, Bureau institutions, or staff training centers.

(c) *Where do I file the claim?* You may either mail or deliver the claim to the regional office in the region where the claim occurred. If the loss or injury occurred in a specific regional office or within the geographical boundaries of the region, you may either mail or deliver the claim to that regional office. If the loss or injury occurred in the Central Office, you may either mail or deliver the claim to the Office of General Counsel, Central Office. If the loss

or injury occurred in one of the training centers, you may either mail or deliver the claim to the Associate General Counsel, Federal Law Enforcement Training Center. 28 CFR part 503 contains information on locating Bureau of Prisons addresses.

[65 FR 34364, May 26, 2000, as amended at 70 FR 67091, Nov. 4, 2005]

§ 543.32 Processing the claim.

(a) *Will I receive an acknowledgment letter?* Yes. If you have provided all necessary information to process your claim (such as time, date, and place where the incident occurred, and a specific sum of money you are requesting as damages), you will receive an acknowledgment letter indicating the filing date and a claim number. The filing date is the date your claim was first received by either the Department of Justice or an office of the Bureau of Prisons. You should refer to your claim number in all further correspondences with the agency. Additionally, you must inform the agency of any changes in your address. If you fail to provide all necessary information, your claim will be rejected and returned to you requesting supplemental information.

(b) *Will I be notified if my claim is transferred?* Yes. If your claim is improperly filed, you will be notified by the responsible office that your claim was transferred to another regional office, the Central Office, a training center, or another agency.

(c) *Will an investigation be conducted?* Yes. The regional office ordinarily refers the claim to the appropriate institution or office for investigation. You may also be required to provide additional information during the investigation. Your failure to respond within a reasonable time may result in the rejection or denial of the claim.

(d) *Who will decide my administrative claim?* The Regional Counsel or his or her designee reviews the investigation and the supporting evidence and renders a decision of all claims properly filed in the regional office and within regional settlement authority. The Regional Counsel has limited settlement authority (up to an amount established by the Director, Bureau of Prisons). After considering the merits of the claim, the Regional Counsel may deny or propose a settlement of the claim. The General Counsel will investigate and propose settlement for all claims properly filed in the Central Office in accordance with delegated settlement authority. If the proposed settlement exceeds the General Counsel's authority, the General Counsel will seek approval from the appropriate Department of Justice officers.

(e) *Will my claim be reviewed by or referred to the Central Office?* If the Regional Counsel recommends a proposed settlement in excess of the settlement authority, the claim will be forwarded, with a recommendation, to the Office of General Counsel, Central Office for their review.

(f) *Will appreciation or depreciation be considered?* Yes. Staff will consider appreciation or depreciation of lost or damaged property in settling a claim.

(g) *If my claim is denied or I am dissatisfied with a settlement offer, what are my options?* If your claim is denied or you are dissatisfied with a settlement offer, you may request, in writing, that the Bureau of Prisons reconsider your claim in the administrative stage. You should include additional evidence of injury or loss to support your request for reconsideration. If you are dissatisfied with the final agency action, you may file suit in an appropriate U.S. District Court as no further administrative action is available.

(h) *What if I accept a settlement of my claim?* If you accept a settlement, you give up your right to bring a lawsuit against the United States or against any employee of the government whose action or lack of action gave rise to your claim.

(i) *How long will it take to get a response?* Generally, you will receive a decision regarding your claim within six months of when you properly file the claim. If you have not received a letter either proposing a settlement or denying your claim within six months after the date your claim was filed, you may assume your claim is denied. You may proceed to file a lawsuit in the appropriate U.S. District Court.

PART 544—EDUCATION

Subparts A–B [Reserved]

Subpart C—Postsecondary Education Programs for Inmates

Sec.
544.20 Purpose and scope.
544.21 Procedures.

Subpart D—Inmate Recreation Programs

544.30 Purpose and scope.
544.31 Definitions.
544.32 Goals.
544.33 Movies.
544.34 Inmate running events.
544.35 Art and hobbycraft.

Subpart E—Mandatory English-as-a-Second Language Program (ESL)

544.40 Purpose and scope.
544.41 Applicability: Who must attend the ESL program.
544.42 Procedures.
544.43 Incentives.
544.44 Disciplinary action.

Subpart F—Occupational Education Programs

544.50 Purpose and scope.
544.51 Procedures.
544.52 Levels of Occupational Education Programs.

Subpart G [Reserved]

Subpart H—Literacy Program

544.70 Purpose and scope.
544.71 Exceptions to required literacy program participation.
544.72 Incentives.
544.73 Program participation.
544.74 Work assignment limitations.
544.75 Disciplinary action.

Subpart I—Education, Training and Leisure-Time Program Standards

544.80 Purpose and scope.
544.81 Program goals.
544.82 General program characteristics.
544.83 Inmate tutors.

Subpart J [Reserved]

Subpart K—Inmate Library Services

544.100 Purpose and scope.
544.101 Procedures.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

SOURCE: 44 FR 38249, June 29, 1979, unless otherwise noted.

Subparts A–B [Reserved]

Subpart C—Postsecondary Education Programs for Inmates

SOURCE: 68 FR 65171, Nov. 19, 2003, unless otherwise noted.

§ 544.20 Purpose and scope.

The Bureau of Prisons offers inmates the opportunity under its postsecondary education program to participate in postsecondary education courses (courses for college credit other than those courses which pertain to occupational education programs) which have been determined to be appropriate in light of the institution's need for discipline, security, and good order. Participation in postsecondary education courses which are part of occupational education programs is governed by the provisions of the Bureau's occupational education program (see subpart F of this part).

§ 544.21 Procedures.

(a) The Warden or designee must appoint a postsecondary education coordinator (ordinarily an education staff member) for the institution. The postsecondary education coordinator is responsible for coordinating the institution's postsecondary education program.

(b) An inmate who wishes to participate in a postsecondary education course must apply through the postsecondary education coordinator. If the postsecondary education coordinator determines that the course is appropriate in light of the institution's need for discipline, security, and good order, the inmate may enroll provided that:

(1) The inmate meets eligibility requirements for the course which have been set by the course provider,

(2) The inmate is responsible for payment of any tuition either through personal funds, community resources, or scholarships available to the inmate, and

(3) The unit team determines that the course is appropriate for the inmate's apparent needs.

Subpart D—Inmate Recreation Programs

SOURCE: 58 FR 65850, Dec. 16, 1993, unless otherwise noted.

§ 544.30 Purpose and scope.

The Bureau of Prisons encourages inmates to make constructive use of leisure time and offers movies, games, sports, social activities, arts and hobbycrafts, wellness and other group and individual activities.

§ 544.31 Definitions.

(a) *Leisure activities* are a wide range of activities in which inmates may participate when not performing assigned duties. Leisure activities include participation in organized and informal games, sports, physical fitness, table games, hobbycrafts, music programs, intramural activities, social and cultural organizations, movies, and stage shows. Religious activities, psychological services, and education classes are not included within this definition, except when they are used specifically to encourage knowledge, skills, and attitudes related to leisure activity involvement.

(b) *Organized activities* are those activities accounted for by registration or roster of individual participants, and occur at a scheduled time and place.

(c) *Art work* includes all paintings and sketches rendered in any of the usual media (oils, pastels, crayons, pencils, inks, and charcoal).

(d) *Hobbycraft activities* include ceramics, leatherwork, models, clay, mosaics, crochet, knitting, sculptures, woodworking, lapidary, and other forms consistent with institution guidelines.

(e) *Inmate wellness program activities* include screening, assessments, goal setting, fitness/nutrition prescriptions and counseling.

§ 544.32 Goals.

The Warden is to ensure, to the extent possible, that leisure activities are provided to meet social, physical, psychological, and overall wellness needs of inmates.

(a) Leisure activities are designed to attract inmate participation regardless of ethnic, racial, age, or sex difference, or handicap considerations, and to enhance the potential for post-release involvement.

(b) Leisure activities are designed to ensure that an inmate with the need has the opportunity to complete one or more activities (see 28 CFR 544.81).

§ 544.33 Movies.

If there is a program to show movies, the Supervisor of Education shall ensure that X-rated movies are not shown.

§ 544.34 Inmate running events.

Running events will ordinarily not exceed 10 kilometers or 6.2 miles. Appropriate medical staff and fluid supplies (e.g., water) should be available for all inmate running events.

§ 544.35 Art and hobbycraft.

(a) An inmate engaged in art or hobbycraft activities may obtain materials through:

(1) The institution art program (if one exists);

(2) The commissary sales unit;

(3) Special purchase commissary orders, if the sales unit is unable to stock a sufficient amount of the needed materials; or

(4) Other sources approved by the Warden.

(b) Each inmate shall identify completed art or hobbycraft products by showing the inmate's name and register number on the reverse side of the item.

(c) Completed or abandoned art or hobbycraft articles must be disposed of in one of the following ways:

(1) Upon approval of the Warden, by giving the item to an authorized visitor. The quantity of items will be determined by the Warden.

(2) By mailing the item to a verified relative or approved visitor at the inmate's expense.

(3) By selling, through an institution art and hobbycraft sales program, if one exists, after the institution price committee has determined the sale price.

(4) Other methods established by the Warden.

(d) *Restrictions.* Art and hobbycraft programs are intended for the personal enjoyment of an inmate and as an opportunity to learn a new leisure skill. They are not for the mass production of art and hobbycraft items by artists or to provide a means of supplementing an inmate's income.

(1) The Warden may restrict, for reasons of security and housekeeping, the size and quantity of all products made in the art and hobbycraft program. Paintings mailed out of the institution must conform to both institution guidelines and postal regulations. If an inmate's art work or hobbycraft is on public display, the Warden may restrict the content of the work in accordance with community standards of decency.

(2) The Warden may set limits, in compliance with commissary guidelines, on the amount of money an inmate may spend on art or hobbycraft items or materials.

(3) The Warden may restrict for reasons of security, fire safety, and housekeeping, the use or possession of art and hobbycraft items or materials.

(4) Appropriate hobbycraft activities shall be encouraged in the inmate living areas. However, the Warden may limit hobbycraft projects in the cell/living areas to those which can be contained/stored in provided personal property containers. Exceptions may be made for such items as a painting where the size would prohibit placement in a locker. Hobbycraft items must be removed from the living area when completed unless they are approved as personal property.

(5) The Warden shall require the inmate to mail completed hobbycraft articles out of the institution at the inmate's expense, or to give them to an authorized visitor within 30 days of completion, or to dispose of them through approved sales. However, articles offered for sale must be sold within 90 days of completion, or must be given to an authorized visitor or mailed out of the institution at the inmate's expense.

(6) Where space and equipment are limited and demand is high, the Warden may set limits on the amount of time an inmate may use a hobbycraft facility, e.g., the Warden may limit an inmate's use of any workshop or classroom to six months to make room for new students. Hobbycraft participants may be rotated to allow for maximum utilization of the resources.

(7) Disciplinary action may be taken against inmates found with unauthorized hobbycraft materials in their possession. This action may include the removal of the inmate from the hobbycraft program.

Subpart E—Mandatory English-as-a-Second Language Program (ESL)

SOURCE: 59 FR 14724, Mar. 29, 1994, unless otherwise noted.

§ 544.40 Purpose and scope.

Pursuant to the Crime Control Act of 1990 (18 U.S.C. 3624(f)), limited English proficient inmates confined in Federal Bureau of Prisons institutions are required to attend an English-as-a-Second Language (ESL) program until they function at the equivalence of the eighth grade level in competency skills. Waivers to this requirement may be granted by the Warden in accordance with §§ 544.41 and 544.42.

§ 544.41 Applicability: Who must attend the ESL program.

(a) All Federal prisoners who have limited English proficiency skills shall attend an ESL program except:

(1) Pretrial inmates;

(2) Inmates committed for purpose of study and observation under the provisions of 18 U.S.C. 4205(c) or, effective November 1, 1987, 18 U.S.C. 3552(b);

(3) Sentenced aliens with a deportation detainer;

(4) Other inmates whom, for documented good cause, the Warden may excuse from attending the ESL program.

(b) Staff shall document in the inmate's education file the specific reasons for not requiring the inmate to participate in the ESL program.

§ 544.42 Procedures.

(a) The Warden at each federal institution shall ensure that inmates who at their initial classification are found

to be limited English proficient are enrolled in the ESL program. Determination of limited English proficiency is made by staff on the basis of personal interviews and placement testing.

(b) An inmate who returns to the Federal Bureau of Prisons on a new sentence or as a parole violator, and who has not achieved or is unable to demonstrate verified achievement of the eighth grade level, must provide verification or enroll in the ESL program until that inmate achieves such a grade or is granted a waiver for cause.

(c) The Warden or designee shall assign to an education staff member the responsibility to coordinate the institution's ESL program. The ESL coordinator or designee shall meet with the inmate for the purpose of enrolling the inmate in the ESL program. The ESL coordinator shall be responsible for the completion of the official ESL Program Record, and shall place it in the inmate's education file.

(d) Ordinarily, there will be no time limit for completion of the ESL mandatory program. However, after 240 instructional hours of continuous enrollment in an ESL program, excluding sick time, furloughs, and other excused absences from scheduled classes, the Warden shall have the authority to grant a waiver from further program participation. This waiver may be granted when it is determined that the inmate will not benefit from further instruction. Each exemption determination shall be made on an individual basis and shall be supported by documentation.

[59 FR 14724, Mar. 29, 1994, as amended at 62 FR 39916, July 24, 1997]

§ 544.43 Incentives.

The Warden or designee shall establish a system of incentives to encourage an inmate to meet the mandatory ESL program requirements.

§ 544.44 Disciplinary action.

As with any other mandatory programs, such as work assignments, staff may take disciplinary action against an inmate when that inmate refuses to enroll and participate in, or to meet the minimum requirements of the mandatory ESL program.

Subpart F—Occupational Education Programs

SOURCE: 68 FR 65170, Nov. 19, 2003, unless otherwise noted.

§ 544.50 Purpose and scope.

The Bureau of Prisons offers eligible inmates the opportunity under its occupational education programs to participate in occupational education courses for the purpose of obtaining marketable skills designed to enhance post-release employment opportunities.

§ 544.51 Procedures.

(a) *Eligibility*. All inmates are eligible to participate in an institution's occupational education program. An eligible inmate must apply through the inmate's unit team for placement consideration. The unit team will determine whether the occupational education course is appropriate for the inmate's apparent needs.

(b) *Special considerations for inmates under orders of deportation, exclusion, or removal:* (1) Generally, inmates under orders of deportation, exclusion, or removal may participate in an institution's occupational education program if Bureau resources permit after meeting the needs of other eligible inmates.

(2) Inmates under orders of deportation, exclusion, or removal who the Attorney General has determined cannot be removed from the United States because the designated country of removal will not accept the inmate's return are exempted from the limitation in paragraph (b)(1) of this section, and may participate in an institution's occupational education in the same manner as other eligible inmates.

§ 544.52 Levels of Occupational Education Programs.

Occupational education programs are offered at the certificate level and the classroom level. Each level may include the following types of training:

(a) *Exploratory Training*. Exploratory training is a study of occupations and industries for the purpose of providing the student with a general knowledge of the occupation and the world of work, rather than specific skill development.

(b) *Marketable Training*. Marketable training provides specific entry-level or advanced job skills. Marketable training may include ''live work'', that is, the training would result in a product or service produced by the inmate for actual use by the institution, FPI, another federal agency, or community service project.

(c) *Apprentice Training*. Apprentice training provides an inmate the opportunity to participate in training which prepares the inmate for employment in various trades through structured apprenticeship programs approved at the state and national levels by the Bureau of Apprenticeship and Training, U.S. Department of Labor.

Subpart G [Reserved]

Subpart H—Literacy Program

SOURCE: 62 FR 50793, Sept. 26, 1997, unless otherwise noted.

§ 544.70 Purpose and scope.

Except as provided for in § 544.71, an inmate confined in a federal institution who does not have a verified General Educational Development (GED) credential or high school diploma is required to attend an adult literacy program for a minimum of 240 instructional hours or until a GED is achieved, whichever occurs first.

§ 544.71 Exceptions to required literacy program participation.

(a) The following inmates are not required to attend the literacy program:

(1) Pretrial inmates;

(2) Inmates committed for purpose of study and observation under the provisions of 18 U.S.C. 4205(c), 4241(d), or, effective November 1, 1987, 18 U.S.C. 3552(b);

(3) Sentenced deportable aliens;

(4) Inmates determined by staff to be temporarily unable to participate in the literacy program due to special circumstances beyond their control (e.g., due to a medical condition, transfer on writ, on a waiting list for initial placement). Such inmates, however, shall be required to participate when the special circumstances are no longer applicable.

(b) Inmates who have been determined (on the basis of formal diagnostic assessment) to have a documented emotional, mental, or physical individual impediment to learning shall not be required to complete the literacy program beyond those achievement levels indicated as realistic by the formal diagnostic assessment.

(c) Staff shall document in the inmate's education file the specific reasons for not requiring the inmate to participate in, or to complete, the literacy program.

§ 544.72 Incentives.

The Warden shall establish a system of incentives to encourage an inmate to obtain a GED credential.

§ 544.73 Program participation.

(a) The Warden or designee shall assign to an education staff member the responsibility to coordinate the institution's literacy program. Initially, staff shall meet with the inmate for the purpose of enrolling the inmate in the literacy program. Subsequently, staff shall formally interview each inmate involved in the literacy program when necessary for the purpose of determining a progress assignment. Staff shall place documentation of these interviews in the inmate's education file.

(b)(1) For the purposes of 18 U.S.C. 3624, an inmate subject to the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) or the Prison Litigation Reform Act of 1995 (PLRA) shall be deemed to be making satisfactory progress toward earning a GED credential or high school diploma unless and until the inmate receives a progress assignment confirming that:

(i) The inmate refuses to enroll in the literacy program;

(ii) The inmate has been found to have committed a prohibited act that occurred in a literacy program during the last 240 instructional hours of the inmate's most recent enrollment in the literacy program; or

(iii) The inmate has withdrawn from the literacy program.

(2) When an inmate subject to VCCLEA or PLRA receives a progress assignment indicating that the inmate is not making satisfactory progress,

the assignment shall be changed to indicate satisfactory progress only after the inmate is currently and continuously enrolled in a literacy program for a minimum of 240 instructional hours. Any further withdrawal or finding that the inmate has committed a prohibited act in a literacy program during the last 240 instructional hours of the inmate's most recent enrollment in the literacy program shall result in a progress assignment indicating that the inmate is again not making satisfactory progress (see paragraphs (b)(1)(ii) and (iii) of this section).

(c) At the end of 240 instructional hours, excluding sick time, furloughs, or other absences from scheduled classes, the unit team during scheduled program review sessions shall meet with the inmate to encourage continued participation in the literacy program until the inmate earns a GED credential or high school diploma. At these meetings, the inmate may elect not to continue in the literacy program, and no disciplinary action will be taken. The inmate may not discontinue this program when participation is mandated by statute.

§ 544.74 Work assignment limitations.

These limitations on work assignment appointment and promotion apply to all inmates, including those exempted from required participation in the literacy program by § 544.71.

(a) *Appointment.* (1) An inmate who does not meet the literacy requirement may be assigned to a grade 4 position contingent upon the inmate's continued enrollment in the literacy program.

(2) An inmate ordinarily must show prior attainment of a GED credential or high school diploma in order to be considered for a commissary work assignment above minimum pay level, an institution work assignment above grade 4 compensation, or an industrial work assignment above grade four or in a non-graded incentive pay position.

(3) If labor force needs require, an inmate who does not meet the literacy requirement may be assigned to an industrial non-graded incentive pay position if the inmate is simultaneously enrolled in a literacy or related program. Withdrawal from the literacy program shall result in termination of the assignment. Local Federal Prison Industry (FPI) management may elect to retain the reassigned inmate in an hourly rated grade 4 position.

(b) *Promotion.* An inmate ordinarily must show prior attainment of a GED credential or high school diploma to be promoted above the minimum pay level or grade in a commissary work assignment, an institutional work assignment, or an industrial work assignment. An inmate already in an assignment above the minimum pay grade who had met prior literacy requirements when approved for promotion is eligible for further promotion under the prior standard. Such inmate, however, must meet the current standard if, due to demotion based upon a poor performance appraisal, he or she needs to reapply for a promotion.

(c) *Exceptions.* The Warden may, for good cause, exempt inmates on a case-by-case basis, from the literacy requirements for work assignment appointment and promotion. Staff shall document such exemption in the inmate's education file and central file.

§ 544.75 Disciplinary action.

As with other mandatory programs, such as work assignments, staff may take disciplinary action against an inmate lacking a GED credential or high school diploma if that inmate refuses to enroll in, and to complete, the mandatory 240 instructional hours of the literacy program.

Subpart I—Education, Training and Leisure-Time Program Standards

SOURCE: 58 FR 65852, Dec. 16, 1993, unless otherwise noted.

§ 544.80 Purpose and scope.

In consideration of inmate education, occupation, and leisure-time needs, the Bureau of Prisons affords inmates the opportunity to improve their knowledge and skills through academic, occupation and leisure-time activities. All institutions, except satellite camps, detention centers and metropolitan correctional centers, shall operate a full range of activities as outlined in this rule.

§ 544.81 Program goals.

The Warden shall ensure that an inmate with the need, capacity, and sufficient time to serve, has the opportunity to:

(a) Complete an Adult Literacy program leading to a General Educational Development (GED) certificate and/or high school diploma;

(b) Complete one or more levels of English-as-a-Second Language;

(c) Acquire or improve marketable skill through one or more programs of Occupation Education (OE);

(d) Complete one or more Postsecondary Education activities;

(e) Complete one or more Adult Continuing Education activities;

(f) Participate in one or more leisure, fitness, wellness or sport activities;

(g) Participate in a Release Preparation program; and

(h) Participate in Career Counseling. Staff shall encourage each inmate to accept the responsibility to identify any specific education needs, set personal goals, and select activities, programs and/or work experiences which will help to reach those goals.

[58 FR 65852, Dec. 16, 1993, as amended at 61 FR 47795, Sept. 10, 1996]

§ 544.82 General program characteristics.

(a) The Supervisor of Education shall assure that the following minimum criteria are met for the institution's education program set forth in § 544.81.

(1) There is a written curriculum which establishes measurable behavioral objectives and procedures.

(2) There are clear criteria which establish minimum expectations for program completion, as well as provisions for the assessment of student progress.

(3) There are provisions for periodic review of the relevancy and effectiveness of the program.

(4) Unless unusual circumstances (e.g., college credit courses) exist, all programs should allow for open entry and exit, at least on a monthly basis.

(5) The Supervisor of Education may establish other requirements necessary to assure that the stated goals of the program are achieved.

(b) Upon an inmate's completion of a program specified in § 544.81, staff may issue and/or review and file a certificate when it contributes to an inmate's future plans in such a way that it validates the inmate's education and training; supports the inmate's chances of securing employment; improves the inmate's acceptance for advanced education; or enhances the inmate's opportunity for success in any other activity the inmate chooses to pursue. The certificate will confirm that the inmate has completed the requirements to receive a certificate that fits one or a combination of the following categories:

(1) Accredited certificates—high school diplomas and occupation training certificates approved or issued through local school districts, state departments of education, or other recognized accrediting educational organizations;

(2) Postsecondary certificates and transcripts—postsecondary degrees or course certificates approved or issued through a sponsoring accredited educational institution;

(3) General Educational Development tests—programs sponsored by the American Council on Education;

(4) Private certificates—outside agencies, private business and industry, other than those stated in paragraph (b)(1) of this section;

(5) Institutional certificates—approved general education, occupation training, recreation, adult continuing education and social education certificates, issued to an inmate who completes a program, and when the institution cannot provide a certificate as provided in paragraphs (b) (1) and (4) of this section; or

(6) Transcripts—issued to an inmate who completes general education programs, formal occupation training, on-the-job and apprentice training and work assignments. With the inmate's consent, transcripts may be sent to schools and colleges, business, industries and other agencies.

§ 544.83 Inmate tutors.

Institutions may establish an inmate tutor/aide program. Guidelines shall be developed regarding the training and supervision of inmate tutors/aides where such programs are available.

Subpart J [Reserved]

Subpart K—Inmate Library Services

§ 544.100 Purpose and scope.

The Bureau of Prisons provides inmates within each of its institutions with library services necessary for educational, cultural, and leisure activity. The Warden shall ensure that the inmate library has a wide variety of reading materials. Library services shall ordinarily be available to all inmates daily, including evenings and weekends, except in detention facilities where service shall be scheduled as frequently as possible to ensure reasonable access.

[46 FR 24900, May 1, 1981]

§ 544.101 Procedures.

(a) The Warden shall assign a staff member (ordinarily the Supervisor of Education) responsibility for the inmate library.

(b) The inmate library shall offer an inmate a variety of reading materials, including, but not limited to, periodicals, newspapers, fiction, non-fiction, and reference books.

(c) Where the population of an institution includes inmates of foreign origin, staff shall attempt to provide reading materials in the inmates' language.

(d) Inmate library services shall be made available to inmates in special housing units.

(e) The Warden or designee may authorize the use of inmates as library assistants.

[46 FR 24900, May 1, 1981]

PART 545—WORK AND COMPENSATION

Subpart A [Reserved]

Subpart B—Inmate Financial Responsibility Program

Sec.

545.10 Purpose and scope.
545.11 Procedures.

Subpart C—Inmate Work and Performance Pay Program

545.20 Purpose and scope.
545.21 Definitions.
545.22 Institution work and performance pay committee.
545.23 Inmate work/program assignment.
545.24 Inmate work conditions.
545.25 Eligibility for performance pay.
545.26 Performance pay provisions.
545.27 Inmate vacations.
545.28 Achievement awards.
545.29 Special awards.
545.30 Funds due deceased inmates.
545.31 Training.

Subpart D [Reserved]

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3013, 3571, 3572, 3621, 3622, 3624, 3663, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4126, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Subpart A [Reserved]

Subpart B—Inmate Financial Responsibility Program

SOURCE: 56 FR 23477, May 21, 1991, unless otherwise noted.

§ 545.10 Purpose and scope.

The Bureau of Prisons encourages each sentenced inmate to meet his or her legitimate financial obligations. As part of the initial classification process, staff will assist the inmate in developing a financial plan for meeting those obligations, and at subsequent program reviews, staff shall consider the inmate's efforts to fulfill those obligations as indicative of that individual's acceptance and demonstrated level of responsibility. The provisions of this rule apply to all inmates in federal facilities, except: Study and observation cases, pretrial detainees, and inmates in holdover status pending designation.

§ 545.11 Procedures.

When an inmate has a financial obligation, unit staff shall help that inmate develop a financial plan and shall monitor the inmate's progress in meeting that obligation.

(a) *Developing a financial plan.* At initial classification, the unit team shall review an inmate's financial obligations, using all available documentation, including, but not limited to, the Presentence Investigation and the

Judgment and Commitment Order(s). The financial plan developed shall be documented and will include the following obligations, ordinarily to be paid in the priority order as listed:

(1) Special Assessments imposed under 18 U.S.C. 3013;

(2) Court-ordered restitution;

(3) Fines and court costs;

(4) State or local court obligations; and

(5) Other federal government obligations.

(b) *Payment*. The inmate is responsible for making satisfactory progress in meeting his/her financial responsibility plan and for providing documentation of these payments to unit staff. Payments may be made from institution resources or non-institution (community) resources. In developing an inmate's financial plan, the unit team shall first subtract from the trust fund account the inmate's minimum payment schedule for UNICOR or non-UNICOR work assignments, set forth in paragraphs (b)(1) and (b)(2) of this section. The unit team shall then exclude from its assessment $75.00 a month deposited into the inmate's trust fund account. This $75.00 is excluded to allow the inmate the opportunity to better maintain telephone communication under the Inmate Telephone System (ITS).

(1) Ordinarily, the minimum payment for non-UNICOR and UNICOR grade 5 inmates will be $25.00 per quarter. This minimum payment may exceed $25.00, taking into consideration the inmate's specific obligations, institution resources, and community resources.

(2) Inmates assigned grades 1 through 4 in UNICOR ordinarily will be expected to allot not less than 50% of their monthly pay to the payment process. Any allotment which is less than the 50% minimum must be approved by the Unit Manager. Allotments may also exceed the 50% minimum after considering the individual's specific obligations and resources.

(c) *Monitoring*. Participation and/or progress in the Inmate Financial Responsibility Program will be reviewed each time staff assess an inmate's demonstrated level of responsible behavior.

(d) *Effects of non-participation*. Refusal by an inmate to participate in the financial responsibility program or to comply with the provisions of his financial plan ordinarily shall result in the following:

(1) Where applicable, the Parole Commission will be notified of the inmate's failure to participate;

(2) The inmate will not receive any furlough (other than possibly an emergency or medical furlough);

(3) The inmate will not receive performance pay above the maintenance pay level, or bonus pay, or vacation pay;

(4) The inmate will not be assigned to any work detail outside the secure perimeter of the facility;

(5) The inmate will not be placed in UNICOR. Any inmate assigned to UNICOR who fails to make adequate progress on his/her financial plan will be removed from UNICOR, and once removed, may not be placed on a UNICOR waiting list for six months. Any exceptions to this require approval of the Warden;

(6) The inmate shall be subject to a monthly commissary spending limitation more stringent than the monthly commissary spending limitation set for all inmates. This more stringent commissary spending limitation for IFRP refusees shall be at least $25 per month, excluding purchases of stamps, telephone credits, and, if the inmate is a common fare participant, Kosher/Halal certified shelf-stable entrees to the extent that such purchases are allowable under pertinent Bureau regulations;

(7) The inmate will be quartered in the lowest housing status (dormitory, double bunking, etc.);

(8) The inmate will not be placed in a community-based program;

(9) The inmate will not receive a release gratuity unless approved by the Warden;

(10) [Reserved]

(11) The inmate will not receive an incentive for participation in residential drug treatment programs.

[56 FR 23477, May 21, 1991, as amended at 59 FR 15825, Apr. 4, 1994; 59 FR 16406, Apr. 6, 1994; 59 FR 53345, Oct. 21, 1994; 60 FR 240, Jan. 3, 1995; 61 FR 91, Jan. 2, 1996; 64 FR 72799, Dec. 28, 1999]

Subpart C—Inmate Work and Performance Pay Program

SOURCE: 49 FR 38915, Oct. 1, 1984, unless otherwise noted.

§ 545.20 Purpose and scope.

(a) The Bureau of Prisons operates an inmate work program within its institutions. To the extent practicable, the work program:

(1) Reduces inmate idleness, while allowing the inmate to improve and/or develop useful job skills, work habits, and experiences that will assist in post-release employment; and

(2) Ensures that activities necessary to maintain the day-to-day operation of the institution are completed. Sentenced inmates who are physically and mentally able to work are required to participate in the work program. When approved by the Warden or designee, drug treatment programming, education, or vocational training may be substituted for all or part of the work program.

(b) The Warden may recognize an inmate's work performance or productive participation in specified correctional programs by granting performance pay.

[49 FR 38915, Oct. 1, 1984, as amended at 61 FR 379, Jan. 4, 1996]

§ 545.21 Definitions.

(a) *Physically and mentally able.* For purposes of this rule, this shall include inmates with disabilities who, with or without reasonable accommodation, can perform the essential function of the work assignment.

(b) *Institution work assignment.* A work assignment which contributes to the day-to-day operation of the institution (e.g., carpentry, plumbing, food service).

(c) *Industry assignment.* A Federal Prison Industries (FPI) work assignment.

(d) *Commissary assignment.* A Trust Fund work assignment.

(e) *Full-time work assignment.* A work assignment to which an inmate is assigned for the entire scheduled work day.

(f) *Part-time work assignment.* A work assignment to which an inmate is assigned for only a portion of the scheduled work day. Part-time work assignments are ordinarily made in conjunction with drug treatment programming, education, and/or vocational training programs.

(g) *Medically unassigned.* An inmate who, because of medical restrictions, is unable to be assigned to any work program.

(h) *Light duty work assignment.* A work assignment in which an inmate may, because of physical limitations, temporary or otherwise, only perform limited work functions, e.g., sedentary work, no prolonged standing, no lifting over 25 lbs., etc.

[49 FR 38915, Oct. 1, 1984, as amended at 61 FR 379, Jan. 4, 1996]

§ 545.22 Institution work and performance pay committee.

(a) The Warden at each Bureau of Prisons institution is to establish an Institution Inmate Work and Performance Pay Committee to administer the institution's work and performance pay program. The Committee is to be comprised of an Associate Warden, the Inmate Performance Pay Coordinator, and any other member(s) the Warden considers appropriate.

(b) The Committee is responsible for approving the following aspects of the institution's inmate work and performance pay program:

(1) Number of inmates on each work detail;

(2) Number of pay grades in each detail;

(3) Job descriptions;

(4) Performance standards;

(5) Budgeting for special act awards; and

(6) Bonus pay/special bonus pay procedures.

§ 545.23 Inmate work/program assignment.

(a) Each sentenced inmate who is physically and mentally able is to be assigned to an institutional, industrial, or commissary work program. Exception shall be made to allow for inmate participation in an education, vocational, or drug abuse treatment program, on either a full or part-time basis, where this involvement is mandated by Bureau policy or statute (for example, the Literacy Program).

Where such participation is not required by either policy or statute, exception may be made to allow an inmate to participate in an education, vocational, or drug abuse treatment program rather than work full-time upon the request of the inmate and approval of the Warden or designee.

(b) A pretrial inmate may not be required to work in any assignment or area other than housekeeping tasks in the inmate's own cell and in the community living area, unless the pretrial inmate has signed a waiver of his or her right not to work (see 28 CFR part 551, subpart J).

(c) Medically unassigned inmates may be required, to the extent medically possible, to perform housekeeping tasks in the inmate's own cell and in the community living area.

(d) In making the work and/or program assignment(s), staff shall consider the inmate's capacity to learn, interests, requests, needs, and eligibility, and the availability of the assignment(s). An inmate's assignment shall be made with consideration of the institution's security and operational needs, and should be consistent with the safekeeping of the inmate and protection of the public.

[49 FR 38915, Oct. 1, 1984, as amended at 61 FR 379, Jan. 4, 1996]

§ 545.24 Inmate work conditions.

(a) The scheduled work day for an inmate in a federal institution ordinarily consists of a minimum of seven hours.

(b) An inmate is expected to report to the place of assignment at the required time. An inmate may not leave an assignment without permission.

(c) An inmate, regardless of assignment, is expected to perform all assigned tasks diligently and conscientiously. Disciplinary action may be taken against an inmate who refuses to work, who otherwise evades attendance and performance standards in assigned activities, or who encourages others to do so.

(d) Work, vocational, and education programs are to meet the appropriate minimum standards for health and safety. Safety equipment is to be available where needed.

(e) An inmate is expected to perform the work assignment in a safe manner, using safety equipment as instructed by the work supervisor. In the event of any work related injury, the inmate shall notify the work supervisor so that appropriate action (for example, medical attention, and submission of necessary reports) may be taken.

[49 FR 38915, Oct. 1, 1984, as amended at 56 FR 23478, May 21, 1991; 56 FR 31531, July 10, 1991; 61 FR 379, Jan. 4, 1996]

§ 545.25 Eligibility for performance pay.

(a) An inmate may receive performance pay for accomplishments in one or more of the following areas:

(1) Institution work assignment;

(2) Literacy program (GED) participation;

(3) Apprenticeship training; and

(4) Vocational training courses (approved by the Bureau of Prisons as certified vocational training instruction).

(b) An inmate is eligible for performance pay from the date of work or program assignment. An inmate is eligible to receive performance pay for each month that the inmate's performance justifies such payment.

(c) An inmate who refuses to participate in the financial responsibility program shall not ordinarily receive performance pay above the maintenance pay level, or bonus pay, or vacation pay in accordance with 28 CFR part 545, subpart B.

(d) An inmate who refuses participation, withdraws, is expelled, or otherwise fails attendance requirements of the drug abuse education course or the RDAP is subject to the limitations specified in § 550.51(e) or § 550.53(g) of this chapter.

(e) Inmates receiving performance pay who are found through the disciplinary process (part 541 of this subchapter) to have committed a level 100 or 200 series drug- or alcohol-related prohibited act will automatically have their performance pay reduced to maintenance pay level and will be removed from any assigned work detail outside the secure perimeter of the institution. This reduction to maintenance pay level, and removal from assigned work detail outside the secure perimeter of the institution, will ordinarily remain in effect for one year,

unless otherwise authorized by the Warden.

[49 FR 38915, Oct. 1, 1984. Redesignated and amended at 56 FR 23478, May 21, 1991; 61 FR 379, Jan. 4, 1996; 73 FR 39866, July 11, 2008; 74 FR 1897, Jan. 14, 2009]

§ 545.26 Performance pay provisions.

(a) The Warden shall ensure that all institution work assignments have standardized work descriptions. Each inmate work position is assigned one of four pay grade levels. Factors to consider in assigning a grade level to the specific work position include the position's educational and vocational requirements, physical demands, working conditions (exposed to dusts, odors, etc.), and the degree of responsibility held by the inmate worker. The inmate assigned to a specific work position shall sign, and, if requested, receive a copy of, that position description.

(b) In recognition of budgetary constraints and for the effective management of the overall performance pay program, the percentage of inmates assigned to each grade level is approximately as follows (Grade 1 is highest pay):

Grade 1—5% of the institution's allotted inmate work assignments;

Grade 2—15% of the institution's allotted inmate work assignments;

Grade 3—25% of the institution's allotted inmate work assignments;

Grade 4—55% of the institution's allotted inmate work assignments.

(c) An inmate may receive performance pay only for that portion of the month that the inmate was working. Performance pay may not be awarded retroactively.

(d) An inmate is eligible to receive performance pay only for those hours during which the inmate is actually performing satisfactory work or actively participating in an education or vocational training program. Absences from an inmate's scheduled assignment for such reasons as call-outs, visits, sick call, interviews, or making telephone calls shall be deducted from the monthly number of hours worked and will accordingly reduce the amount of pay received by the inmate. Any exception to such reduction in pay must be approved by the Assistant Director, Correctional Programs Division, Central Office.

(e) *Work evaluation.* (1) At the end of each month the work detail/program supervisor shall compute the hours worked by the inmate and the pay to be awarded for that month.

(2) An inmate shall receive performance pay only for those hours during which the inmate is actively participating in a work assignment or an education/vocational program.

(3) The work detail/program supervisor shall rate the inmate's performance in each of several categories on a monthly basis when the inmate's work performance is average or below average or on a quarterly basis when the inmate's work performance is above average. For example, an inmate may be rated in such categories as quality of work, quantity of work, initiative, ability to learn, dependability, response to supervision and instruction, safety and care of equipment, ability to work with others, and overall job proficiency. Any exception to the work performance evaluation procedures cited in this paragraph requires approval of the Assistant Director, Correctional Programs Division, Central Office. The work detail/program supervisor shall review the evaluation with the inmate. The supervisor shall request that the inmate sign the evaluation form. If the inmate refuses to sign the form, the supervisor shall note this refusal on the evaluation and, if known, the reasons for refusal.

(f) *Bonus pay.* When the supervisor of an inmate worker or program participant believes the inmate has made exceptional accomplishments or appreciably contributed to the work assignment, the supervisor may recommend that the inmate receive a bonus. For example, an inmate who works in excess of the scheduled work day can qualify for bonus pay. Written justification for the bonus request must be forwarded to the Department Head for approval.

(g) *Special bonus pay.* An inmate may receive special bonus pay based on the inmate's exceptional work in a temporary job assignment, provided this assignment has been previously identified by the Warden, and approved by the Regional Director, as critical to

the institution. When the supervisor of an inmate worker assigned to this temporary job assignment believes the inmate has performed exceptionally well, the supervisor may recommend that the inmate received a special bonus. Written justification for the special bonus request must be forwarded to the Department Head for approval.

(h) An inmate's performance pay, once earned, becomes vested.

(i) Each inmate in performance pay status shall be notified of monthly earnings.

[49 FR 38915, Oct. 1, 1984. Redesignated and amended at 56 FR 23478, 23479, May 21, 1991; 61 FR 379, Jan. 4, 1996; 63 FR 67560, Dec. 7, 1998]

§ 545.27 Inmate vacations.

(a) An inmate who has worked full-time for 12 consecutive months on an institution work assignment is eligible to take a five-day paid vacation at the inmate's prevailing hourly rate. A recommendation for an inmate to receive vacation credit is made by the inmate's work supervisor, through the Department Head, to the Unit Team, who shall approve the request if the inmate's work performance qualifies for vacation credit.

(b) Staff shall schedule an inmate's vacation so it is compatable with shop production and administrative support requirements.

(c) The Warden or designee may authorize an inmate to accumulate vacation credit when:

(1) The inmate is transferred to another institution for the benefit of the government or because of the inmate's favorable adjustment (custody reduction); or

(2) The inmate is placed in a new work assignment in the institution for the benefit of the government or institution, rather than solely at the inmate's request or because of the inmate's poor performance or adverse behavior.

[49 FR 38915, Oct. 1, 1984. Redesignated and amended at 56 FR 23478, 23479, May 21, 1991]

§ 545.28 Achievement awards.

(a) With prior approval of the Education Department, each inmate who completes the Literacy program, Vocational Training, or related trades classroom work that is part of a certified apprenticeship program may be granted an achievement award from performance pay funds.

(b) With prior approval of the Psychology Services Department, each inmate who is making satisfactory progress or completes a residential drug treatment program may also be granted an achievement award from performance pay funds.

[61 FR 379, Jan. 4, 1996]

§ 545.29 Special awards.

(a) Inmates who perform exceptional services not ordinarily a part of the inmate's regular assignment may be granted a special award regardless of the inmate's work or program status. Examples of actions which may result in the inmate being considered for a special award are the following:

(1) An act of heroism.

(2) Voluntary acceptance and satisfactory performance of an unusually hazardous assignment.

(3) An act which protects the lives of employees or inmates, or the property of the United States. (This does not apply to informants.)

(4) Suggestions which result in substantial improvements or cost-savings in institutional programs or operations.

(5) Other exceptionally meritorious or outstanding services consistent with the general character of the preceding cases.

(b) The special award may be given in the form of a monetary payment in addition to any other award (e.g., extra good time) given.

(c) The Warden of each institution is empowered to approve special awards not exceeding $150. Awards in excess of this amount may not be made unless approved by the Regional Director.

[49 FR 38915, Oct. 1, 1984. Redesignated and amended at 56 FR 23478, 23479, May 21, 1991]

§ 545.30 Funds due deceased inmates.

Funds due a deceased inmate for work performed and not yet paid shall be made to a legal representative of the inmate's estate or in accordance

with the laws of descent and distribution of the state of the inmate's domicile.

[49 FR 38915, Oct. 1, 1984. Redesignated and amended at 56 FR 23478, 23479, May 21, 1991]

§ 545.31 Training.

The Warden shall ensure that staff receive training on their roles in, and on the operation of, the work and performance pay program. The Warden shall also ensure that the inmate population is informed of the work and performance pay program, and of the hourly rates paid to inmate workers.

[49 FR 38915, Oct. 1, 1984. Redesignated at 56 FR 23479, May 21, 1991]

Subpart D [Reserved]

PART 547—FOOD SERVICE

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

Subparts A–B [Reserved]

Subpart C—Special Food or Meals

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 4001, 4042, 4081, 5015, 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

§ 547.20 Policy.

The Bureau of Prisons is responsible for procuring and preparing any food or food ingredients to be served to the institution's inmate population. Except as allowed for in paragraphs (a) through (c) of this section, the Bureau requires that special food or meals prepared for and/or served to any group(s) of inmates also be served to the institution's entire inmate population. Special food or meals, as identified in paragraphs (a) through (c) of this section, may be prepared and/or served to a specific group of inmates rather than to the entire inmate population of the institution.

(a) Food items sold in the institution's commissary.

(b) Religious dietary practices as authorized in accordance with 28 CFR 548.20.

(c) Medical diet foods.

[61 FR 16374, Apr. 12, 1996]

PART 548—RELIGIOUS PROGRAMS

Subpart A [Reserved]

Subpart B—Religious Beliefs and Practices of Committed Offenders

Sec.
548.10 Purpose and scope.
548.11 Definition.
548.12 Chaplains.
548.13 Schedules and facilities.
548.14 Community involvement (volunteers, contractors).
548.15 Equity.
548.16 Inmate religious property.
548.17 Work assignments.
548.18 Observance of religious holy days.
548.19 Pastoral visits.
548.20 Dietary practices.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 42 U.S.C. 1996; 28 CFR 0.95–0.99.

SOURCE: 44 FR 38251, June 29, 1979, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Religious Beliefs and Practices of Committed Offenders

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 4001, 4042, 4081, 4082, 5006–5024, 5039; 28 U.S.C. 509, 510; 42 U.S.C. 1996; 28 CFR 0.95–0.99.

SOURCE: 60 FR 46486, Sept. 6, 1995, unless otherwise noted.

§ 548.10 Purpose and scope.

(a) The Bureau of Prisons provides inmates of all faith groups with reasonable and equitable opportunities to pursue religious beliefs and practices, within the constraints of budgetary limitations and consistent with the security and orderly running of the institution and the Bureau of Prisons.

(b) When considered necessary for the security or good order of the institution, the Warden may limit attendance at or discontinue a religious activity.

Opportunities for religious activities are open to the entire inmate population, without regard to race, color, nationality, or ordinarily, creed. The Warden, after consulting with the institution chaplain, may limit participation in a particular religious activity or practice to the members of that religious group. Ordinarily, when the nature of the activity or practice (e.g., religious fasts, wearing of headwear, work proscription, ceremonial meals) indicates a need for such a limitation, only those inmates whose files reflect the pertinent religious preference will be included.

(c) The Bureau of Prisons does not require an inmate to profess a religious belief. An inmate may designate any or no religious preference at his/her initial team screening. By notifying the chaplain in writing, an inmate may request to change this designation at any time, and the change will be effected in a timely fashion.

§ 548.11 Definition.

For purposes of this subpart, the term ''religious activity'' includes religious diets, services, ceremonies, and meetings.

§ 548.12 Chaplains.

Institution chaplains are responsible for managing religious activities within the institution. Institution chaplains are available upon request to provide pastoral care and counseling to inmates through group programs and individual services. Pastoral care and counseling from representatives in the community are available in accordance with the provisions of §§ 548.14 and 548.19. The chaplain may ask the requesting inmate to provide information regarding specific requested religious activities for the purpose of making an informed decision regarding the request.

[62 FR 44836, Aug. 22, 1997]

§ 548.13 Schedules and facilities.

(a) Under the general supervision of the Warden, chaplains shall schedule and direct the institution's religious activities.

(b) The Warden may relieve an inmate from an institution program or assignment if a religious activity is also scheduled at that time.

(c) Institutions shall have space designated for the conduct of religious activities.

§ 548.14 Community involvement (volunteers, contractors).

(a) The institution's chaplain may contract with representatives of faith groups in the community to provide specific religious services which the chaplain cannot personally deliver due to, ordinarily, religious prescriptions or ecclesiastical constraints to which the chaplain adheres.

(b) The institution's chaplain may secure the services of volunteers to assist inmates in observing their religious beliefs.

(c) The Warden or the Warden's designee (ordinarily the chaplain) may require a recognized representative of the faith group to verify a volunteer's or contractor's religious credentials prior to approving his or her entry into the institution.

§ 548.15 Equity.

No one may disparage the religious beliefs of an inmate, nor coerce or harass an inmate to change religious affiliation. Attendance at all religious activities is voluntary and, unless otherwise specifically determined by the Warden, open to all.

§ 548.16 Inmate religious property.

(a) Inmate religious property includes but is not limited to rosaries and prayer beads, oils, prayer rugs, phylacteries, medicine pouches, and religious medallions. Such items, which become part of an inmate's personal property, are subject to normal considerations of safety and security. If necessary, their religious significance shall be verified by the chaplain prior to the Warden's approval.

(b) An inmate ordinarily shall be allowed to wear or use personal religious items during religious services, ceremonies, and meetings in the chapel, unless the Warden determines that the wearing or use of such items would threaten institution security, safety, or good order. Upon request of the inmate, the Warden may allow the wearing or use of certain religious items

throughout the institution, consistent with considerations of security, safety, or good order. The Warden may request the chaplain to obtain direction from representatives of the inmate's faith group or other appropriate sources concerning the religious significance of the items.

(c) An inmate who wishes to have religious books, magazines or periodicals must comply with the general rules of the institution regarding ordering, purchasing, retaining, and accumulating personal property. Religious literature is permitted in accordance with the procedures governing incoming publications. Distribution to inmates of religious literature purchased by or donated to the Bureau of Prisons is contingent upon the chaplain's granting his or her approval.

[60 FR 46486, Sept. 6, 1995, as amended at 62 FR 44836, Aug. 22, 1997]

§ 548.17 Work assignments.

When the religious tenets of an inmate's faith are violated or jeopardized by a particular work assignment, a different work assignment ordinarily shall be made after it is requested in writing by the inmate, and the specific religious tenets have been verified by the chaplain. Maintaining security, safety, and good order in the institution are grounds for denial of such request for a different work assignment.

§ 548.18 Observance of religious holy days.

Consistent with maintaining security, safety, and good order in the institution, the Warden shall endeavor to facilitate the observance of important religious holy days which involve special fasts, dietary regulations, worship, or work proscription. The inmate must submit a written request to the chaplain for time off from work to observe a religious holy day. The Warden may request the chaplain to consult with community representatives of the inmate's faith group and/or other appropriate sources to verify the religious significance of the requested observance. The chaplain will work with requesting inmates to accommodate a proper observance of the holy day. The Warden will ordinarily allow an inmate to take earned vacation days, or to make up for missed work, or to change work assignments in order to facilitate the observance of the religious holy day.

§ 548.19 Pastoral visits.

If requested by an inmate, the chaplain shall facilitate arrangements for pastoral visits by a clergyperson or representative of the inmate's faith.

(a) The chaplain may request an NCIC check and documentation of such clergyperson's or faith group representative's credentials.

(b) Pastoral visits may not be counted as social visits. They will ordinarily take place in the visiting room during regular visiting hours.

§ 548.20 Dietary practices.

(a) The Bureau provides inmates requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice within the constraints of budget limitations and the security and orderly running of the institution and the Bureau through a religious diet menu. The inmate will provide a written statement articulating the religious motivation for participation in the religious diet program.

(b) An inmate who has been approved for a religious diet menu must notify the chaplain in writing if the inmate wishes to withdraw from the religious diet. Approval for an inmate's religious diet may be withdrawn by the chaplain if the inmate is documented as being in violation of the terms of the religious diet program to which the inmate has agreed in writing. In order to preserve the integrity and orderly operation of the religious diet program and to prevent fraud, inmates who withdraw (or are removed) may not be immediately reestablished back into the program. The process of reapproving a religious diet for an inmate who voluntarily withdraws or who is removed ordinarily may extend up to thirty days. Repeated withdrawals (voluntary or otherwise), however, may result in inmates being subjected to a waiting period of up to one year.

(c) The chaplain may arrange for inmate religious groups to have one appropriate ceremonial or commemorative meal each year for their members

as identified by the religious preference reflected in the inmate's file. An inmate may attend one religious ceremonial meal in a calendar year.

[60 FR 46486, Sept. 6, 1995, as amended at 62 FR 44836, Aug. 22, 1997; 68 FR 74860, Dec. 29, 2003]

PART 549—MEDICAL SERVICES

Subpart A—Infectious Disease Management

Sec.
549.10 Purpose and scope.
549.11 Program responsibility.
549.12 Testing.
549.13 Programming, duty, and housing restrictions.
549.14 Confidentiality of information.
549.15 Infectious disease training and preventive measures.

Subpart B—Over-The-Counter (OTC) Medications

549.30 Purpose and scope.
549.31 Inmates without funds.

Subpart C—Psychiatric Evaluation and Treatment

549.40 Purpose and scope.
549.41 Hospitalization in a suitable facility.
549.42 Use of psychiatric medications.
549.43 Transfer for psychiatric or psychological examination.
549.44 Voluntary hospitalization in a suitable facility for psychiatric care or treatment and voluntary administration of psychiatric medication.
549.45 Involuntary hospitalization in a suitable facility for psychiatric care or treatment.
549.46 Procedures for involuntary administration of psychiatric medication.

Subpart D—Plastic Surgery

549.50 Purpose and scope.
549.51 Approval procedures.
549.52 Informed consent.

Subpart E—Hunger Strikes, Inmate

549.60 Purpose and scope.
549.61 Definition.
549.62 Initial referral.
549.63 Initial medical evaluation and management.
549.64 Food/liquid intake/output.
549.65 Refusal to accept treatment.
549.66 Release from treatment.

Subpart F—Fees for Health Care Services

549.70 Purpose and scope.
549.71 Inmates affected.
549.72 Services provided without fees.
549.73 Appealing the fee.
549.74 Inmates without funds.

Subpart G—Authority To Conduct Autopsies

549.80 Authority to conduct autopsies.

Subpart H—Civil Commitment of a Sexually Dangerous Person

549.90 Purpose and application.
549.91 Definition of ''sexually dangerous person.''
549.92 Definition of ''sexually violent conduct.''
549.93 Definition of ''child molestation.''
549.94 Definition of ''sexually dangerous to others.''
549.95 Determining ''serious difficulty in refraining from sexually violent conduct or child molestation if released.''

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 876b; 18 U.S.C. 3621, 3622, 3524, 4001, 4005, 4042, 4045, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), Chapter 313, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Subpart A—Infectious Disease Management

SOURCE: 70 FR 29193, May 20, 2005, unless otherwise noted.

§ 549.10 Purpose and scope.

The Bureau will manage infectious diseases in the confined environment of a correctional setting through a comprehensive approach which includes testing, appropriate treatment, prevention, education, and infection control measures.

§ 549.11 Program responsibility.

Each institution's Health Services Administrator (HSA) and Clinical Director (CD) are responsible for the operation of the institution's infectious disease program in accordance with applicable laws and regulations.

§ 549.12 Testing.

(a) *Human Immunodeficiency Virus (HIV)*—(1) *Clinically indicated.* The Bureau tests inmates who have sentences

of six months or more if health services staff determine, taking into consideration the risk as defined by the Centers for Disease Control guidelines, that the inmate is at risk for HIV infection. If the inmate refuses testing, staff may initiate an incident report for refusing to obey an order.

(2) *Exposure incidents.* The Bureau tests an inmate, regardless of the length of sentence or pretrial status, when there is a well-founded reason to believe that the inmate may have transmitted the HIV infection, whether intentionally or unintentionally, to Bureau employees or other non-inmates who are lawfully present in a Bureau institution. Exposure incident testing does not require the inmate's consent.

(3) *Surveillance Testing.* The Bureau conducts HIV testing for surveillance purposes as needed. If the inmate refuses testing, staff may initiate an incident report for refusing to obey an order.

(4) *Inmate request.* An inmate may request to be tested. The Bureau limits such testing to no more than one per 12-month period unless the Bureau determines that additional testing is warranted.

(5) *Counseling.* Inmates being tested for HIV will receive pre- and post-test counseling, regardless of the test results.

(b) *Tuberculosis (TB).* (1) The Bureau screens each inmate for TB within two calendar days of initial incarceration.

(2) The Bureau conducts screening for each inmate annually as medically indicated.

(3) The Bureau will screen an inmate for TB when health services staff determine that the inmate may be at risk for infection.

(4) An inmate who refuses TB screening may be subject to an incident report for refusing to obey an order. If an inmate refuses skin testing, and there is no contraindication to tuberculin skin testing, then, institution medical staff will test the inmate involuntarily.

(5) The Bureau conducts TB contact investigations following any incident in which inmates or staff may have been exposed to tuberculosis. Inmates will be tested according to paragraph (b)(4) of this section.

(c) *Diagnostics.* The Bureau tests an inmate for an infectious or communicable disease when the test is necessary to verify transmission following exposure to bloodborne pathogens or to infectious body fluid. An inmate who refuses diagnostic testing is subject to an incident report for refusing to obey an order.

§ 549.13 Programming, duty, and housing restrictions.

(a) The CD will assess any inmate with an infectious disease for appropriateness for programming, duty, and housing. Inmates with infectious diseases that are transmitted through casual contact will be prohibited from work assignments in any area, until fully evaluated by a health care provider.

(b) Inmates may be limited in programming, duty, and housing when their infectious disease is transmitted through casual contact. The Warden, in consultation with the CD, may exclude inmates, on a case-by-case basis, from work assignments based upon the security and good order of the institution.

(c) If an inmate tests positive for an infectious disease, that test alone does not constitute sole grounds for disciplinary action. Disciplinary action may be considered when coupled with a secondary action that could lead to transmission of an infectious agent. Inmates testing positive for infectious disease are subject to the same disciplinary policy that applies to all inmates (*see* 28 CFR part 541, subpart B). Except as provided for in our disciplinary policy, no special or separate housing units may be established for HIV-positive inmates.

§ 549.14 Confidentiality of information.

Any disclosure of test results or medical information is made in accordance with:

(a) The Privacy Act of 1974, under which the Bureau publishes routine uses of such information in the Department of Justice Privacy Act System of Records Notice entitled ''Inmate Physical and Mental Health Record System, JUSTICE/BOP–007''; and

(b) The Correction Officers Health and Safety Act of 1998 (codified at 18 U.S.C. 4014), which provides that test results must be communicated to a person requesting the test, the person tested, and, if the results of the test indicate the presence of HIV, to correctional facility personnel consistent with Bureau policy.

§ 549.15 Infectious disease training and preventive measures.

(a) The HSA will ensure that a qualified health care professional provides training, incorporating a question-and-answer session, about infectious diseases to all newly committed inmates, during Admission and Orientation.

(b) Inmates in work assignments which staff determine to present the potential for occupational exposure to blood or infectious body fluids will receive annual training on prevention of work-related exposures and will be offered vaccination for Hepatitis B.

Subpart B—Over-The-Counter (OTC) Medications

SOURCE: 68 FR 47849, Aug. 12, 2003, unless otherwise noted.

§ 549.30 Purpose and scope.

This subpart establishes procedures governing inmate access to Over-The-Counter (OTC) medications for all inmates except those in inpatient status at Federal Medical Centers. Inmates may buy OTC medications which are available at the commissary. Inmates may also obtain OTC medications at sick call if the inmate does not already have the OTC medication and:

(a) Health services staff determine that the inmate has an immediate medical need which must be addressed before his or her regularly scheduled commissary visit; or

(b) The inmate is without funds.

§ 549.31 Inmates without funds.

(a) The Warden must establish procedures to provide up to two OTC medications per week for an inmate without funds. An inmate without funds is an inmate who has not had a trust fund account balance of $6.00 for the past 30 days.

(b) An inmate without funds may obtain additional OTC medications at sick call if health services staff determine that he/she has an immediate medical need which must be addressed before the inmate may again apply for OTC medications under this section.

(c) To prevent abuses of this section (*e.g.*, inmate shows a pattern of depleting his or her commissary funds before requesting OTC medications), the Warden may impose restrictions on the provisions of this section.

[68 FR 47849, Aug. 12, 2003, as amended at 69 FR 53805, Sept. 3, 2004]

Subpart C—Psychiatric Evaluation and Treatment

SOURCE: 76 FR 40231, July 8, 2011, unless otherwise noted.

§ 549.40 Purpose and scope.

(a) This subpart describes procedures for voluntary and involuntary psychiatric evaluation, hospitalization, care, and treatment, in a suitable facility, for persons in Bureau of Prisons (Bureau) custody. These procedures are authorized by 18 U.S.C. Chapter 313 and 18 U.S.C. 4042.

(b) This subpart applies to inmates in Bureau custody, as defined in 28 CFR part 500.

§ 549.41 Hospitalization in a suitable facility.

As used in 18 U.S.C. Chapter 313 and this subpart, ''hospitalization in a suitable facility'' includes the Bureau's designation of inmates to medical referral centers or correctional institutions that provide the required care or treatment.

§ 549.42 Use of psychiatric medications.

Psychiatric medications will be used only for treatment of diagnosable mental illnesses and disorders, and their symptoms, for which such medication is accepted treatment. Psychiatric medication will be administered only after following the applicable procedures in this subpart.

§ 549.43 Transfer for psychiatric or psychological examination.

The Bureau may transfer an inmate to a suitable facility for psychiatric or psychological examination to determine whether hospitalization in a suitable facility for psychiatric care or treatment is needed.

§ 549.44 Voluntary hospitalization in a suitable facility for psychiatric care or treatment, and voluntary administration of psychiatric medication.

(a) *Hospitalization*. An inmate may be hospitalized in a suitable facility for psychiatric care or treatment after providing informed and voluntary consent when, in the professional medical judgment of qualified health services staff, such care or treatment is required and prescribed.

(b) *Psychiatric medication*. An inmate may also provide informed and voluntary consent to the administration of psychiatric medication that complies with the requirements of § 549.42 of this subpart.

(c) *Voluntary consent*. An inmate's ability to provide informed and voluntary consent for both hospitalization in a suitable facility for psychiatric care or treatment, and administration of psychiatric medications, will be assessed by qualified health services staff and documented in the inmate's medical record. Additionally, the inmate must sign a consent form to accept hospitalization in a suitable facility for psychiatric care or treatment and the administration of psychiatric medications. These forms will be maintained in the inmate's medical record.

§ 549.45 Involuntary hospitalization in a suitable facility for psychiatric care or treatment.

(a) *Hospitalization of inmates pursuant to 18 U.S.C. Chapter 313*. A court determination is necessary for involuntary hospitalization or commitment of inmates pursuant to 18 U.S.C. Chapter 313, who are in need of psychiatric care or treatment, but are unwilling or unable to voluntarily consent.

(b) *Hospitalization of inmates not subject to hospitalization pursuant to 18 U.S.C. chapter 313*. Pursuant to 18 U.S.C. 4042, the Bureau is authorized to provide for the safekeeping, care, and subsistence, of all persons charged with offenses against the United States, or held as witnesses or otherwise. Accordingly, if an examiner determines pursuant to § 549.43 of this subpart that an inmate not subject to hospitalization pursuant to 18 U.S.C. chapter 313 should be hospitalized for psychiatric care or treatment, and the inmate is unwilling or unable to consent, the Bureau will provide the inmate with an administrative hearing to determine whether hospitalization for psychiatric care or treatment is warranted. The hearing will provide the following procedural safeguards:

(1) The inmate will not be involuntarily administered psychiatric medication before the hearing except in the case of psychiatric emergencies, as defined in § 549.46(b)(1).

(2) The inmate must be provided 24-hours advance written notice of the date, time, place, and purpose, of the hearing, including an explanation of the reasons for the proposal to hospitalize the inmate for psychiatric care or treatment.

(3) The inmate must be informed of the right to appear at the hearing, to present evidence, to have a staff representative, to request witnesses, and to request that witnesses be questioned by the staff representative or by the person conducting the hearing. If the inmate does not request a staff representative, or requests a staff representative with insufficient experience or education, or one who is not reasonably available, the institution mental health division administrator must appoint a qualified staff representative.

(4) The hearing is to be conducted by a psychiatrist other than the attending psychiatrist, and who is not currently involved in the diagnosis or treatment of the inmate.

(5) Witnesses should be called if they are reasonably available and have information relevant to the inmate's mental condition or need for hospitalization. Witnesses who will provide only repetitive information need not be called.

(6) A treating/evaluating psychiatrist/clinician, who has reviewed the case, must be present at the hearing and must present clinical data and

background information relative to the inmate's need for hospitalization. Members of the treating/evaluating team may also be called as witnesses at the hearing to provide relevant information.

(7) The psychiatrist conducting the hearing must determine whether involuntary hospitalization is necessary because the inmate is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(8) The psychiatrist must prepare a written report regarding the initial decision. The inmate must be promptly provided a copy of the initial decision report, and informed that he/she may appeal it to the institution's mental health division administrator. The inmate's appeal, which may be handwritten, must be submitted within 24 hours after receipt of the hearing officer's report. Upon request of the inmate, the staff representative will assist the inmate in preparing and submitting the appeal.

(9) If the inmate appeals the initial decision, hospitalization must not occur before the administrator issues a decision on the appeal. The inmate's appeal will ordinarily be reviewed by the administrator or his designee within 24 hours of its submission. The administrator will review the initial decision and ensure that the inmate received all necessary procedural protections, and that the justification for hospitalization is appropriate.

(c) *Psychiatric medication.* Following an inmate's involuntary hospitalization for psychiatric care or treatment as provided in this section, psychiatric medication may be involuntarily administered only after following the administrative procedures provided in § 549.46 of this subpart.

§ 549.46 Procedures for involuntary administration of psychiatric medication.

Except as provided in paragraph (b) of this section, the Bureau will follow the administrative procedures of paragraph (a) of this section before involuntarily administering psychiatric medication to any inmate.

(a) *Procedures.* When an inmate is unwilling or unable to provide voluntary written informed consent for recommended psychiatric medication, the inmate will be scheduled for an administrative hearing. The hearing will provide the following procedural safeguards:

(1) Unless an exception exists as provided in paragraph (b) of this section, the inmate will not be involuntarily administered psychiatric medication before the hearing.

(2) The inmate must be provided 24-hours advance written notice of the date, time, place, and purpose, of the hearing, including an explanation of the reasons for the psychiatric medication proposal.

(3) The inmate must be informed of the right to appear at the hearing, to present evidence, to have a staff representative, to request witnesses, and to request that witnesses be questioned by the staff representative or by the person conducting the hearing. If the inmate does not request a staff representative, or requests a staff representative with insufficient experience or education, or one who is not reasonably available, the institution mental health division administrator must appoint a qualified staff representative.

(4) The hearing is to be conducted by a psychiatrist other than the attending psychiatrist, and who is not currently involved in the diagnosis or treatment of the inmate.

(5) Witnesses should be called if they are reasonably available and have information relevant to the inmate's mental condition or need for psychiatric medication. Witnesses who will provide only repetitive information need not be called.

(6) A treating/evaluating psychiatrist/clinician, who has reviewed the case, must be present at the hearing and must present clinical data and background information relative to the inmate's need for psychiatric medication. Members of the treating/evaluating team may also be called as witnesses at the hearing to provide relevant information.

(7) The psychiatrist conducting the hearing must determine whether involuntary administration of psychiatric

medication is necessary because, as a result of the mental illness or disorder, the inmate is dangerous to self or others, poses a serious threat of damage to property affecting the security or orderly running of the institution, or is gravely disabled (manifested by extreme deterioration in personal functioning).

(8) The psychiatrist must prepare a written report regarding the initial decision. The inmate must be promptly provided a copy of the initial decision report, and informed that he/she may appeal it to the institution's mental health division administrator. The inmate's appeal, which may be handwritten, must be submitted within 24 hours after receipt of the hearing officer's report. Upon request of the inmate, the staff representative will assist the inmate in preparing and submitting the appeal.

(9) If the inmate appeals the initial decision, psychiatric medication must not be administered before the administrator issues a decision on the appeal, unless an exception exists as provided in paragraph (b) of this section. The inmate's appeal will ordinarily be reviewed by the administrator or his designee within 24 hours of its submission. The administrator will review the initial decision and ensure that the inmate received all necessary procedural protections, and that the justification for administering psychiatric medication is appropriate.

(10) If an inmate was afforded an administrative hearing which resulted in the involuntary administration of psychiatric medication, and the inmate subsequently consented to the administration of such medication, and then later revokes his consent, a follow-up hearing will be held before resuming the involuntary administration of psychiatric medication. All such follow-up hearings will fully comply with the procedures outlined in paragraphs (a)(1) through (10) of this section.

(b) *Exceptions.* The Bureau may involuntarily administer psychiatric medication to inmates in the following circumstances without following the procedures outlined in paragraph (a) of this section:

(1) *Psychiatric emergencies.*

(i) During a psychiatric emergency, psychiatric medication may be administered only when the medication constitutes an appropriate treatment for the mental illness or disorder and its symptoms, and alternatives (*e.g.*, seclusion or physical restraint) are not available or indicated, or would not be effective. If psychiatric medication is still recommended after the psychiatric emergency, and the emergency criteria no longer exist, it may only be administered after following the procedures in §§ 549.44 or 549.46 of this subpart.

(ii) For purposes of this subpart, a psychiatric emergency exists when a person suffering from a mental illness or disorder creates an immediate threat of:

(A) Bodily harm to self or others;

(B) Serious destruction of property affecting the security or orderly running of the institution; or

(C) Extreme deterioration in personal functioning secondary to the mental illness or disorder.

(2) *Court orders for the purpose of restoring competency to stand trial.* Absent a psychiatric emergency as defined above, § 549.46(a) of this subpart does not apply to the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial. Only a Federal court of competent jurisdiction may order the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial.

Subpart D—Plastic Surgery

SOURCE: 61 FR 13322, Mar. 26, 1996, unless otherwise noted.

§ 549.50 Purpose and scope.

The Bureau of Prisons does not ordinarily perform plastic surgery on inmates to correct preexisting disfigurements (including tattoos) on any part of the body. In circumstances where plastic surgery is a component of a presently medically necessary standard of treatment (for example, part of the treatment for facial lacerations or for mastectomies due to cancer) or it is necessary for the good order and security of the institution,

the necessary surgery may be performed.

§ 549.51 Approval procedures.

The Clinical Director shall consider individually any request from an inmate or a BOP medical consultant.

(a) In circumstances where plastic surgery is a component of the presently medically necessary standard of treatment, the Clinical Director shall forward the surgery request to the Office of Medical Designations and Transportation for approval.

(b) If the Clinical Director recommends plastic surgery for the good order and security of the institution, the request for plastic surgery authorization will be forwarded to the Warden for initial approval. The Warden will forward the request through the Regional Director to the Medical Director. The Medical Director shall have the final authority to approve or deny this type of plastic surgery request.

(c) If the Clinical Director is unable to determine whether the plastic surgery qualifies as a component of presently medically necessary standard of treatment, the Clinical Director may forward the request to the Medical Director for a final determination in accordance with the provisions of paragraph (b) of this section.

§ 549.52 Informed consent.

Approved plastic surgery procedures may not be performed without the informed consent of the inmate involved.

Subpart E—Hunger Strikes, Inmate

SOURCE: 45 FR 23365, Apr. 4, 1980, unless otherwise noted.

§ 549.60 Purpose and scope.

The Bureau of Prisons provides guidelines for the medical and administrative management of inmates who engage in hunger strikes. It is the responsibility of the Bureau of Prisons to monitor the health and welfare of individual inmates, and to ensure that procedures are pursued to preserve life.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§ 549.61 Definition.

As defined in this rule, an inmate is on a *hunger strike:*

(a) When he or she communicates that fact to staff and is observed by staff to be refraining from eating for a period of time, ordinarily in excess of 72 hours; or

(b) When staff observe the inmate to be refraining from eating for a period in excess of 72 hours. When staff consider it prudent to do so, a referral for medical evaluation may be made without waiting 72 hours.

§ 549.62 Initial referral.

(a) Staff shall refer an inmate who is observed to be on a hunger strike to medical or mental health staff for evaluation and, when appropriate, for treatment.

(b) Medical staff ordinarily shall place the inmate in a medically appropriate locked room for close monitoring.

[59 FR 31883, June 20, 1994]

§ 549.63 Initial medical evaluation and management.

(a) Medical staff shall ordinarily perform the following procedures upon initial referral of an inmate on a hunger strike:

(1) Measure and record height and weight;

(2) Take and record vital signs;

(3) Urinalysis;

(4) Psychological and/or psychiatric evaluation;

(5) General medical evaluation;

(6) Radiographs as clinically indicated;

(7) Laboratory studies as clinically indicated.

(b) Medical staff shall take and record weight and vital signs at least once every 24 hours while the inmate is on a hunger strike. Other procedures identified in paragraph (a) of this section shall be repeated as medically indicated.

(c) When valid medical reasons exist, the physician may modify, discontinue, or expand any of the medical procedures described in paragraphs (a) and (b) of this section.

(d) When medical staff consider it medically mandatory, an inmate on a

hunger strike will be transferred to a Medical Referral Center or to another Bureau institution considered medically appropriate, or to a community hospital.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§ 549.64 Food/liquid intake/output.

(a) Staff shall prepare and deliver to the inmate's room three meals per day or as otherwise authorized by the physician.

(b) Staff shall provide the inmate an adequate supply of drinking water. Other beverages shall also be offered.

(c) Staff shall remove any commissary food items and private food supplies of the inmate while the inmate is on a hunger strike. An inmate may not make commissary food purchases while under hunger strike management.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§ 549.65 Refusal to accept treatment.

(a) When, as a result of inadequate intake or abnormal output, a physician determines that the inmate's life or health will be threatened if treatment is not initiated immediately, the physician shall give consideration to forced medical treatment of the inmate.

(b) Prior to medical treatment being administered against the inmate's will, staff shall make reasonable efforts to convince the inmate to voluntarily accept treatment. Medical risks faced by the inmate if treatment is not accepted shall also be explained to the inmate. Staff shall document their treatment efforts in the medical record of the inmate.

(c) When, after reasonable efforts, or in an emergency preventing such efforts, a medical necessity for immediate treatment of a life or health threatening situation exists, the physician may order that treatment be administered without the consent of the inmate. Staff shall document their treatment efforts in the medical record of the inmate.

(d) Staff shall continue clinical and laboratory monitoring as necessary until the inmate's life or permanent health is no longer threatened.

(e) Staff shall continue medical, psychiatric and/or psychological follow-up as long as necessary.

[45 FR 23365, Apr. 4, 1980, as amended at 59 FR 31883, June 20, 1994]

§ 549.66 Release from treatment.

Only the physician may order that an inmate be released from hunger strike evaluation and treatment. This order shall be documented in the medical record of the inmate.

[59 FR 31883, June 20, 1994]

Subpart F—Fees for Health Care Services

SOURCE: 70 FR 43050, July 26, 2005, unless otherwise noted.

§ 549.70 Purpose and scope.

(a) The Bureau of Prisons (Bureau) may, under certain circumstances, charge you, an inmate under our care and custody, a fee for providing you with health care services.

(b) Generally, if you are an inmate as described in § 549.71, you must pay a fee for health care services of $2.00 per health care visit if you:

(1) Receive health care services in connection with a health care visit that you requested, (except for services described in § 549.72); or

(2) Are found responsible through the Disciplinary Hearing Process to have injured an inmate who, as a result of the injury, requires a health care visit.

§ 549.71 Inmates affected.

This subpart applies to:

(a) Any individual incarcerated in an institution under the Bureau's jurisdiction; or

(b) Any other individual, as designated by the Director, who has been charged with or convicted of an offense against the United States.

§ 549.72 Services provided without fees.

We will not charge a fee for:

(a) Health care services based on staff referrals;

(b) Staff-approved follow-up treatment for a chronic condition;

(c) Preventive health care services;
(d) Emergency services;
(e) Prenatal care;
(f) Diagnosis or treatment of chronic infectious diseases;
(g) Mental health care; or
(h) Substance abuse treatment.

§ 549.73 Appealing the fee.

You may seek review of issues related to health service fees through the Bureau's Administrative Remedy Program (see 28 CFR part 542).

§ 549.74 Inmates without funds.

You will not be charged a health care service fee if you are considered indigent and unable to pay the health care service fee. The Warden may establish procedures to prevent abuse of this provision.

Subpart G—Authority To Conduct Autopsies

§ 549.80 Authority to conduct autopsies.

(a) The Warden may order an autopsy and related scientific or medical tests to be performed on the body of a deceased inmate of the facility in the event of homicide, suicide, fatal illness or accident, or unexplained death. The autopsy or tests may be ordered in one of these situations only when the Warden determines that the autopsy or test is necessary to detect a crime, maintain discipline, protect the health or safety of other inmates, remedy official misconduct, or defend the United States or its employees from civil liability arising from the administration of the facility.

(1) The authority of the Warden under this section may not be delegated below the level of Acting Warden.

(2) Where the Warden has the authority to order an autopsy under this provision, no non-Bureau of Prisons authorization (e.g., from either the coroner or from the inmate's next-of-kin) is required. A decision on whether to order an autopsy is ordinarily made after consultation with the attending physician, and a determination by the Warden that the autopsy is in accordance with the statutory provision. Once it is determined that an autopsy is appropriate, the Warden shall prepare a written statement authorizing this procedure. The written statement is to include the basis for approval.

(b) In any situation other than as described in paragraph (a) of this section, the Warden may order an autopsy or post-mortem operation, including removal of tissue for transplanting, to be performed on the body of a deceased inmate of the facility with the written consent of a person (e.g., coroner, or next-of-kin, or the decedent's consent in the case of tissue removed for transplanting) authorized to permit the autopsy or post-mortem operation under the law of the State in which the facility is located.

(1) The authority of the Warden under this section may not be delegated below the level of Acting Warden.

(2) When the conducting of an autopsy requires permission of the family or next-of-kin, the following message is to be included in the telegram notifying the family or next-of-kin of the death: ''Permission is requested to perform a complete autopsy''. Also inform the family or next-of-kin that they may telegraph the institution *collect* with their response. Where permission is not received from the person (e.g., coroner or next-of-kin) authorized to permit the autopsy or post-mortem operation, an autopsy or post-mortem operation may not be performed under the conditions of this paragraph (b).

(c) In addition to the provisions of paragraphs (a) and (b) of this section, each institution also is expected to abide by the following procedures.

(1) Staff shall ensure that the state laws regarding the reporting of deaths are followed.

(2) Time is a critical factor in arranging for an autopsy, as this ordinarily must be performed within 48 hours. While a decision on an autopsy is pending, no action should be taken that will affect the validity of the autopsy results. Therefore, while the body may be released to a funeral home, this should be done only with the written understanding from the funeral home that no preparation for burial, including embalming, should be performed until a final decision is made on the need for an autopsy.

(3) Medical staff shall arrange for the approved autopsy to be performed.

(4) To the extent consistent with the needs of the autopsy or of specific scientific or medical tests, provisions of state and local laws protecting religious beliefs with respect to such autopsies are to be observed.

[52 FR 48068, Dec. 17, 1987]

Subpart H—Civil Commitment of a Sexually Dangerous Person

SOURCE: 73 FR 70279, Nov. 20, 2008, unless otherwise noted.

§ 549.90 Purpose and application.

(a) This subpart provides definitions and standards for review of persons for certification to federal district courts as sexually dangerous persons, as authorized by title 18 U.S.C. Chapter 313, by Bureau of Prisons staff or contractors (collectively referred to in this Part as ''the Bureau'').

(b) This subpart applies to persons in Bureau custody, including those:

(1) Under a term of imprisonment;

(2) For whom all criminal charges have been dismissed solely for reasons relating to the person's mental condition; or

(3) In Bureau custody pursuant to 18 U.S.C. 4241(d).

(c) The Bureau may certify that a person in Bureau custody is a sexually dangerous person when review under this subpart provides reasonable cause to believe that the person is a sexually dangerous person. In determining whether a person is a sexually dangerous person and should be so certified, the Bureau will consider any available information in its possession and may transfer the person to a suitable facility for psychological examination in order to obtain information for this purpose.

§ 549.91 Definition of "sexually dangerous person."

For purposes of this subpart, a ''sexually dangerous person'' is a person:

(a) Who has engaged or attempted to engage in:

(1) Sexually violent conduct; or

(2) Child molestation; and

(b) Has been assessed as sexually dangerous to others by a Bureau mental health professional.

§ 549.92 Definition of "sexually violent conduct."

For purposes of this subpart, ''sexually violent conduct'' includes any unlawful conduct of a sexual nature with another person (''the victim'') that involves:

(a) The use or threatened use of force against the victim;

(b) Threatening or placing the victim in fear that the victim, or any other person, will be harmed;

(c) Rendering the victim unconscious and thereby engaging in conduct of a sexual nature with the victim;

(d) Administering to the victim, by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance, and thereby substantially impairing the ability of the victim to appraise or control conduct; or

(e) Engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or physically or mentally incapable of declining participation in, or communicating unwillingness to engage in, that conduct.

§ 549.93 Definition of "child molestation."

For purposes of this subpart, ''child molestation'' includes any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.

§ 549.94 Definition of "sexually dangerous to others."

For purposes of this subpart, ''sexually dangerous to others'' means that a person suffers from a serious mental illness, abnormality, or disorder as a result of which he or she would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

§ 549.95 Determining "serious difficulty in refraining from sexually violent conduct or child molestation if released."

In determining whether a person will have ''serious difficulty in refraining

from sexually violent conduct or child molestation if released,'' Bureau mental health professionals may consider, but are not limited to, evidence:

(a) Of the person's repeated contact, or attempted contact, with one or more victims of sexually violent conduct or child molestation;

(b) Of the person's denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging or attempting to engage in sexually violent conduct or child molestation;

(c) Established through interviewing and testing of the person or through other risk assessment tools that are relied upon by mental health professionals;

(d) Established by forensic indicators of inability to control conduct, such as:

(1) Offending while under supervision;

(2) Engaging in offense(s) when likely to get caught;

(3) Statement(s) of intent to re-offend; or

(4) Admission of inability to control behavior; or

(e) Indicating successful completion of, or failure to successfully complete, a sex offender treatment program.

PART 550—DRUG PROGRAMS

Subpart A [Reserved]

Subpart B—Alcohol Testing

Sec.
550.10 Purpose and scope.

Subpart C [Reserved]

Subpart D—Urine Surveillance

550.30 Purpose and scope.
550.31 Procedures.

Subpart E—Drug Services (Urine Surveillance and Counseling for Sentenced Inmates in Contract CTCs)

550.40 Purpose and scope.
550.41 Urine surveillance.
550.42 Procedures for urine surveillance.
550.43 Drug counseling.
550.44 Procedures for arranging drug counseling.

Subpart F—Drug Abuse Treatment Program

550.50 Purpose and scope.
550.51 Drug abuse education course.
550.52 Non-residential drug abuse treatment services.
550.53 Residential Drug Abuse Treatment Program (RDAP).
550.54 Incentives for RDAP participation.
550.55 Eligibility for early release.
550.56 Community Transitional Drug Abuse Treatment Program (TDAT).
550.57 Inmate appeals.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3521–3528, 3621, 3622, 3624, 4001, 4042, 4046, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 21 U.S.C. 848; 28 U.S.C. 509, 510; Title V, Pub. L. 91–452, 84 Stat. 933 (18 U.S.C. Chapter 223).

Subpart A [Reserved]

Subpart B—Alcohol Testing

§ 550.10 Purpose and scope.

The Bureau of Prisons maintains a surveillance program in order to deter and to detect the illegal introduction or use of alcohol in its institutions. In an effort to reduce the introduction or use of alcohol, the Warden shall establish procedures for monitoring and testing individual inmates or groups of inmates who are known or suspected to be users of alcohol, or who are considered high risks based on behavior observed or on information received by staff.

(a) Staff may prepare a disciplinary report on an inmate who shows a positive substantiated test result for alcohol.

(b) Staff may initiate disciplinary action against an inmate who refuses to submit to an alcohol test.

[45 FR 33940, May 20, 1980]

Subpart C [Reserved]

Subpart D—Urine Surveillance

SOURCE: 62 FR 45292, Aug. 26, 1997, unless otherwise noted.

§ 550.30 Purpose and scope.

The Warden shall establish programs of urine testing for drug use, to monitor specific groups or individual inmates who are considered as high risk for drug use, such as those involved in

community activities, those with a history of drug use, and those inmates specifically suspected of drug use. Testing shall be performed with frequency determined by the Warden on at least 50 percent of those inmates who are involved in community activities. In addition, staff shall randomly sample each institution's inmate population during each month to test for drug use.

§ 550.31 Procedures.

(a) Staff of the same sex as the inmate tested shall directly supervise the giving of the urine sample. If an inmate is unwilling to provide a urine sample within two hours of a request for it, staff ordinarily shall file an incident report. No waiting period or extra time need be allowed for an inmate who directly and specifically refuses to provide a urine sample. To eliminate the possibility of diluted or adulterated samples, staff shall keep the inmate under direct visual supervision during this two-hour period, or until a complete sample is furnished. To assist the inmate in giving the sample, staff shall offer the inmate eight ounces of water at the beginning of the two-hour time period. An inmate is presumed to be unwilling if the inmate fails to provide a urine sample within the allotted time period. An inmate may rebut this presumption during the disciplinary process.

(b) Institution staff shall determine whether a justifiable reason exists, (e.g., use of prescribed medication) for any positive urine test result. If the inmate's urine test shows a positive test result for the presence of drugs which cannot be justified, staff shall file an incident report.

Subpart E—Drug Services (Urine Surveillance and Counseling for Sentenced Inmates in Contract CTCs)

SOURCE: 48 FR 24624, June 1, 1983, unless otherwise noted.

§ 550.40 Purpose and scope.

The Bureau of Prisons requires that an inmate who is serving a sentence in a contract community treatment center (CTC) participate in a program of urine testing for drug use. An inmate who is serving a sentence in a contract CTC, and who has drug aftercare as a condition of release also shall receive drug counseling during the inmate's stay at the contract CTC.

§ 550.41 Urine surveillance.

A program of urine testing for drug use shall be established in contract CTCs.

(a) Urine surveillance shall be conducted on all inmates serving their sentence in a contract CTC:

(1) Who have drug aftercare as a condition of release;

(2) Who have a known history of drug abuse; or

(3) Who are suspected of using drugs.

Center staff shall collect a minimum of six samples per month from an inmate who meets one or more of the criteria listed in paragraphs (a) (1) through (3) of this section.

(b) The Center Director shall establish a schedule for random collection for all other sentenced inmates not identified in paragraph (a) of this section.

§ 550.42 Procedures for urine surveillance.

(a) Contractor authorized personnel of the same sex as the inmate must witness collection of the inmate's urine sample. Inmates may not be involved in the collection, recording, mailing, or processing of the test results.

(b) If an inmate fails to provide a urine sample within two hours of a request for it, center staff may file a disciplinary report. To eliminate the possibility of diluted or adulterated samples, center staff shall keep the inmate under direct supervision during this two-hour period.

(c) Center staff shall have each positive urine test validated to substantiate the positive result. Center staff shall file a disciplinary report if the inmate's urine test shows a positive result for the presence of drugs which the inmate cannot satisfactorily justify to center staff.

(d) The results of disciplinary hearings and a copy of positive urine testing results which the inmate cannot satisfactorily justify to center staff

shall be sent to the appropriate Regional U.S. Parole Commission Office, the Community Programs Manager (CPM), and the U.S. Probation Office.

§ 550.43 Drug counseling.

(a) Drug counseling shall be provided to sentenced inmates in contract community treatment centers who have drug aftercare as a condition of release.

(b) Counseling shall include a minimum of a 30-minute session each week, provided by qualified staff.

(c) Center staff shall document in the inmate's file the date and time of each counseling session. The counselor must prepare a monthly summary of each inmate's progress. This report shall be placed in the inmate's file.

§ 550.44 Procedures for arranging drug counseling.

The contract center staff shall hold a program planning conference with a sentenced inmate who has drug aftercare as a condition of release. At this meeting, held within one week of the inmate's arrival at the center, plans are made for the inmate to receive drug counseling. The meeting is attended by center staff, the inmate, and the Chief U.S. Probation Officer or designee.

Subpart F—Drug Abuse Treatment Program

SOURCE: 74 FR 1897, Jan. 14, 2009, unless otherwise noted.

§ 550.50 Purpose and scope.

The purpose of this subpart is to describe the Bureau's drug abuse treatment programs. All Bureau institutions have a drug abuse treatment specialist who, under the Drug Abuse Program Coordinator's supervision, provides drug abuse education and nonresidential drug abuse treatment services to the inmate population. Institutions with residential drug abuse treatment programs (RDAP) should have additional drug abuse treatment specialists to provide treatment services in the RDAP unit.

§ 550.51 Drug abuse education course.

(a) *Purpose of the drug abuse education course.* All institutions provide a drug abuse education course to:

(1) Inform inmates of the consequences of drug/alcohol abuse and addiction; and

(2) Motivate inmates needing drug abuse treatment to apply for further drug abuse treatment, both while incarcerated and after release.

(b) *Course placement.* (1) Inmates will get primary consideration for course placement if they were sentenced or returned to custody as a violator after September 30, 1991, when unit and/or drug abuse treatment staff determine, through interviews and file review that:

(i) There is evidence that alcohol or other drug use contributed to the commission of the offense;

(ii) Alcohol or other drug use was a reason for violation either of supervised release (including parole) or Bureau community status;

(iii) There was a recommendation (or evaluation) for drug programming during incarceration by the sentencing judge; or

(iv) There is evidence of a history of alcohol or other drug use.

(2) Inmates may also be considered for course placement if they request to participate in the drug abuse education program but do not meet the criteria of paragraph (b)(1) of this section.

(3) Inmates may not be considered for course placement if they:

(i) Do not have enough time remaining to serve to complete the course; or

(ii) Volunteer for, enter or otherwise complete a RDAP.

(c) *Consent.* Inmates will only be admitted to the drug abuse education course if they agree to comply with all Bureau requirements for the program.

(d) *Completion.* To complete the drug abuse education course, inmates must attend and participate during course sessions and pass a final course exam. Inmates will ordinarily have at least three chances to pass the final course exam before they lose privileges or the effects of non-participation occur (see paragraph (e) of this section).

(e) *Effects of non-participation.* (1) If inmates considered for placement under paragraph (b)(1) of this section

refuse participation, withdraw, are expelled, or otherwise fail to meet attendance and examination requirements, such inmates:

(i) Are not eligible for performance pay above maintenance pay level, or for bonus pay, or vacation pay; and

(ii) Are not eligible for a Federal Prison Industries work program assignment (unless the Warden makes an exception on the basis of work program labor needs).

(2) The Warden may make exceptions to the provisions of this section for good cause.

§ 550.52 Non-residential drug abuse treatment services.

All institutions must have non-residential drug abuse treatment services, provided through the institution's Psychology Services department. These services are available to inmates who voluntarily decide to participate.

§ 550.53 Residential Drug Abuse Treatment Program (RDAP).

(a) *RDAP*. To successfully complete the RDAP, inmates must complete each of the following components:

(1) *Unit-based component*. Inmates must complete a course of activities provided by drug abuse treatment specialists and the Drug Abuse Program Coordinator in a treatment unit set apart from the general prison population. This component must last at least six months.

(2) *Follow-up services*. If time allows between completion of the unit-based component of the RDAP and transfer to a community-based program, inmates must participate in the follow-up services to the unit-based component of the RDAP.

(3) *Transitional drug abuse treatment (TDAT) component*. Inmates who have completed the unit-based program and (when appropriate) the follow-up treatment and are transferred to community confinement must successfully complete community-based drug abuse treatment in a community-based program to have successfully completed RDAP. The Warden, on the basis of his or her discretion, may find an inmate ineligible for participation in a community-based program.

(b) *Admission criteria*. Inmates must meet all of the following criteria to be admitted into RDAP.

(1) Inmates must have a verifiable substance use disorder.

(2) Inmates must sign an agreement acknowledging program responsibility.

(3) When beginning the program, the inmate must be able to complete all three components described in paragraph (a) of this section.

(c) *Application to RDAP*. Inmates may apply for the RDAP by submitting requests to a staff member (ordinarily, a member of the unit team or the Drug Abuse Program Coordinator).

(d) *Referral to RDAP*. Inmates will be identified for referral and evaluation for RDAP by unit or drug treatment staff.

(e) *Placement in RDAP*. The Drug Abuse Program Coordinator decides whether to place inmates in RDAP based on the criteria set forth in paragraph (b) of this section.

(f) *Completing the unit-based component of RDAP*. To complete the unit-based component of RDAP, inmates must:

(1) Have satisfactory attendance and participation in all RDAP activities; and

(2) Pass each RDAP testing procedure. Ordinarily, we will allow inmates who fail any RDAP exam to retest one time.

(g) *Expulsion from RDAP*. (1) Inmates may be removed from the program by the Drug Abuse Program Coordinator because of disruptive behavior related to the program or unsatisfactory progress in treatment.

(2) Ordinarily, inmates must be given at least one formal warning before removal from RDAP. A formal warning is not necessary when the documented lack of compliance with program standards is of such magnitude that an inmate's continued presence would create an immediate and ongoing problem for staff and other inmates.

(3) Inmates will be removed from RDAP immediately if the Discipline Hearing Officer (DHO) finds that they have committed a prohibited act involving:

(i) Alcohol or drugs;

(ii) Violence or threats of violence;

(iii) Escape or attempted escape; or

(iv) Any 100-level series incident.

(4) We may return an inmate who withdraws or is removed from RDAP to his/her prior institution (if we had transferred the inmate specifically to participate in RDAP).

(h) *Effects of non-participation.* (1) If inmates refuse to participate in RDAP, withdraw, or are otherwise removed, they are not eligible for:

(i) A furlough (other than possibly an emergency furlough);

(ii) Performance pay above maintenance pay level, bonus pay, or vacation pay; and/or

(iii) A Federal Prison Industries work program assignment (unless the Warden makes an exception on the basis of work program labor needs).

(2) Refusal, withdrawal, and/or expulsion will be a factor to consider in determining length of community confinement.

(3) Where applicable, staff will notify the United States Parole Commission of inmates' needs for treatment and any failure to participate in the RDAP.

§ 550.54 Incentives for RDAP participation.

(a) An inmate may receive incentives for his or her satisfactory participation in the RDAP. Institutions may offer the basic incentives described in paragraph (a)(1) of this section. Bureau-authorized institutions may also offer enhanced incentives as described in paragraph (a)(2) of this section.

(1) *Basic incentives.* (i) Limited financial awards, based upon the inmate's achievement/completion of program phases.

(ii) Consideration for the maximum period of time in a community-based treatment program, if the inmate is otherwise eligible.

(iii) Local institution incentives such as preferred living quarters or special recognition privileges.

(iv) Early release, if eligible under § 550.55.

(2) *Enhanced incentives.* (i) Tangible achievement awards as permitted by the Warden and allowed by the regulations governing personal property (see 28 CFR part 553).

(ii) Photographs of treatment ceremonies may be sent to the inmate's family.

(iii) Formal consideration for a nearer release transfer for medium and low security inmates.

(b) An inmate must meet his/her financial program responsibility obligations (see 28 CFR part 545) and GED responsibilities (see 28 CFR part 544) before being able to receive an incentive for his/her RDAP participation.

(c) If an inmate withdraws from or is otherwise removed from RDAP, that inmate may lose incentives he/she previously achieved.

§ 550.55 Eligibility for early release.

(a) *Eligibility.* Inmates may be eligible for early release by a period not to exceed twelve months if they:

(1) Were sentenced to a term of imprisonment under either:

(i) 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense; or

(ii) D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those included within the definition of ''crime of violence'' in D.C. Code § 23–1331(4); and

(2) Successfully complete a RDAP, as described in § 550.53, during their current commitment.

(b) *Inmates not eligible for early release.* As an exercise of the Director's discretion, the following categories of inmates are not eligible for early release:

(1) Immigration and Customs Enforcement detainees;

(2) Pretrial inmates;

(3) Contractual boarders (for example, State or military inmates);

(4) Inmates who have a prior felony or misdemeanor conviction for:

(i) Homicide (including deaths caused by recklessness, but not including deaths caused by negligence or justifiable homicide);

(ii) Forcible rape;

(iii) Robbery;

(iv) Aggravated assault;

(v) Arson;

(vi) Kidnaping; or

(vii) An offense that by its nature or conduct involves sexual abuse offenses committed upon minors;

(5) Inmates who have a current felony conviction for:

(i) An offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another;

(ii) An offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device);

(iii) An offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or

(iv) An offense that, by its nature or conduct, involves sexual abuse offenses committed upon minors;

(6) Inmates who have been convicted of an attempt, conspiracy, or other offense which involved an underlying offense listed in paragraph (b)(4) and/or (b)(5) of this section; or

(7) Inmates who previously received an early release under 18 U.S.C. 3621(e).

(c) *Early release time-frame.* (1) Inmates so approved may receive early release up to twelve months prior to the expiration of the term of incarceration, except as provided in paragraphs (c)(2) and (3) of this section.

(2) Under the Director's discretion allowed by 18 U.S.C. 3621(e), we may limit the time-frame of early release based upon the length of sentence imposed by the Court.

(3) If inmates cannot fulfill their community-based treatment obligations by the presumptive release date, we may adjust provisional release dates by the least amount of time necessary to allow inmates to fulfill their treatment obligations.

§ 550.56 Community Transitional Drug Abuse Treatment Program (TDAT).

(a) For inmates to successfully complete all components of RDAP, they must participate in TDAT in the community. If inmates refuse or fail to complete TDAT, they fail the RDAP and are disqualified for any additional incentives.

(b) Inmates with a documented drug abuse problem who did not choose to volunteer for RDAP may be required to participate in TDAT as a condition of participation in a community-based program, with the approval of the Transitional Drug Abuse Program Coordinator.

(c) Inmates who successfully complete RDAP and who participate in transitional treatment programming at an institution must participate in such programming for at least one hour per month.

§ 550.57 Inmate appeals.

Inmates may seek formal review of complaints regarding the operation of the drug abuse treatment program by using administrative remedy procedures in 28 CFR part 542.

PART 551—MISCELLANEOUS

Subpart A—Grooming

Sec.
551.1 Policy.
551.2 Mustaches and beards.
551.3 Hairpieces.
551.4 Hair length.
551.5 Restrictions and exceptions.
551.6 Personal hygiene.
551.7 Bathing and clothing.

Subpart B—Marriages of Inmates

551.10 Purpose and scope.
551.11 Authority to approve a marriage.
551.12 Eligibility to marry.
551.13 Application to marry.
551.14 Special circumstances.
551.15 Furloughs.
551.16 Marriage ceremony in the institution.

Subpart C—Birth Control, Pregnancy, Child Placement, and Abortion

551.20 Purpose and scope.
551.21 Birth control.
551.22 Pregnancy.
551.23 Abortion.
551.24 Child placement.

Subpart D—Inmate Organizations

551.30 Purpose and scope.
551.31 Approval of an organization.
551.32 Staff supervision.
551.33 Dues.
551.34 Organization activities.
551.35 Withdrawal of approval of an organization.
551.36 Funding.

Subpart E—Inmate Contributions

551.50 Policy.

Subpart F—Volunteer Community Service Projects

551.60 Volunteer community service projects.

Subpart G—Administering of Polygraph Test

551.70 Purpose and scope.
551.71 Procedures.

Subpart H—Inmate Manuscripts

551.80 Definition.
551.81 Manuscript preparation.
551.82 Mailing inmate manuscripts.
551.83 Limitations on an inmate's accumulation of manuscript material.

Subpart I—Non-Discrimination Toward Inmates

551.90 Policy.

Subpart J—Pretrial Inmates

551.100 Purpose and scope.
551.101 Definitions.
551.102 Commitment prior to arraignment.
551.103 Procedure for admission.
551.104 Housing.
551.105 Custody.
551.106 Institutional employment.
551.107 Pretrial inmate reviews.
551.108 Performance pay.
551.109 Community activities.
551.110 Religious programs.
551.111 Marriage.
551.112 Education.
551.113 Counseling.
551.114 Medical, psychiatric and psychological.
551.115 Recreation.
551.116 Discipline.
551.117 Access to legal resources.
551.118 Property.
551.119 Release of funds and property of pretrial inmates.
551.120 Visiting.

Subparts K–L [Reserved]

Subpart M—Victim and/or Witness Notification

551.150 Purpose and scope.
551.151 Definitions.
551.152 Procedures.
551.153 Cancelling the notification request.

Subpart N—Smoking/No Smoking Areas

551.160 Purpose and scope.
551.161 Definitions.
551.162 Designated smoking areas.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 1512, 3621, 3622, 3624, 4001, 4005, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; Pub. L. 99–500 (sec. 209); Attorney General's May 1, 1995 Guidelines for Victim and Witness Assistance.

SOURCE: 44 FR 38252, June 29, 1979, unless otherwise noted.

Subpart A—Grooming

§551.1 Policy.

The Bureau of Prisons permits an inmate to select the hair style of personal choice, and expects personal cleanliness and dress in keeping with standards of good grooming and the security, good order, and discipline of the institution.

§551.2 Mustaches and beards.

An inmate may wear a mustache or beard or both. The Warden shall require an inmate with a beard to wear a beard covering when working in food service or where a beard could result in increased likelihood of work injury.

[46 FR 59509, Dec. 4, 1981]

§551.3 Hairpieces.

Inmates may not wear wigs or artificial hairpieces, unless medical authorization to do so is approved by the Warden.

[55 FR 40354, Oct. 2, 1990]

§551.4 Hair length.

(a) The Warden may not restrict hair length if the inmate keeps it neat and clean.

(b) The Warden shall require an inmate with long hair to wear a cap or hair net when working in food service or where long hair could result in increased likelihood of work injury.

(c) The Warden shall make available to an inmate hair care services which comply with applicable health and sanitation requirements.

[44 FR 38252, June 29, 1979, as amended at 46 FR 59509, Dec. 4, 1981]

§551.5 Restrictions and exceptions.

The Warden may impose restrictions or exceptions for documented medical reasons.

§ 551.6 Personal hygiene.

The Warden shall make available to an inmate those articles necessary for maintaining personal hygiene.

[46 FR 59509, Dec. 4, 1981]

§ 551.7 Bathing and clothing.

Each inmate must observe the standards concerning bathing and clothing that exist in the institution as required by standards of § 551.1.

[46 FR 59509, Dec. 4, 1981]

Subpart B—Marriages of Inmates

SOURCE: 49 FR 18385, Apr. 30, 1984, unless otherwise noted.

§ 551.10 Purpose and scope.

The Warden shall approve an inmate's request to marry except where a legal restriction to the marriage exists, or where the proposed marriage presents a threat to the security or good order of the institution, or to the protection of the public. The Warden may approve the use of institution facilities for an inmate's marriage ceremony. If a marriage ceremony poses a threat to the security or good order of the institution, the Warden may disapprove a marriage ceremony in the institution.

[49 FR 18385, Apr. 30, 1984, as amended at 63 FR 5218, Jan. 30, 1998]

§ 551.11 Authority to approve a marriage.

(a) The Warden may approve the marriage of a federal inmate confined in a federal institution. This authority may not be delegated below the level of Acting Warden.

(b) The appropriate Community Corrections Manager may approve the request to marry of a federal inmate who is not confined in a federal institution (for example, a federal inmate who is in a community corrections center, in home confinement, in state custody, or in a local detention facility).

[49 FR 18385, Apr. 30, 1984, as amended at 58 FR 58248, Oct. 29, 1993]

§ 551.12 Eligibility to marry.

An inmate's request to marry shall be approved provided:

(a) The inmate is legally eligible to marry;

(b) The inmate is mentally competent;

(c) The intended spouse has verified, ordinarily in writing, an intention to marry the inmate; and

(d) The marriage poses no threat to institution security or good order, or to the protection of the public.

§ 551.13 Application to marry.

(a) A federal inmate confined in a Bureau institution who wants to get married shall submit a request to marry to the inmate's unit team. The unit team shall evaluate the request based on the criteria identified in § 551.12. A written report of the unit team's findings, and its recommendation, shall be forwarded to the Warden for a final decision.

(b) The Warden shall notify the inmate in writing whether the inmate's request to marry is approved or disapproved. A copy of this notification shall be placed in the inmate's central file. When the Warden's decision is to disapprove the inmate's request, the notification to the inmate shall include a statement of reason(s) for that action. The Warden shall advise the inmate that the decision may be appealed through the Administrative Remedy Procedure.

(c) All expenses of the marriage (for example, a marriage license) shall be paid by the inmate, the inmate's intended spouse, the inmate's family, or other appropriate source approved by the Warden. The Warden may not permit appropriated funds to be used for an inmate marriage.

§ 551.14 Special circumstances.

(a) *Detainers and pending charges.* Staff review of a marriage request from an inmate who has a detainer(s) and/or a pending charge(s) shall include an assessment of the legal effects of the marriage on these actions. For example, an inmate could request to marry a potential witness in litigation pending against that inmate. Approving this marriage could affect the status of this litigation.

(b) *Pretrial inmates.* A pretrial inmate may request permission to marry in accordance with the provisions of this rule. Staff shall contact the court, U.S.

Attorney, and in the case of an alien, the Immigration and Naturalization Service, to advise of the marriage request of the pretrial inmate and to request their comments.

(c) *Federal inmates not in Federal institutions.* A federal inmate who is not confined in a federal institution who wants to get married shall submit a request to the appropriate Community Corrections Manager. Prior to making a decision on the inmate's request, the Community Corrections Manager shall advise the confining authority of the inmate's request and ask that information on the criteria identified in § 551.12 be furnished.

[49 FR 18385, Apr. 30, 1984, as amended at 58 FR 58248, Oct. 29, 1993]

§ 551.15 Furloughs.

An inmate whose request to marry is approved, and who also meets the Bureau's criteria for furlough (see part 570, subpart C), may be considered for a furlough for the purpose of getting married.

§ 551.16 Marriage ceremony in the institution.

(a) The Warden may approve the use of institution facilities for an inmate's marriage ceremony. If a marriage ceremony poses a threat to the security or good order of the institution, the Warden may disapprove a marriage ceremony in the institution. The Warden may not delegate the authority to approve or to disapprove a marriage ceremony in the institution below the level of Acting Warden.

(b) Expenses for a marriage ceremony in the institution shall be paid by the inmate, the inmate's intended spouse, the inmate's family, or other appropriate source approved by the Warden. The Warden may not permit appropriated funds to be used for the marriage ceremony, except for those inherent in providing the place and supervision for the event. Upon request of the inmate, Bureau of Prisons or community clergy, or a justice of the peace may be authorized to assist in a marriage ceremony at the institution.

(1) The marriage ceremony may be performed by Bureau of Prisons or community clergy, or by a justice of the peace.

(2) Because of ecclesiastical constraints, Bureau of Prisons chaplains may decline to perform the marriage ceremony. Upon request of the inmate, a Bureau chaplain will assist that inmate in preparing for an approved marriage; for example, by providing, or arranging for an inmate to receive, prenuptial marriage counseling.

(c) The Warden shall require that a marriage ceremony at the institution be a private ceremony conducted without media publicity.

Subpart C—Birth Control, Pregnancy, Child Placement, and Abortion

§ 551.20 Purpose and scope.

The Bureau of Prisons provides an inmate with medical and social services related to birth control, pregnancy, child placement, and abortion. The Warden shall ensure compliance with the applicable law regarding these matters.

§ 551.21 Birth control.

Medical staff shall provide an inmate with advice and consultation about methods for birth control and, where medically appropriate, prescribe and provide methods for birth control.

§ 551.22 Pregnancy.

(a) The Warden shall ensure that each pregnant inmate is provided medical, case management, and counseling services.

(b) In order to ensure proper medical and social services, the inmate shall inform the institution medical staff as soon as she suspects she is pregnant.

(c) Medical staff shall arrange for the childbirth to take place at a hospital outside the institution.

[44 FR 38252, June 29, 1979, as amended at 59 FR 62968, Dec. 6, 1994]

§ 551.23 Abortion.

(a) The inmate has the responsibility to decide either to have an abortion or to bear the child.

(b) The Warden shall offer to provide each pregnant inmate with medical, religious, and social counseling to aid her in making the decision whether to carry the pregnancy to full term or to

have an elective abortion. If an inmate chooses to have an abortion, she shall sign a statement to that effect. The inmate shall sign a written statement acknowledging that she has been provided the opportunity for the counseling and information called for in this policy.

(c) Upon receipt of the inmate's written statements required by paragraph (b) of this section, ordinarily submitted through the unit manager, the Clinical Director shall arrange for an abortion to take place.

[51 FR 47178, Dec. 30, 1986, as amended at 59 FR 62968, Dec. 6, 1994]

§ 551.24 Child placement.

(a) The Warden may not permit the inmate's new born child to return to the institution except in accordance with the Bureau of Prisons policy governing visiting.

(b) Child placement is the inmate's responsibility. The Warden shall provide opportunities for counseling by institution staff and community social agencies to aid the inmate with placement.

(c) The institution staff shall work closely with community agencies and persons to ensure the child is appropriately placed. The staff shall give notice to the responsible community agency of the inmate's plan for her child. Child welfare workers may come to the institution in appropriate cases to interview and counsel an inmate.

[44 FR 38252, June 29, 1979, as amended at 51 FR 47179, Dec. 30, 1986; 59 FR 62968, Dec. 6, 1994]

Subpart D—Inmate Organizations

SOURCE: 61 FR 11275, Mar. 19, 1996, unless otherwise noted.

§ 551.30 Purpose and scope.

The Bureau of Prisons permits inmates and persons in the community to participate in approved inmate organizations for recreational, social, civic, and benevolent purposes.

§ 551.31 Approval of an organization.

(a) An inmate must submit a request for recognition of a proposed inmate organization to the Warden. The organization may not become active without the Warden's approval.

(b) The Warden may approve an inmate organization upon determining that:

(1) The organization has a constitution and bylaws duly approved by its members; the constitution and bylaws must include the organization's purpose and objectives, the duties and responsibilities of its officer(s), and the requirements for activities reporting and operational review; and

(2) The organization does not operate in opposition to the security, good order, or discipline of the institution.

§ 551.32 Staff supervision.

(a) The Warden shall appoint a staff member as the institution's Inmate Organization Manager (IOM). The IOM shall be responsible for monitoring the activities of the institution's inmate organizations and staff sponsors.

(b) The Warden or designee shall assign to a staff sponsor responsibility for supervising the activities of an individual inmate organization. The staff sponsor's duties are performed while in official duty status.

§ 551.33 Dues.

Dues may be collected if they are required by the national organization, are collected by that same national organization, and the rate and method of institution collection have been approved by the Warden. No portion of the dues may be kept by the inmate organization for use at the institution. The organization may not make payment of dues a requirement of membership for an inmate who lacks funds.

§ 551.34 Organization activities.

(a) An officer of the inmate organization must submit a written request for approval of an activity to the Warden or designee. Activities include, but are not limited to, meetings, guest speakers, sports competitions, banquets, or community programs. Activities may not include fund-raising projects. The request must specifically include:

(1) Name of the organization;

(2) Nature or purpose of the activity;

(3) Date, time, and estimated duration of the activity;

(4) Estimated cost;

(5) Information concerning guest participation; and

(6) Other pertinent information requested by the Warden.

(b) The Warden may approve the request if the activity:

(1) Does not conflict with scheduled inmate work or program activities;

(2) Has confirmation of staff supervision;

(3) Can be appropriately funded when applicable (see § 551.36); and

(4) Does not conflict with the security, good order, or discipline of the institution.

(c) When an activity requires the expenditure of government funds, the Warden ordinarily shall require reimbursement from non-inmate participants (guests or members).

(d) Each inmate organization shall be responsible for maintaining accurate records of its activities.

(e) The activities of an inmate organization may be suspended temporarily due to noncompliance with Bureau policy. The IOM is responsible for recommending the specific suspension sanction for the Warden's approval. The inmate organization is to receive written notice of the proposed suspension sanction and shall have the opportunity to respond to the Warden. Continued noncompliance with Bureau policy shall result in an increase in the severity of the suspension sanction, and may include withdrawal of approval of the organization.

§ 551.35 Withdrawal of approval of an organization.

The Warden may withdraw approval of an inmate organization for reasons of the security, good order, and discipline of the institution, or in accordance with § 551.34(e).

§ 551.36 Funding.

The Bureau of Prisons may fund approved activities of inmate organizations or organization requests for purchase of equipment or services for all inmates subject to the availability of designated funds.

Subpart E—Inmate Contributions

§ 551.50 Policy.

(a) An inmate may contribute to a candidate for election to a federal, state or local office, in a primary, general, or special election.

(b) An inmate may contribute to any international, national or local organization, including political parties, so long as the contribution does not violate any law or regulation.

Subpart F—Volunteer Community Service Projects

§ 551.60 Volunteer community service projects.

(a) A volunteer community service project is a project sponsored and developed by local government or by a nonprofit charitable organization, submitted to the institution, and recommended by the Warden for approval of the Regional Director. Volunteer community service projects are designed to provide for the public good in keeping with the overall goals of the community, such as community-wide beautification or public safety. The sponsoring organization is responsible for certifying to the Bureau that the community service project does not displace regular employees, supplant employment opportunities ordinarily available within the sponsoring organization, or impair contracts for services. These projects are not work assignments. Any inmate who chooses to participate does so voluntarily, and may not receive performance pay or any other salaried compensation for participation in the project, nor be eligible to submit a claim under the provisions of the Inmate Accident Compensation Program.

(b) An inmate may volunteer to participate in a community service project by submitting a written request for the Warden's approval. The inmate must have custody classification appropriate for the project and be otherwise eligible for the conditions of the project. The decision of the Warden to approve or disapprove an inmate's request shall be documented in writing.

(c) An inmate may appeal the Warden's decision through the Administrative Remedy Procedure (see 28 CFR part 542).

[58 FR 5210, Jan. 19, 1993]

Subpart G—Administering of Polygraph Test

§ 551.70 Purpose and scope.

The Bureau of Prisons cooperates with law enforcement officials and other authorized individuals in the performance of their duties by permitting them to administer polygraph tests to an inmate if the inmate consents to the testing.

§ 551.71 Procedures.

(a) The Warden may permit polygraph tests in connection with a State or Federal criminal felony investigation.

(b) The Warden may permit polygraph tests in connection with misdemeanor offenses, civil proceedings, or any other matters. This type of request, however, is generally disapproved, absent a federal court order for the test.

(c) The Warden may permit a polygraph test at the request of a defense counsel or other representative of the inmate. These requests are subject to the same standards and procedures applicable to testing by law enforcement officials.

(d) The Warden may deny any request for testing which may disrupt the security or good order of the institution.

(e) Upon written request to conduct a polygraph examination of an inmate, the Warden may approve the request if:

(1) The validity of the request and of the examining agency can be confirmed;

(2) The request complies with this section; and

(3) The inmate gives written consent to the testing.

(f) If the request is approved, the Warden shall notify the requestor that he is responsible for meeting all state and local requirements in administering the test.

(g) The Bureau of Prisons maintains a record in the inmate's central file of the polygraph test indicating the inmate's consent and the time and place of and the personnel involved in the testing.

Subpart H—Inmate Manuscripts

§ 551.80 Definition.

As used in this rule, *manuscript* means fiction, nonfiction, poetry, music and lyrics, drawings and cartoons, and other writings of a similar nature.

§ 551.81 Manuscript preparation.

An inmate may prepare a manuscript for private use or for publication while in custody without staff approval. The inmate may use only non-work time to prepare a manuscript.

§ 551.82 Mailing inmate manuscripts.

An inmate may mail a manuscript as general correspondence, in accordance with part 540, subpart B of this chapter. An inmate may not circulate his manuscript within the institution.

§ 551.83 Limitations on an inmate's accumulation of manuscript material.

The Warden may limit, for housekeeping, fire-prevention, or security reasons, the amount of accumulated inmate manuscript material.

Subpart I—Non-Discrimination Toward Inmates

§ 551.90 Policy.

Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.

[63 FR 55774, Oct. 16, 1998]

Subpart J—Pretrial Inmates

SOURCE: 59 FR 60285, Nov. 22, 1994, unless otherwise noted.

§ 551.100 Purpose and scope.

In addition to convicted inmates, the Bureau of Prisons houses persons who have not been convicted. Procedures

and practices required for the care, custody, and control of such inmates may differ from those established for convicted inmates. Pretrial inmates will be separated, to the extent practicable, from convicted inmates. Except as specified by this rule, policies and standards applicable to persons committed to the custody of the Attorney General or the Bureau of Prisons apply also to pretrial inmates as defined in § 551.101.

§ 551.101 Definitions.

(a) *Pretrial inmate.* For purpose of this rule, ''pretrial inmate'' means a person who is legally detained but for whom the Bureau of Prisons has not received notification of conviction. Thus, ''pretrial inmate'' ordinarily includes a person awaiting trial, being tried, or awaiting a verdict.

(1) *Civil contempt, deportable aliens, or material witnesses.* For purpose of this rule, an inmate committed for civil contempt, or as a deportable alien, or as a material witness is considered a pretrial inmate.

(2) *Mental evaluation or treatment.* An inmate committed under Title 18 U.S.C. Sections 4241 (b) and (d), 4242(a), or 4243(b) is considered to be a pretrial inmate, whereas commitments under Sections 4243(e), 4244, 4245 or 4246 are treated as convicted inmates.

(3) *Concurrent federal and state sentences.* For purpose of this rule, an inmate in a status described in paragraph (a) introductory text, (a)(1), or (a)(2) of this section and who is at the same time serving a state or federal sentence is not considered a pretrial inmate.

(b) *Convicted inmate.* For purposes of this rule, an individual a court has found guilty of an offense punishable by law.

§ 551.102 Commitment prior to arraignment.

On receipt of a U.S. Marshal remand, the Bureau of Prisons shall accept an individual who has not been arraigned for commitment as a pretrial inmate, provided that the institution has appropriate detention facilities available for that individual.

§ 551.103 Procedure for admission.

Staff in administrative institutions or institutions with administrative components housing U.S. Marshals' prisoners shall establish procedures for admitting a pretrial inmate which include, but are not limited to:

(a) Verification of commitment papers;

(b) Search of the inmate;

(c) Photographing and fingerprinting;

(d) Disposition of clothing and personal possessions;

(e) Intake screening (including Notice of Separation);

(f) Providing institution guidelines governing telephone calls (including procedures for making unmonitored calls to an attorney);

(g) Provisions for personal hygiene, to include:

(1) Issue of personal hygiene items;

(2) Issue of clean clothing; and

(3) Opportunity for shower and hair care;

(h) Orientation;

(i) Opportunity for waiver of right not to work;

(j) Assignment to an appropriate housing unit.

§ 551.104 Housing.

To the extent practicable, pretrial inmates will be housed separately from convicted inmates.

§ 551.105 Custody.

(a) Staff ordinarily will supervise a pretrial inmate as if classified ''In'' custody.

(b) Where circumstances warrant, staff may supervise a pretrial inmate according to procedures for other custody levels.

§ 551.106 Institutional employment.

Unless a pretrial inmate signs a waiver of his or her right not to work, the Warden may not require the inmate to work in any assignment other than housekeeping tasks in the inmate's own cell and in the community living area.

§ 551.107 Pretrial inmate reviews.

Staff shall conduct regular reviews of a pretrial inmate's status.

(a) Each pretrial inmate shall be scheduled for an initial review by the unit team within 21 calendar days of the inmate's first arrival at the institution, and subsequent reviews shall be conducted at least every 90 days.

(b) The inmate shall be notified at least 48 hours prior to the inmate's scheduled review.

(c) A pretrial inmate is expected to attend these reviews. If the inmate refuses to appear, staff shall document in the record of the meeting the inmate's refusal and, if known, the reason for refusal.

(d) Inmate reviews are to be documented on the Pretrial Inmate Review Report.

§ 551.108 Performance pay.

The Warden may approve a pretrial inmate for performance pay and special awards.

§ 551.109 Community activities.

(a) The Warden may not grant a furlough to a pretrial inmate (18 U.S.C. § 3622).

(b) In an emergency, staff shall facilitate contact with the pretrial inmate's attorney of record, who may seek from the court a decision concerning release from custody or an escorted trip.

(c) Except by order of the court, a pretrial inmate may not be considered for participation in community programs.

§ 551.110 Religious programs.

(a) When consistent with institution security and good order, pretrial inmates may be allowed the opportunity to participate in religious programs with convicted inmates.

(b) Staff shall ensure that pretrial inmates who do not participate in religious programs with convicted inmates have access to other religious programs.

§ 551.111 Marriage.

A pretrial inmate may request permission to marry in accordance with current Bureau of Prisons policy for convicted inmates. Staff shall contact the court, U.S. Attorney, U.S. Marshals Service, and in the case of an alien, the Immigration and Naturalization Service, to advise of the marriage request of the pretrial inmate and to request their comments.

§ 551.112 Education.

(a) A pretrial inmate may participate in correspondence and self-study educational courses. Institutional staff may also arrange for educational assistance to the pretrial inmate through the use of contract personnel or community volunteers.

(b) When consistent with institution security and good order, pretrial inmates may be allowed the opportunity to have access to the institution's educational program.

§ 551.113 Counseling.

(a) When consistent with institution security and good order, pretrial inmates may be allowed the opportunity to receive counseling services with convicted inmates.

(b) Staff shall ensure that pretrial inmates who do not receive counseling services with convicted inmates have access to other counseling services.

§ 551.114 Medical, psychiatric and psychological.

(a) Staff shall provide the pretrial inmate with the same level of basic medical (including dental), psychiatric, and psychological care provided to convicted inmates.

(b) Staff shall advise the court, through the U.S. Marshal, of medication the pretrial inmate receives which may alter the inmate's courtroom behavior.

(c) In event of serious illness or death of a pretrial inmate, staff shall notify the committing court, U.S. Marshal, U.S. Attorney's Office, the inmate's attorney of record, and the designated family member or next of kin.

§ 551.115 Recreation.

(a) When consistent with institution security and good order, pretrial inmates may be allowed the opportunity to participate with convicted inmates in recreational activities. Staff shall ensure that inmates who do not participate in recreational activities with convicted inmates have access to other recreational activities.

(b) At a minimum, and except as noted in paragraph (d) of this section,

staff shall provide the pretrial inmate with the following recreational opportunities:

(1) One hour daily of outside recreation, weather permitting; or

(2) Two hours daily of indoor recreation.

(c) Staff shall make recreation equipment available to the pretrial inmate including, but not limited to, physical exercise equipment, books, table games, and television.

(d) Staff shall provide the pretrial inmate housed in Administrative Detention or Disciplinary Segregation with exercise as provided by the Bureau of Prisons rules on Inmate Discipline. (See 28 CFR part 541, subpart B.)

(e) Provisions of paragraphs (b) and (c) of this section must be carried out unless compelling security or safety reasons dictate otherwise. Institution staff shall document these reasons.

§551.116 Discipline.

(a) Staff shall require the pretrial inmate to abide by Bureau of Prisons rules on Inmate Discipline (see 28 CFR part 541, subpart B), subject to the limitations of §551.106 of this part.

(b) Staff shall advise the court, through the U.S. Marshal, of repeated or serious disruptive behavior by a pretrial inmate.

§551.117 Access to legal resources.

(a) The Warden shall provide the opportunity for pretrial inmate-attorney visits on a seven-days-a-week basis.

(b) Staff shall provide pretrial inmates with access to legal materials in the institution.

(c) Staff shall allow the pretrial inmate, upon the inmate's request, to telephone the inmate's attorney as often as resources of the institution allow.

§551.118 Property.

(a) A pretrial inmate may retain personal property as authorized for convicted inmates housed in administrative detention units. (See 28 CFR part 541, subpart B.)

(b) Staff may store the pretrial inmate's unauthorized personal property until the individual is released, transferred to another facility, or sentenced and committed to a federal institution.

(c) Staff may supply the pretrial inmate with clothing for court appearances, or the inmate may supply his or her own.

§551.119 Release of funds and property of pretrial inmates.

(a) Staff shall establish procedures which allow for the release of funds and personal property to pretrial inmates released during other than normal business hours.

(b) Staff shall ensure that pretrial inmates are informed of existing policy relative to the commissary account and the deposit/release of funds.

§551.120 Visiting.

Staff shall allow pretrial inmates to receive visits in accordance with the Bureau's rule and local institution guidelines on visiting. Staff may allow a pretrial inmate special visits to protect the inmate's business interests or to help prepare for trial.

Subparts K–L [Reserved]

Subpart M—Victim and/or Witness Notification

SOURCE: 49 FR 18386, Apr. 30, 1984, unless otherwise noted.

§551.150 Purpose and scope.

The Bureau of Prisons provides a requesting victim and/or witness of a serious crime with information on the release from a Bureau institution of the inmate convicted of that serious crime.

[64 FR 68265, Dec. 6, 1999]

§551.151 Definitions.

(a) For purpose of this rule, *victim* is generally defined as someone who suffers direct or threatened physical, emotional, or financial harm as the result of the commission of a crime. The term ''victim'' also includes the immediate family of a minor or a homicide victim.

(b) For purpose of this rule, *witness* is defined as someone who has information or evidence concerning a crime, and provides information regarding this knowledge to a law enforcement agency. Where the witness is a minor,

the term ''witness'' includes an appropriate family member. The term ''witness'' does not include defense witnesses or those individuals involved in the crime as a perpetrator or accomplice.

(c) For purpose of this rule, *serious crime* is defined as a criminal offense that involves personal violence, attempted or threatened personal violence or significant property loss.

(d) For purpose of this rule, the phrase *release from a Bureau institution* refers to an inmate's furlough, parole (including appearance before the Parole Commission), transfer to a State or local detention facility, transfer to a community corrections center, mandatory release, expiration of sentence, escape (including apprehension), death, and other such release-related information.

[49 FR 18386, Apr. 30, 1984, as amended at 55 FR 6178, Feb. 21, 1990; 64 FR 68265, Dec. 6, 1999]

§ 551.152 Procedures.

(a) A victim and/or witness of a serious crime who wants to be notified of a specific inmate's release must make this request to the United States Attorney in the district where the prosecution occurred. Requests for notification received by the Bureau of Prisons directly from a victim and/or witness will be referred to the U.S. Attorney in the district of prosecution for approval.

(b) Institution staff shall promptly notify the victim and/or witness when his or her request for notification has been received. Staff shall advise each approved victim and/or witness of that person's responsibility for notifying the Bureau of Prisons of any address and/or telephone number changes.

[49 FR 18386, Apr. 30, 1984, as amended at 55 FR 6178, Feb. 21, 1990]

§ 551.153 Cancelling the notification request.

(a) A victim and/or witness may request cancellation of the notification by contacting either the Bureau of Prisons or the U.S. Attorney from the prosecuting district. The Bureau of Prisons shall notify the victim and/or witness that his or her request for notification has been cancelled.

(b) Bureau of Prisons staff may cancel a notification request when the victim and/or witness has not responded within 60 calendar days to a Bureau of Prisons inquiry concerning whether the victim and/or witness wishes to continue receiving notification of the inmate's release(s).

(c) A notification request by a victim and/or witness ordinarily terminates when the inmate has completed service of the sentence for the serious crime which resulted in the request for notification.

Subpart N—Smoking/No Smoking Areas

SOURCE: 69 FR 13737, Mar. 24, 2004, unless otherwise noted.

§ 551.160 Purpose and scope.

To advance towards becoming a clean air environment and to protect the health and safety of staff and inmates, the Bureau of Prisons will restrict areas and circumstances where smoking is permitted within its institutions and offices.

§ 551.161 Definitions.

For purpose of this subpart, *smoking* is defined as carrying or inhaling a lighted cigar, cigarette, pipe, or other lighted tobacco products.

§ 551.162 Designated smoking areas.

(a) The Warden must designate a smoking area for use in instances where smoking is part of an authorized inmate religious activity.

(b)(1) The Warden may designate only outdoor smoking areas for general inmate use (that is, for smoking which is not part of an authorized religious activity). These smoking areas must be clearly identified.

(2) The Warden, with the Regional Director's concurrence, may choose not to designate smoking areas for general use. Once this occurs, the Regional Director's concurrence is required if the Warden later chooses to designate smoking areas for general use at the institution.

PART 552—CUSTODY

Subpart A [Reserved]

Subpart B—Searches of Housing Units, Inmates, and Inmate Work Areas

Sec.
552.10 Purpose and scope.
552.11 Searches of inmates.
552.12 Close observation.
552.13 X-ray, major instrument, fluoroscope, or surgical intrusion.
552.14 Search of inmate housing and work areas.

Subpart C—Use of Force and Application of Restraints on Inmates

552.20 Purpose and scope.
552.21 Types of force.
552.22 Principles governing the use of force and application of restraints.
552.23 Confrontation avoidance procedures.
552.24 Use of four-point restraints.
552.25 Use of less-than-lethal weapons, including chemical agents.
552.26 Medical attention in use of force and application of restraints incidents.
552.27 Documentation of use of force and application of restraints incidents.

Subpart D—Hostage Situation Management

552.30 Purpose and scope.
552.31 Negotiations.
552.32 Hostages.
552.33 Media.

Subpart E—Suicide Prevention Program

552.40 Purpose and scope.
552.41 Program procedures.
552.42 Suicide watch conditions.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

SOURCE: 45 FR 33941, May 20, 1980, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Searches of Housing Units, Inmates, and Inmate Work Areas

SOURCE: 45 FR 75134, Nov. 13, 1980, unless otherwise noted.

§ 552.10 Purpose and scope.

In order to further the safe, secure, and orderly running of its institutions, the Bureau of Prisons conducts searches of inmates and of inmate housing and work areas to locate contraband and to deter its introduction and movement. Staff shall employ the least intrusive method of search practicable, as indicated by the type of contraband and the method of suspected introduction.

§ 552.11 Searches of inmates.

(a) *Electronic devices*. Inspection of an inmate using electronic devices (for example, metal detector, or ion spectrometry device) does not require the inmate to remove clothing. The inspection includes a search of the inmate's clothing and personal effects. Staff may conduct an electronic device search of an inmate on a routine or random basis to control contraband.

(b) *Pat Search*. Inspection of an inmate using the hands does not require the inmate to remove clothing. The inspection includes a search of the inmate's clothing and personal effects. Staff may conduct a pat search of an inmate on a routine or random basis to control contraband.

(c) *Visual search*—a visual inspection of all body surfaces and body cavities.

(1) Staff may conduct a visual search where there is reasonable belief that contraband may be concealed on the person, or a good opportunity for concealment has occured. For example, placement in a special housing unit (see 28 CFR part 541, subpart B), leaving the institution, or re-entry into an institution after contact with the public (after a community trip, court transfer, or after a ''contact'' visit in a visiting room) is sufficient to justify a visual search. The visual search shall be made in a manner designed to assure as much privacy to the inmate as practicable.

(2) Staff of the same sex as the inmate shall make the search, except where circumstances are such that delay would mean the likely loss of contraband. Where staff of the opposite sex makes a visual search, staff shall document the reasons for the opposite sex search in the inmate's central file.

(d) *Digital or simple instrument search*—inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps. A digital or simple instrument search may be conducted only by designated qualified health personnel (for example, physicians, physician assistants, and nurses) upon approval of the Warden or Acting Warden and only if the Warden or Acting Warden has reasonable belief that an inmate is concealing contraband in or on his person. If located, the contraband or foreign item may be removed immediately by medical staff if such removal can easily be effected by use of fingers or the simple instruments referred to above. Staff shall document all digital and simple instrument searches and the reasons for the searches in the inmate's central file.

(1) Staff shall solicit the inmate's written consent prior to conducting a digital or simple instrument search. However, the inmate's consent is not required.

(2) Staff may not conduct a digital or simple instrument search if it is likely to result in physical injury to the inmate.

[45 FR 75134, Nov. 13, 1980, as amended at 48 FR 48970, Oct. 21, 1983; 56 FR 21036, May 6, 1991; 72 FR 37631, July 11, 2007]

§ 552.12 Close observation.

When there is reasonable belief that an inmate has ingested contraband or concealed contraband in a body cavity and the methods of search specified in § 552.11 are inappropriate or likely to result in physical injury to the inmate, the Warden or designee may authorize the placement of an inmate in a room or cell for the purpose of staff's closely observing that inmate until the inmate has voided the contraband or until sufficient time has elapsed to preclude the possibility that the inmate is concealing contraband.

(a) The length of close observation status will be determined on an individual basis. Ordinarily, the Captain, in consultation with qualified health personnel, shall determine when termination is appropriate. The status of an inmate under close observation for as long as three days must be reviewed by the Segregation Review Official according to the provisions in § 541.22(c) of this chapter, and the initial SRO review conducted within three work days shall be a formal hearing. Maintaining an inmate under close observation beyond seven days requires approval of the Warden, who makes this decision in consultation with the Captain and qualified health personnel.

(b) The supervising staff member shall be the same sex as the inmate and shall maintain complete and constant visual supervision of the inmate.

(c) The supervisor responsible for initiating the close observation watch shall advise the inmate of the conditions and of what is expected.

(1) The inmate shall be required to provide a urine sample within two hours of placement under close observation in accordance with the provisions of § 550.30 of this chapter on urine surveillance. A second urine sample is required prior to releasing the inmate from close observation.

(2) The light will be kept on at all times.

(3) No inmate under close observation status may be allowed to come into contact with another inmate.

(4) The inmate ordinarily may not be allowed personal property while under close observation status, except legal and personal mail and a reasonable amount of legal materials when requested. Personal hygiene items will be controlled by staff.

(5) When the inmate is lying on a bed, the inmate shall be required to lie on top of the mattress in full view, weather and room temperature permitting. When necessary for the inmate to use cover, hands must remain visible at all times so that staff can observe any attempt to move contraband.

(6) Due to security concerns, the inmate ordinarily may not be permitted recreation outside of the cell.

(7) The inmate is to be served the same meals as those served to the general population, unless medically contraindicated.

(8) No medications may be given to the inmate except for those prescribed and given by hospital personnel. No laxatives may be given except natural laxatives, i.e., coffee, prune juice, etc.

(9) When the inmate needs to urinate and/or defecate, the inmate will be furnished an empty hospital bed pan.

(10) When the inmate requests to shave, to brush teeth, or other such request, a wash pan and container of water is to be provided for use in the cell.

(11) Institution staff shall be available to the inmate upon request, within reason and within the bounds of security concerns.

[56 FR 21036, May 6, 1991]

§ 552.13 X-ray, major instrument, fluoroscope, or surgical intrusion.

(a) The institution physician may authorize use of a fluoroscope, major instrument (including anoscope or vaginal speculum), or surgical intrusion for medical reasons only, with the inmate's consent.

(b) The institution physician may authorize use of an X-ray for medical reasons and only with the consent of the inmate. When there exists no reasonable alternative, and an X-ray examination is determined necessary for the security, good order, or discipline of the institution, the Warden, upon approval of the Regional Director, may authorize the institution physician to order a non-repetitive X-ray examination for the purpose of determining if contraband is concealed in or on the inmate (for example: in a cast or body cavity). The X-ray examination may not be performed if it is determined by the institution physician that it is likely to result in serious or lasting medical injury or harm to the inmate. Staff shall place documentation of the examination and the reasons for the examination in the inmate's central file and medical file.

(1) The Warden and Regional Director or persons officially acting in that capacity may not redelegate the authority to approve an X-ray examination for the purpose of determining if contrabrand is present. An Acting Warden or Acting Regional Director may, however, perform this function.

(2) Staff shall solicit the inmate's consent prior to the X-ray examination. However, the inmate's consent is not required.

(c) The Warden may direct X-rays of inanimate objects where the inmate is not exposed.

[45 FR 75134, Nov. 13, 1980, as amended at 48 FR 48970, Oct. 21, 1983. Redesignated and amended at 56 FR 20136, 20137, May 6, 1991]

§ 552.14 Search of inmate housing and work areas.

(a) Staff may search an inmate's housing and work area, and personal items contained within those areas, without notice to or prior approval from the inmate and without the inmate's presence.

(b) Staff conducting the search shall leave the housing or work area as nearly as practicable in its original order.

[45 FR 75134, Nov. 13, 1980. Redesignated at 56 FR 21036, May 6, 1991]

Subpart C—Use of Force and Application of Restraints on Inmates

SOURCE: 54 FR 21394, May 17, 1989, unless otherwise noted.

§ 552.20 Purpose and scope.

The Bureau of Prisons authorizes staff to use force only as a last alternative after all other reasonable efforts to resolve a situation have failed. When authorized, staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff, and others, to prevent serious property damage and to ensure institution security and good order. Staff are authorized to apply physical restraints necessary to gain control of an inmate who appears to be dangerous because the inmate:

(a) Assaults another individual;

(b) Destroys government property;

(c) Attempts suicide;

(d) Inflicts injury upon self; or

(e) Becomes violent or displays signs of imminent violence.

This rule on application of restraints does not restrict the use of restraints in situations requiring precautionary restraints, particularly in the movement or transfer of inmates (e.g., the use of handcuffs in moving inmates to and from a cell in detention, escorting

an inmate to a Special Housing Unit pending investigation, etc.).

[59 FR 30469, June 13, 1994, as amended at 61 FR 39800, July 30, 1996]

§ 552.21 Types of force.

(a) *Immediate use of force.* Staff may immediately use force and/or apply restraints when the behavior described in § 552.20 constitutes an immediate, serious threat to the inmate, staff, others, property, or to institution security and good order.

(b) *Calculated use of force and/or application of restraints.* This occurs in situations where an inmate is in an area that can be isolated (e.g., a locked cell, a range) and where there is no immediate, direct threat to the inmate or others. When there is time for the calculated use of force or application of restraints, staff must first determine if the situation can be resolved without resorting to force (see § 552.23).

(c) *Use of Force Team Technique.* If use of force is determined to be necessary, and other means of gaining control of an inmate are deemed inappropriate or ineffective, then the Use of Force Team Technique shall be used to control the inmate and to apply soft restraints, to include ambulatory leg restraints. The Use of Force Team Technique ordinarily involves trained staff, clothed in protective gear, who enter the inmate's area in tandem, each with a coordinated responsibility for helping achieve immediate control of the inmate.

(d) *Exceptions.* Any exception to this rule is prohibited, except where the facts and circumstances known to the staff member would warrant a person using sound correctional judgment to reasonably believe other action is necessary (as a last resort) to prevent serious physical injury, or serious property damage which would immediately endanger the safety of staff, inmates, or others.

[59 FR 30469, June 13, 1994, as amended at 61 FR 39800, July 30, 1996]

§ 552.22 Principles governing the use of force and application of restraints.

(a) Staff ordinarily shall first attempt to gain the inmate's voluntary cooperation before using force.

(b) Force may not be used to punish an inmate.

(c) Staff shall use only that amount of force necessary to gain control of the inmate. Situations when an appropriate amount of force may be warranted include, but are not limited to:

(1) Defense or protection of self or others;

(2) Enforcement of institutional regulations; and

(3) The prevention of a crime or apprehension of one who has committed a crime.

(d) Where immediate use of restraints is indicated, staff may temporarily apply such restraints to an inmate to prevent that inmate from hurting self, staff, or others, and/or to prevent serious property damage. When the temporary application of restraints is determined necessary, and after staff have gained control of the inmate, the Warden or designee is to be notified immediately for a decision on whether the use of restraints should continue.

(e) Staff may apply restraints (for example, handcuffs) to the inmate who continues to resist after staff achieve physical control of that inmate, and may apply restraints to any inmate who is placed under control by the Use of Force Team Technique. If an inmate in a forcible restraint situation refuses to move to another area on his own, staff may physically move that inmate by lifting and carrying the inmate to the appropriate destination.

(f) Restraints should remain on the inmate until self-control is regained.

(g) Except when the immediate use of restraints is required for control of the inmate, staff may apply restraints to, or continue the use of progressive restraints on, an inmate while in a cell in administrative detention or disciplinary segregation only with approval of the Warden or designee.

(h) Restraint equipment or devices (e.g., handcuffs) may not be used in any of the following ways:

(1) As a method of punishing an inmate.

(2) About an inmate's neck or face, or in any manner which restricts blood circulation or obstructs the inmate's airways.

(3) In a manner that causes unnecessary physical pain or extreme discomfort.

(4) To secure an inmate to a fixed object, such as a cell door or cell grill, except as provided in § 552.24.

(i) Medication may not be used as a restraint solely for security purposes.

(j) All incidents involving the use of force and the application of restraints (as specified in § 552.27) must be carefully documented.

[54 FR 21394, May 17, 1989. Redesignated and amended at 59 FR 30469, 30470, June 13, 1994; 61 FR 39800, July 30, 1996]

§ 552.23 Confrontation avoidance procedures.

Prior to any calculated use of force, the ranking custodial official (ordinarily the Captain or shift Lieutenant), a designated mental health professional, and others shall confer and gather pertinent information about the inmate and the immediate situation. Based on their assessment of that information, they shall identify a staff member(s) to attempt to obtain the inmate's voluntary cooperation and, using the knowledge they have gained about the inmate and the incident, determine if use of force is necessary.

[59 FR 30470, June 13, 1994]

§ 552.24 Use of four-point restraints.

When the Warden determines that four-point restraints are the only means available to obtain and maintain control over an inmate, the following procedures must be followed:

(a) Soft restraints (e.g., vinyl) must be used to restrain an inmate, unless:

(1) Such restraints previously have proven ineffective with respect to that inmate, or

(2) Such restraints are proven ineffective during the initial application procedure.

(b) Inmates will be dressed in clothing appropriate to the temperature.

(c) Beds will be covered with a mattress, and a blanket/sheet will be provided to the inmate.

(d) Staff shall check the inmate at least every 15 minutes, both to ensure that the restraints are not hampering circulation and for the general welfare of the inmate. When an inmate is restrained to a bed, staff shall periodically rotate the inmate's position to avoid soreness or stiffness.

(e) A review of the inmate's placement in four-point restraints shall be made by a Lieutenant every two hours to determine if the use of restraints has had the required calming effect and so that the inmate may be released from these restraints (completely or to lesser restraints) as soon as possible. At every two-hour review, the inmate will be afforded the opportunity to use the toilet, unless the inmate is continuing to actively resist or becomes violent while being released from the restraints for this purpose.

(f) When the inmate is placed in four-point restraints, qualified health personnel shall initially assess the inmate to ensure appropriate breathing and response (physical or verbal). Staff shall also ensure that the restraints have not restricted or impaired the inmate's circulation. When inmates are so restrained, qualified health personnel ordinarily are to visit the inmate at least twice during each eight hour shift. Use of four-point restraints beyond eight hours requires the supervision of qualified health personnel. Mental health and qualified health personnel may be asked for advice regarding the appropriate time for removal of the restraints.

(g) When it is necessary to restrain an inmate for longer than eight hours, the Warden (or designee) or institution administrative duty officer shall notify the Regional Director or Regional Duty Officer by telephone.

[54 FR 21394, May 17, 1989. Redesignated and amended at 59 FR 30469, 30470, June 13, 1994; 61 FR 39800, July 30, 1996]

§ 552.25 Use of less-than-lethal weapons, including chemical agents.

(a) The Warden may authorize the use of less-than-lethal weapons, including those containing chemical agents, only when the situation is such that the inmate:

(1) Is armed and/or barricaded; or

(2) Cannot be approached without danger to self or others; and

(3) It is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result

in a major disturbance or serious property damage.

(b) The Warden may delegate the authority under this regulation to one or more supervisors on duty and physically present, but not below the position of Lieutenant.

[76 FR 6056, Feb. 3, 2011]

§ 552.26 Medical attention in use of force and application of restraints incidents.

(a) In immediate use of force situations, staff shall seek the assistance of mental health or qualified health personnel upon gaining physical control of the inmate. When possible, staff shall seek such assistance at the onset of the violent behavior. In calculated use of force situations, the use of force team leader shall seek the guidance of qualified health personnel (based upon a review of the inmate's medical record) to identify physical or mental problems. When mental health staff or qualified health personnel determine that an inmate requires continuing care, and particularly when the inmate to be restrained is pregnant, the deciding staff shall assume responsibility for the inmate's care, to include possible admission to the institution hospital, or, in the case of a pregnant inmate, restraining her in other than face down four-point restraints.

(b) After any use of force or forcible application of restraints, the inmate shall be examined by qualified health personnel, and any injuries noted, immediately treated.

[61 FR 39801, July 30, 1996]

§ 552.27 Documentation of use of force and application of restraints incidents.

Staff shall appropriately document all incidents involving the use of force, chemical agents, or less-than-lethal weapons. Staff shall also document, in writing, the use of restraints on an inmate who becomes violent or displays signs of imminent violence. A copy of the report shall be placed in the inmate's central file.

[59 FR 30470, June 13, 1994, as amended at 76 FR 6056, Feb. 3, 2011]

Subpart D—Hostage Situation Management

SOURCE: 61 FR 38042, July 22, 1996, unless otherwise noted.

§ 552.30 Purpose and scope.

The Bureau of Prisons primary objectives in all hostage situations are to safely free the hostage(s) and to regain control of the institution.

§ 552.31 Negotiations.

The Warden is not ordinarily involved directly in the negotiation process. Instead, this responsibility is ordinarily assigned to a team of individuals specifically trained in hostage negotiation techniques.

(a) Negotiators have no decision-making authority in hostage situations, but rather serve as intermediaries between hostage takers and command center staff.

(b) During the negotiation process, the following items are non-negotiable: release of captors from custody, providing of weapons, exchange of hostages, and immunity from prosecution.

§ 552.32 Hostages.

Captive staff have no authority and their directives shall be disregarded.

§ 552.33 Media.

The Warden shall assign staff to handle all news releases and news media inquiries in accordance with the rule on Contact with News Media (see 28 CFR 540.65).

Subpart E—Suicide Prevention Program

SOURCE: 72 FR 12086, Mar. 15, 2007, unless otherwise noted.

§ 552.40 Purpose and scope.

The Bureau of Prisons (Bureau) operates a suicide prevention program to assist staff in identifying and managing potentially suicidal inmates. When staff identify an inmate as being at risk for suicide, staff will place the inmate on suicide watch. Based upon clinical findings, staff will either terminate the suicide watch when the inmate is no longer at imminent risk for

suicide or arrange for the inmate's transfer to a medical referral center or contract health care facility.

§ 552.41 Program procedures.

(a) *Program Coordinator*. Each institution must have a Program Coordinator for the institution's suicide prevention program.

(b) *Training*. The Program Coordinator is responsible for ensuring that appropriate training is available to staff and to inmates selected as inmate observers.

(c) *Identification of at risk inmates*. (1) Medical staff are to screen a newly admitted inmate for signs that the inmate is at risk for suicide. Ordinarily, this screening is to take place within twenty-four hours of the inmate's admission to the institution.

(2) Staff (whether medical or nonmedical) may make an identification at any time based upon the inmate's observed behavior.

(d) *Referral*. Staff who identify an inmate to be at risk for suicide will have the inmate placed on suicide watch.

(e) *Assessment*. A psychologist will clinically assess each inmate placed on suicide watch.

(f) *Intervention*. Upon completion of the clinical assessment, the Program Coordinator or designee will determine the appropriate intervention that best meets the needs of the inmate.

§ 552.42 Suicide watch conditions.

(a) *Housing*. Each institution must have one or more rooms designated specifically for housing an inmate on suicide watch. The designated room must allow staff to maintain adequate control of the inmate without compromising the ability to observe and protect the inmate.

(b) *Observation*. (1) Staff or trained inmate observers operating in scheduled shifts are responsible for keeping the inmate under constant observation.

(2) Only the Warden may authorize the use of inmate observers.

(3) Inmate observers are considered to be on an institution work assignment when they are on their scheduled shift.

(c) *Suicide watch log*. Observers are to document significant observed behavior in a log book.

(d) *Termination*. Based upon clinical findings, the Program Coordinator or designee will:

(1) Remove the inmate from suicide watch when the inmate is no longer at imminent risk for suicide, or

(2) Arrange for the inmate's transfer to a medical referral center or health care facility.

PART 553—INMATE PROPERTY

Subpart A [Reserved]

Subpart B—Inmate Personal Property

Sec.
553.10 Purpose and scope.
553.11 Limitations on inmate personal property.
553.12 Contraband.
553.13 Procedures for handling contraband.
553.14 Inmate transfer between institutions and inmate release.
553.15 Limitations on personal property—medical transfers.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4126, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

SOURCE: 48 FR 19573, Apr. 29, 1983, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Inmate Personal Property

§ 553.10 Purpose and scope.

It is the policy of the Bureau of Prisons that an inmate may possess ordinarily only that property which the inmate is authorized to retain upon admission to the institution, which is issued while the inmate is in custody, which the inmate purchases in the institution commissary, or which is approved by staff to be mailed to, or otherwise received by an inmate. These rules contribute to the management of inmate personal property in the institution, and contribute to a safe environment for staff and inmates by reducing fire hazards, security risks, and sanitation problems which relate to inmate personal property. Consistent with the mission of the institution, each Warden shall identify in writing

that personal property which may be retained by an inmate in addition to that personal property which has been approved by the Director for retention at all institutions.

[48 FR 19573, Apr. 29, 1983, as amended at 64 FR 36753, July 7, 1999]

§ 553.11 Limitations on inmate personal property.

(a) *Numerical limitations*. Authorized personal property may be subject to numerical limitations. The institution's Admission and Orientation program shall include notification to the inmate of any numerical limitations in effect at the institution and a current list of any numerical limitations shall be posted on inmate unit bulletin boards.

(b) *Storage space*. Staff shall set aside space within each housing area for use by an inmate. The designated area shall include a locker or other securable area in which the inmate is to store authorized personal property. The inmate shall be allowed to purchase an approved locking device for personal property storage in regular living units. Staff may not allow an inmate to accumulate materials to the point where the materials become a fire, sanitation, security, or housekeeping hazard.

(c) *Clothing*. Civilian clothing (i.e., clothing not issued to the inmate by the Bureau or purchased by the inmate from the commissary) ordinarily is not authorized for retention by the inmate. Civilian clothing which previously had been approved for retention may not be retained after August 6, 1999. Prerelease civilian clothing for an inmate may be retained by staff in the Receiving and Discharge area during the last 30 days of the inmate's confinement.

(d) *Legal materials*. Staff may allow an inmate to possess legal materials in accordance with the provisions on inmate legal activities (see § 543.11 of this chapter).

(e) *Hobbycraft materials*. Staff shall limit an inmate's hobby shop projects within the cell or living area to those projects which the inmate may store in designated personal property containers. Staff may make an exception for an item (for example, a painting) where size would prohibit placing the item in a locker. This exception is made with the understanding that the placement of the item is at the inmate's own risk. Staff shall require that hobby shop items be removed from the living area when completed, and be disposed of in accordance with the provisions of part 544, subpart D, of this chapter.

(f) *Radios and Watches*. An inmate may possess only one approved radio and one approved watch at a time. The inmate must be able to demonstrate proof of ownership. An inmate who purchases a radio or watch through a Bureau of Prisons commissary is ordinarily permitted the use of that radio or watch at any Bureau institution if the inmate is later transferred. If the inmate is not allowed to use the radio or watch at the new institution, the inmate shall be permitted to mail, at the receiving institution's expense, the radio or watch to a destination of the inmate's choice. Where the inmate refuses to provide a mailing address, the radio and/or watch may be disposed of through approved methods, including destruction of the property.

(g) *Education Program Materials*. Education program materials or current correspondence courses may be retained even if not stored as provided in paragraph (b) of this section.

(h) *Personal Photos*. An inmate may possess photographs, subject to the limitations of paragraph (b) of this section, so long as they are not detrimental to personal safety or security, or to the good order of the institution.

[64 FR 36753, July 7, 1999]

§ 553.12 Contraband.

(a) Contraband is defined in § 500.1(h) of this chapter. Items possessed by an inmate ordinarily are not considered to be contraband if the inmate was authorized to retain the item upon admission to the institution, the item was issued by authorized staff, purchased by the inmate from the commissary, or purchased or received through approved channels (to include approved for receipt by an authorized staff member or authorized by institution guidelines).

(b) For the purposes of this subpart, there are two types of contraband.

(1) Staff shall consider as hard contraband any item which poses a serious threat to the security of an institution and which ordinarily is not approved for possession by an inmate or for admission into the institution. Examples of hard contraband include weapons, intoxicants, and currency (where prohibited).

(2) Staff shall consider as nuisance contraband any item other than hard contraband, which has never been authorized, or which may be, or which previously has been authorized for possession by an inmate, but whose possession is prohibited when it presents a threat to security or its condition or excessive quantities of it present a health, fire, or housekeeping hazard. Examples of nuisance contraband include: personal property no longer permitted for admission to the institution or permitted for sale in the commissary; altered personal property; excessive accumulation of commissary, newspapers, letters, or magazines which cannot be stored neatly and safely in the designated area; food items which are spoiled or retained beyond the point of safe consumption; government-issued items which have been altered, or other items made from government property without staff authorization.

[64 FR 36754, July 7, 1999]

§ 553.13 Procedures for handling contraband.

(a) Staff shall seize any item in the institution which has been identified as contraband whether the item is found in the physical possession of an inmate, in an inmate's living quarters, or in common areas of the institution.

(b) Staff shall dispose of items seized as contraband in accordance with the following procedures.

(1) Staff shall return to the institution's issuing authority any item of government property seized as contraband, except where the item is needed as evidence for disciplinary action or criminal prosecution. In such cases, staff may retain the seized property as evidence.

(2) Items of personal property confiscated by staff as contraband are to be inventoried and stored pending identification of the true owner (if in question) and possible disciplinary action. Following an inventory of the confiscated items, staff shall employ the following procedures.

(i) Staff shall provide the inmate with a copy of the inventory as soon as practicable. A copy of this inventory shall also be placed in the inmate's central file.

(ii) The inmate shall have seven days following receipt of the inventory to provide staff with evidence of ownership of the listed items. A claim of ownership may not be accepted for an item made from the unauthorized use of government property. Items obtained from another inmate (for example, through purchase, or as a gift) without staff authorization may be considered nuisance contraband for which a claim of ownership is ordinarily not accepted.

(iii) If the inmate establishes ownership, but the item is identified as contraband, staff shall mail such items (other than hard contraband), at the inmate's expense, to a destination of the inmate's choice. The Warden or designee may authorize the institution to pay the cost of such mailings when the item had not been altered and originally had been permitted for admission to the institution or had been purchased from the commissary, or where the inmate has insufficient funds and no likelihood of new funds being received. Where the inmate has established ownership of a contraband item, but is unwilling, although financially able to pay postage as required, or refuses to provide a mailing address for return of the property, the property is to be disposed of through approved methods, including destruction of the property.

(iv) If the inmate is unable to establish ownership, staff shall make reasonable efforts to identify the owner of the property before any decision to destroy the property is made.

(v) Staff shall prepare and retain written documentation describing any items destroyed and the reasons for such action.

(vi) Where disciplinary action is appropriate, staff shall delay disposition of property until completion of such action (including appeals).

(c) Staff shall retain items of hard contraband for disciplinary action or prosecution or both. The contraband items may be delivered to law enforcement personnel for official use. When it is determined that the item is not needed for criminal prosecution, the hard contraband shall be destroyed as provided in paragraph (b)(2)(v) of this section. Written documentation of the destruction shall be maintained for at least two years.

(d) Staff may not allow an inmate to possess funds in excess of established institutional limits. Staff shall deliver to the cashier any cash or negotiable instruments found in an inmate's possession which exceed the institution's allowable limits. Funds determined to be contraband shall be confiscated for crediting to the U.S. Treasury.

(1) Where disciplinary action against the inmate is appropriate, staff shall delay final disposition of the funds until such action (including appeals) is completed.

(2) Prior to a decision on the disposition of funds, staff shall allow the inmate a reasonable amount of time to prove ownership.

[48 FR 19573, Apr. 29, 1983, as amended at 64 FR 36754, July 7, 1999]

§ 553.14 Inmate transfer between institutions and inmate release.

(a) Except as provided for in paragraphs (a)(1) through (3) of this section, authorized personal property shall be shipped by staff to the receiving institution.

(1) The Warden ordinarily shall allow an inmate transferring to another institution to transport personal items determined necessary or appropriate by staff and, if applicable, legal materials for active court cases.

(2) The Warden may require or allow an inmate who is transferring to another institution under furlough conditions to transport all the inmate's authorized personal property with him or her.

(3) An inmate who is being released or who is transferring to a Community Corrections Center may arrange to ship personal property at the inmate's expense. The inmate is responsible for transporting any personal property not so shipped.

(b) If the inmate's personal property is not authorized for retention by the receiving institution, staff at the receiving institution shall arrange for the inmate's excess personal property to be mailed to a non-Bureau destination of the inmate's choice. The inmate shall bear the expense for this mailing.

(c) Whenever the inmate refuses to provide a mailing address for return of the property or, when required, refuses to bear the expense of mailing the property, the property is to be disposed of through approved methods, including destruction of the property.

[64 FR 36754, July 7, 1999]

§ 553.15 Limitations on personal property—medical transfers.

The Warden shall set a limit on the amount of personal property that may accompany an inmate transferring to a medical facility. For purpose of this rule, a medical facility is one which provides observation and/or treatment of a medical, surgical, or psychiatric nature, or any combination of these. Such medical transfers are ordinarily of a short-term duration (30–120 days).

(a) The Wardens of the sending and receiving institutions shall allow the inmate to retain those legal materials specifically needed in respect to ongoing litigation. Questions as to the need for such material may be referred to Regional Counsel.

(b) The Warden of the sending institution shall designate a secure location for storage of all inmate personal property not accompanying the inmate.

(c) Personal property permitted in the sending institution, but not in the receiving institution, shall either be retained at the sending institution or be mailed to a destination of the inmate's choice.

(1) If the inmate is expected to return to the sending institution within 120 days of transfer, staff shall advise the inmate that property not allowed in the medical facility may be held at the sending institution or sent to a destination of the inmate's choice (other than the medical facility), at the inmate's expense. Where lack of space prevents retention of the inmate's property at the sending institution, that institution shall pay postage costs connected with mailing the inmate's

property to a destination of the inmate's choice. Where lack of space prevents the retention of the inmate's property at the sending institution, and the inmate refuses to provide a mailing address for return of the property, the property is to be disposed of through approved methods, including destruction of the property.

(2) The inmate's property may be sent with the inmate to the medical facility when the inmate is not expected to return to the sending institution, will be at the medical facility over 120 days, or for any other justified reason. The Warden at the sending institution shall prepare and place in the inmate's central file written documentation for forwarding the inmate's personal property.

(d) The Warden of the medical facility shall return an inmate's personal property ordinarily in the same or equivalent size container as originally used by the sending institution. Property accumulated over that amount, at the option of the inmate, will either be sent to a destination selected by the inmate, at the inmate's expense, donated, or destroyed. If the inmate is financially able but refuses to pay for the mailing, or if the inmate refuses to provide a mailing address for forwarding of the property, the property is to be disposed of through approved methods, including destruction of the property.

SUBCHAPTER D—COMMUNITY PROGRAMS AND RELEASE

PART 570—COMMUNITY PROGRAMS

Subpart A [Reserved]

Subpart B—Pre-Release Community Confinement

Sec.
570.20 Purpose.
570.21 Time-frames.
570.22 Designation.

Subpart C—Furloughs

570.30 Purpose.
570.31 Inmate eligibility for furloughs.
570.32 Types of furloughs.
570.33 Justification for furlough.
570.34 Expenses of furlough.
570.35 Transfer furlough eligibility requirements.
570.36 Non-transfer furlough eligibility requirements.
570.37 Procedures to apply for a furlough.
570.38 Conditions of Furlough.

Subpart D—Escorted Trips

570.40 Purpose and scope.
570.41 Medical escorted trips.
570.42 Non-medical escorted trips.
570.43 Inmates requiring a high degree of control and supervision.
570.44 Supervision and restraint requirements.
570.45 Violation of escorted trip.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 751, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166, 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Subpart A [Reserved]

Subpart B—Pre-Release Community Confinement

SOURCE: 73 FR 62443, Oct. 21, 2008, unless otherwise noted.

§ 570.20 Purpose.

The purpose of this subpart is to provide the procedures of the Bureau of Prisons (Bureau) for designating inmates to pre-release community confinement or home detention.

(a) *Community confinement* is defined as residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community correctional facility (including residential re-entry centers); and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours.

(b) *Home detention* is defined as a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office or other monitoring authority.

§ 570.21 Time-frames.

(a) *Community confinement*. Inmates may be designated to community confinement as a condition of pre-release custody and programming during the final months of the inmate's term of imprisonment, not to exceed twelve months.

(b) *Home detention*. Inmates may be designated to home detention as a condition of pre-release custody and programming during the final months of the inmate's term of imprisonment, not to exceed the shorter of ten percent of the inmate's term of imprisonment or six months.

(c) *Exceeding time-frames*. These time-frames may be exceeded when separate statutory authority allows greater periods of community confinement as a condition of pre-release custody.

§ 570.22 Designation.

Inmates will be considered for pre-release community confinement in a manner consistent with 18 U.S.C. section 3621(b), determined on an individual basis, and of sufficient duration to provide the greatest likelihood of successful reintegration into the community, within the time-frames set forth in this part.

Subpart C—Furloughs

SOURCE: 76 FR 1517, Jan. 11, 2011, unless otherwise noted.

§ 570.30 Purpose.

The purpose of this subpart is to describe the procedures governing the furlough program of the Federal Bureau of Prisons (Bureau), which is authorized by 18 U.S.C. 3622. Under the furlough program, the Bureau allows inmates who meet certain requirements to be temporarily released from custody under carefully prescribed conditions.

§ 570.31 Inmate eligibility for furloughs.

(a) *Eligible inmates*. The following types of inmates may be eligible for furloughs:

(1) Sentenced inmates housed in Bureau facilities.

(2) Pretrial inmates housed in Bureau facilities (provided that they comply with the requirements of 28 CFR part 551, Subpart J).

(3) Sentenced inmates housed in Bureau facilities and classified as central inmate monitoring cases (provided that they comply with the requirements of 28 CFR part 524, Subpart F).

(b) *Ineligible inmates*. The following types of inmates are not eligible for furloughs:

(1) Sentenced inmates housed in contract facilities are not eligible to participate in the Bureau's furlough program under these rules, but may apply for furloughs as specified in that facility's written agreement with the Bureau.

(2) Inmates who are U.S. Marshals prisoners housed in contract facilities are not eligible to participate, but must direct any furlough requests to the U.S. Marshals.

§ 570.32 Types of furloughs.

A furlough is an authorized absence from an institution by an inmate who is not under escort of a staff member, U.S. Marshal, or state or federal agents. The two types of furloughs are:

(a) *Transfer furlough*—A furlough for the purpose of transferring an inmate from one Bureau facility to another, a non-federal facility, or community confinement (including home confinement) as noted below at § 570.33(a).

(b) *Non-transfer furlough*—A furlough for any purpose other than a transfer furlough, and which may be defined based on its nature, as either emergency or routine, as follows:

(1) *Emergency furlough*—A furlough allowing an inmate to address a family crisis or other urgent situation as noted below at § 570.33(b).

(2) *Routine furlough*—A furlough for any of the reasons noted below at § 570.33 (a) and (c) through (j).

(c) *Duration and distance of non-transfer furlough*—

(1) *Day furlough*—A furlough within the geographic limits of the commuting area of the institution, which lasts 16 hours or less and ends before midnight.

(2) *Overnight furlough*—A furlough which falls outside the criteria of a day furlough.

§ 570.33 Justification for furlough.

The Warden or designee may authorize a furlough, for 30 calendar days or less, for an inmate to:

(a) Transfer directly to another Bureau institution, a non-federal facility, or community confinement;

(b) Be present during a crisis in the immediate family, or in other urgent situations;

(c) Participate in the development of release plans;

(d) Establish or reestablish family and community ties;

(e) Participate in selected educational, social, civic, and religious activities which will facilitate release transition;

(f) Appear in court in connection with a civil action;

(g) Comply with an official request to appear before a grand jury, or to comply with a request from a legislative body, or regulatory or licensing agency;

(h) Appear in or prepare for a criminal court proceeding, but only when the use of a furlough is requested or recommended by the applicable court or prosecuting attorney;

(i) Participate in special training courses or in institution work assignments, including Federal Prison Industries (FPI) work assignments, when

daily commuting from the institution is not feasible; or

(j) Receive necessary medical, surgical, psychiatric, or dental treatment not otherwise available.

§ 570.34 Expenses of furlough.

All expenses of a furlough, including transportation, food, lodging, and incidentals, are the responsibility of the inmate, the inmate's family, or other appropriate source approved by the Warden, except that the government may bear the expense of a furlough if it is for the government's primary benefit.

§ 570.35 Transfer furlough eligibility requirements.

(a) Inmates transferring to administrative, low, medium, or high security facilities are generally not eligible for participation in the Bureau's transfer furlough program.

(b) For a transfer furlough, inmates other than those described in paragraph (a) of this section must:

(1) Be physically and mentally capable of completing the furlough; and

(2) Demonstrate sufficient responsibility to provide reasonable assurance that furlough requirements will be met.

(c) Inmates transferring to minimum security facilities must meet the requirements described in paragraph (b) of this section, and must also be:

(1) Transferring from a low or minimum security facility; and

(2) Appropriate for placement in a minimum security facility based on the inmate's security designation and custody classification at the time of transfer.

(d) Inmates transferring to community confinement must meet the requirements described in paragraph (b) of this section, and must also be appropriate for placement in community confinement based on the inmate's security designation and custody classification at the time of transfer.

§ 570.36 Non-transfer furlough eligibility requirements.

(a) An inmate may be eligible for a non-transfer furlough if the inmate meets the criteria described in 570.35(b) and the following additional criteria:

If an inmate has . . .	Then the inmate may only be considered for . . .
been confined at the initially designated institution for less than 90 days.	an emergency furlough.
more than two years remaining until the projected release date.	an emergency furlough.
2 years or less remaining until the projected release date.	an emergency furlough or a routine day furlough.
18 months or less remaining until the projected release date.	an emergency furlough, a routine day furlough, or a routine overnight furlough within the institution's commuting area.
1 year or less remaining until the projected release date.	an emergency furlough, a routine day furlough, or a routine overnight furlough either within or outside the institution's commuting area.

(b) Ordinarily, Wardens will not grant a furlough to an inmate if:

(1) The inmate is convicted of a serious crime against a person;

(2) The inmate's presence in the community could attract undue public attention, create unusual concern, or diminish the seriousness of the offense; or

(3) The inmate has been granted a furlough in the past 90 days.

§ 570.37 Procedures to apply for a furlough.

(a) *Application*. Inmates may submit a furlough application to staff, who will review it for compliance with these regulations and Bureau policy.

(b) *Notification of decision*. An inmate will be notified of the Warden's decision on the furlough application. Where a furlough application is denied, the inmate will be notified of the reasons for the denial.

(c) *Appeal*. An inmate may appeal any aspect of the furlough program through the Administrative Remedy Program, 28 CFR Part 542, Subpart B.

§ 570.38 Conditions of Furlough.

(a) An inmate who violates the conditions of a furlough may be considered an escapee under 18 U.S.C. 4082 or 18 U.S.C. 751, and may be subject to criminal prosecution and institution disciplinary action.

(b) A furlough will only be approved if an inmate agrees to the following

conditions and understands that, while on furlough, he/she:

(1) Remains in the legal custody of the U.S. Attorney General, in service of a term of imprisonment;

(2) Is subject to prosecution for escape if he/she fails to return to the institution at the designated time;

(3) Is subject to institution disciplinary action, arrest, and criminal prosecution for violating any condition(s) of the furlough;

(4) May be thoroughly searched and given a urinalysis, breathalyzer, and other comparable test, during the furlough or upon return to the institution, and must pre-authorize the cost of such test(s) if the inmate or family members are paying the other costs of the furlough. The inmate must pre-authorize all testing fee(s) to be withdrawn directly from his/her inmate deposit fund account;

(5) Must contact the institution (or United States Probation Officer) in the event of arrest, or any other serious difficulty or illness; and

(6) Must comply with any other special instructions given by the institution.

(c) While on furlough, the inmate must not:

(1) Violate the laws of any jurisdiction (federal, state, or local);

(2) Leave the area of his/her furlough without permission, except for traveling to the furlough destination, and returning to the institution;

(3) Purchase, sell, possess, use, consume, or administer any narcotic drugs, marijuana, alcohol, or intoxicants in any form, or frequent any place where such articles are unlawfully sold, dispensed, used, or given away;

(4) Use medication that is not prescribed and given to the inmate by the institution medical department or a licensed physician;

(5) Have any medical/dental/surgical/psychiatric treatment without staff's written permission, unless there is an emergency. Upon return to the institution, the inmate must notify institution staff if he/she received any prescribed medication or treatment in the community for an emergency;

(6) Possess any firearm or other dangerous weapon;

(7) Get married, sign any legal papers, contracts, loan applications, or conduct any business without staff's written permission;

(8) Associate with persons having a criminal record or with persons who the inmate knows to be engaged in illegal activities without staff's written permission;

(9) Drive a motor vehicle without staff's written permission, which can only be obtained if the inmate has proof of a currently valid driver's license and proof of appropriate insurance; or

(10) Return from furlough with anything the inmate did not take out with him/her (for example, clothing, jewelry, or books).

Subpart D—Escorted Trips

SOURCE: 50 FR 48366, Nov. 22, 1985, unless otherwise noted.

§ 570.40 Purpose and scope.

The Bureau of Prisons provides approved inmates with staff-escorted trips into the community for such purposes as receiving medical treatment not otherwise available, for visiting a critically-ill member of the inmate's immediate family, or for participating in program or work-related functions.

§ 570.41 Medical escorted trips.

(a) Medical escorted trips are intended to provide an inmate with medical treatment not available within the institution. There are two types of medical escorted trips.

(1) *Emergency medical escorted trip.* An escorted trip occurring as the result of an unexpected life-threatening medical situation requiring immediate medical treatment not available at the institution. The required treatment may be on either an in-patient or out-patient basis.

(2) *Non-emergency medical escorted trip.* A pre-planned escorted trip for the purpose of providing an inmate with medical treatment ordinarily not available at the institution. The required treatment may be on either an in-patient or out-patient basis.

(b) The Clinical Director or designee is responsible for determining whether a medical escorted trip is appropriate.

(c) *Escorted trip procedures—out-patient medical treatment.* A recommendation for an inmate to receive a medical escorted trip is prepared by medical staff, forwarded through the appropriate staff for screening and clearance, and then submitted to the Warden for review. The Warden may approve an inmate for an out-patient medical escorted trip.

(d) *Escorted trip procedures—in-patient medical treatment.* A recommendation for an inmate to receive a medical escorted trip is prepared by medical staff, forwarded through the appropriate staff for screening and clearance, and then submitted to the Warden. The Warden may approve an inmate for an in-patient medical escorted trip.

[50 FR 48366, Nov. 22, 1985, as amended at 57 FR 21158, May 18, 1992]

§ 570.42 Non-medical escorted trips.

(a) Non-medical escorted trips allow an inmate to leave the institution under staff escort for approved, non-medical reasons. There are two types of non-medical escorted trips.

(1) *Emergency non-medical escorted trip.* An escorted trip for such purposes as allowing an inmate to attend the funeral of, or to make a bedside visit to, a member of an inmate's immediate family. For purposes of this rule, immediate family refers to mother, father, brother, sister, spouse, children, step-parents, and foster parents.

(2) *Non-emergency, non-medical escorted trip.* An escorted trip for such purposes as allowing inmates to participate in program-related functions, such an educational or religious activities, or in work-related functions.

(b) *Escorted trip procedures—emergency non-medical reasons.* Unit staff are to investigate, and determine, the merits of an escorted trip following a review of the available information. This includes contacting those persons (e.g., attending physician, hospital staff, funeral home staff, family members, U.S. Probation Officer) who can contribute to a determination on whether an escorted trip should be approved.

(1) The government assumes the salary expenses of escort staff for the first eight hours of each day. All other expenses, including transportation costs, are assumed by the inmate, the inmate's family, or other appropriate source approved by the Warden. The necessary funds must be deposited to the inmate's trust fund account prior to the trip. Funds paid by the inmate for purposes of the escorted trip are then drawn, payable to the Treasury of the United States. Unexpended funds are returned to the inmate's trust fund account following the completion of the trip.

(2) A request for an inmate to receive an emergency non-medical escorted trip is prepared by unit staff, forwarded through the appropriate staff for screening and clearance, and then submitted to the Warden. Except as specified in § 570.43, the Warden may approve an inmate for an emergency non-medical escorted trip.

(c) *Escorted trip procedures—non-emergency, non-medical reasons.* This type of escorted trip is considered for an inmate who has been at the institution for at least 90 days, and who is considered eligible for less secure housing and for work details, under minimal supervision, outside the institution's perimeter. A recommendation for an inmate to receive an escorted trip for non-emergency, non-medical reasons is prepared by the recommending staff, forwarded through the appropriate staff for screening and clearance, and then submitted to the Warden. Except as specified in § 570.43, the Warden may approve an inmate for a non-emergency, non-medical escorted trip.

§ 570.43 Inmates requiring a high degree of control and supervision.

Only the Regional Director may approve a non-medical escorted trip (either emergency or non-emergency) for an inmate determined to require a high degree of control and supervision.

§ 570.44 Supervision and restraint requirements.

Inmates under escort will be within the constant and immediate visual supervision of escorting staff at all times. Restraints may be applied to an inmate going on an escorted trip, after considering the purpose of the escorted trip and the degree of supervision required by the inmate. Except for escorted

trips for a medical emergency, an inmate going on an escorted trip must agree in writing to the conditions of the escorted trip (for example, agrees not to consume alcohol).

§ 570.45 Violation of escorted trip.

(a) Staff shall process as an escapee an inmate who absconds from an escorted trip.

(b) Staff may take disciplinary action against an inmate who fails to comply with any of the conditions of the escorted trip.

PART 571—RELEASE FROM CUSTODY

Subpart A [Reserved]

Subpart B—Release Preparation Program

Sec.
571.10 Purpose and scope.
571.11 Program responsibility.
571.12 General characteristics.
571.13 Institution release preparation program.

Subpart C—Release Gratuities, Transportation, and Clothing

571.20 Purpose and scope.
571.21 Procedures.
571.22 Release clothing and transportation.

Subpart D—Release of Inmates Prior to a Weekend or Legal Holiday

571.30 Purpose and scope.

Subpart E—Petition for Commutation of Sentence

571.40 Purpose and scope.
571.41 Procedures.

Subpart F—Fines and Costs

571.50 Purpose and scope.
571.51 Definitions.
571.52 Procedures—committed fines.
571.53 Determination of indigency by U.S. Magistrate—inmates in federal institutions.
571.54 Determination of indigency by U.S. Magistrate Judge—inmates in contract community-based facilities or state institutions.

Subpart G—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 3582(c)(1)(A) and 4205(g))

571.60 Purpose and scope.
571.61 Initiation of request—extraordinary or compelling circumstances.
571.62 Approval of request.
571.63 Denial of request.
571.64 Ineligible offenders.

Subpart H—Designation of Offenses for Purposes of 18 U.S.C. 4042(c)

571.71 Purpose and scope.
571.72 Additional designated offenses.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3565; 3568 and 3569 (Repealed in part as to offenses committed on or after November 1, 1987), 3582, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 and 4201–4218 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5031–5042; 28 U.S.C. 509 and 510; U.S. Const., Art. II, Sec. 2; 28 CFR 1.1–1.10; D.C. Official Code sections 24–101, 24–461, 24–465, 24–467, and 24–468.

SOURCE: 44 FR 38254, June 29, 1979, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Release Preparation Program

SOURCE: 59 FR 35456, July 11, 1994, unless otherwise noted.

§ 571.10 Purpose and scope.

The Bureau of Prisons recognizes that an inmate's preparation for release begins at initial commitment and continues throughout incarceration and until final release to the community. This subpart establishes a standardized release preparation program for all sentenced inmates reintegrating into the community from Bureau facilities. Exception to this subpart may be made by the Warden of a Bureau facility which has been designated as an administrative maximum security institution.

[61 FR 38043, July 22, 1996]

§ 571.11 Program responsibility.

The Warden shall designate to a staff member the responsibility to:

(a) Determine the general release needs of the inmate population;

(b) Coordinate the institution release preparation program;

(c) Chair the Release Preparation Program Committee;

(d) Contact and schedule volunteers from the local community to participate in the release preparation program.

§ 571.12 General characteristics.

(a) Staff shall structure the release preparation program to make extensive use of staff, inmate, and community resources.

(b) Staff shall strongly encourage and support an inmate's participation in the institution release preparation program. Staff shall document the inmate's participation in the program in the inmate's central file.

§ 571.13 Institution release preparation program.

(a) The institution release preparation program shall be administered by the Release Preparation Program Committee.

(b) The institution release preparation program will be based on a core curriculum of topics/courses organized into six broad categories. The six categories are:

(1) Health and nutrition.

(2) Employment.

(3) Personal finance/consumer skills.

(4) Information/community resources.

(5) Release requirements and procedures.

(6) Personal growth and development.

(c) To assist in the release process, the Warden may, in accordance with the Bureau of Prisons' rule on furloughs, grant an inmate a furlough for release preparation purposes.

(d) Staff shall help an inmate obtain proper identification (social security card, driver's license, birth certificate, and/or any other documents needed by the inmate) prior to release.

(e) An inmate who is not being released through a Community Corrections Center (CCC) may ask staff to request the assistance of a United States Probation Officer in establishing a release plan. Bureau staff are to encourage the inmate to give at least one employment lead or contact. Where the inmate or the inmate's family has already identified employment, the case manager shall notify the United States Probation Officer so that the usual verification of release plans may be made. Where employment has not been identified, the case manager shall notify the United States Probation Officer of the employment need. This notification should ordinarily occur at least six weeks prior to the inmate's release.

Subpart C—Release Gratuities, Transportation, and Clothing

SOURCE: 56 FR 23480, May 21, 1991, unless otherwise noted.

§ 571.20 Purpose and scope.

It is the policy of the Bureau of Prisons that an inmate being released to the community will have suitable clothing, transportation to the inmate's release destination, and some funds to use until he or she begins to receive income. Based on the inmate's need and financial resources, a discretionary gratuity up to the amount permitted by statute may be granted.

[61 FR 47795, Sept. 10, 1996]

§ 571.21 Procedures.

(a) An inmate is eligible for a gratuity as determined by the availability of personal and community resources. Greater consideration may be given to an inmate without funds or community resources.

(b) A federal prisoner boarded in a non-federal facility is eligible for a release gratuity. The director of the non-federal facility housing federal inmates or the community corrections manager shall determine the amount of release gratuity in accordance with the purpose and scope of this regulation for federal inmates housed in non-federal facilities.

(c) An inmate who is without personal funds may receive a gratuity when transferred to a community corrections center. The amount shall enable the inmate to care for needs in transit and allow for the purchase of necessary personal items upon arrival.

(d) Staff shall provide the inmate released to a detainer with information on how to apply for a gratuity if released prior to expiration of the federal sentence.

(e) Staff will ensure that each alien released to immigration authorities for the purpose of release or transfer to a community corrections center has $10 cash. This provision does not apply to aliens being released for the purpose of deportation, exclusion, or removal, or to aliens detained or serving 60 days or less in contract facilities.

[56 FR 23480, May 21, 1991, as amended at 68 FR 34300, June 9, 2003]

§ 571.22 Release clothing and transportation.

(a) Staff shall provide release clothing appropriate for the time of year and the inmate's geographical destination. Upon request, work clothing will be provided. Nonavailability of work clothing may limit this practice.

(b) Inmates transferring to a community corrections center will be provided adequate clothing to complete a job search and perform work. Additionally, an outer garment, seasonably suited for the geographical destination will be provided.

(c) Transportation will be provided to an inmate's place of conviction or to his/her legal residence within the United States or its territories.

[56 FR 23480, May 21, 1991, as amended at 68 FR 34302, June 9, 2003]

Subpart D—Release of Inmates Prior to a Weekend or Legal Holiday

§ 571.30 Purpose and scope.

The Bureau of Prisons may release an inmate whose release date falls on a Saturday, Sunday, or legal holiday, on the last preceding weekday unless it is necessary to detain the inmate for another jurisdiction seeking custody under a detainer, or for any other reason which might indicate that the inmate should not be released until the inmate's scheduled release date.

(a) The release authority for inmates convicted of offenses occurring prior to November 1, 1987 is pursuant to 18 U.S.C. 4163. The number of days used under 18 U.S.C. 4163 may not be added to the number of days remaining to be served to release an inmate ''as if * * * on parole'' (18 U.S.C. 4164) who would otherwise have been released by expiration of sentence.

(b) The release authority for inmates sentenced under the provisions of the Sentencing Reform Act of the Comprehensive Crime Control Act of 1984 for offenses committed on/or after November 1, 1987 is pursuant to 18 U.S.C. 3624(a).

[54 FR 49070, Nov. 28, 1989]

Subpart E—Petition for Commutation of Sentence

§ 571.40 Purpose and scope.

An inmate may file a petition for commutation of sentence in accordance with the provisions of 28 CFR part 1.

(a) An inmate may request from the inmate's case manager the appropriate forms (and instructions) for filing a petition for commutation of sentence.

(b) When specifically requested by the U.S. Pardon Attorney, the Director, Bureau of Prisons will forward a recommendation on the inmate's petition for commutation of sentence.

[47 FR 9756, Mar. 5, 1982]

§ 571.41 Procedures.

(a) Staff shall suggest that an inmate who wishes to submit a petition for commutation of sentence do so through the Warden to the U.S. Pardon Attorney. This procedure allows institution staff to forward with the application the necessary supplemental information (for example, sentencing information, presentence report, progress report, pertinent medical records if the petition involves the inmate's health, etc.). Except as provided in paragraph (b) of this section, no Bureau of Prisons recommendation is to be forwarded with the package of material submitted to the U.S. Pardon Attorney.

(b) When specifically requested by the U.S. Pardon Attorney, the Director, Bureau of Prisons shall submit a recommendation on the petition. Prior to making a recommendation, the Director may request comments from the Warden at the institution where the inmate is confined. Upon review of those comments, the Director will forward a recommendation on the petition to the U.S. Pardon Attorney.

(c) When a petition for commutation of sentence is granted by the President of the United States, the U.S. Pardon Attorney will forward the original of the signed and sealed warrant of clemency evidencing the President's action to the Warden at the detaining institution, with a copy to the Director, Bureau of Prisons. The Warden shall deliver the original warrant to the affected inmate, and obtain a signed receipt for return to the U.S. Pardon Attorney. The Warden shall take such action as is indicated in the warrant of clemency.

(1) If a petition for commutation of sentence is granted, Bureau of Prisons staff shall recalculate the inmate's sentence in accordance with the terms of the commutation order.

(2) If the commutation grants parole eligibility, the inmate is to be placed on the appropriate parole docket.

(d) When a petition for commutation of sentence is denied, the U.S. Pardon Attorney ordinarily notifies the Warden, requesting that the Warden notify the inmate of the denial.

[47 FR 9756, Mar. 5, 1982, as amended at 57 FR 34663, Aug. 5, 1992; 75 FR 13681, Mar. 23, 2010]

Subpart F—Fines and Costs

SOURCE: 48 FR 48971, Oct. 21, 1983, unless otherwise noted.

§ 571.50 Purpose and scope.

This subpart establishes procedures for processing a fine, or fine and costs ordered by the court with respect to an inmate convicted of an offense committed before November 1, 1987. When the court orders a prisoner's confinement until payment of a fine, or fine and costs under 18 U.S.C. 3565, the Bureau of Prisons shall confine that inmate until the fine, or fine and costs are paid, unless the inmate qualifies for release under 18 U.S.C. 3569.

(a) An inmate held on the sole basis of his/her inability to pay such fine, or fine and costs, and whose non-exempt property does not exceed $20.00 may request discharge from imprisonment on the basis of indigency (see 18 U.S.C. 3569).

(b) Under 18 U.S.C. 3569, the determination of indigency may be made by a U.S. Magistrate Judge. Where the U.S. Magistrate Judge makes a finding of non-indigency based on the inmate's application for a determination of his ability to pay the committed fine, or fine and costs, staff shall refer the application to the appropriate United States Attorney for the purpose of making a final decision on the inmate's discharge under 18 U.S.C. 3569. It is to be noted that 18 U.S.C. 3569 provides for confining an inmate for nonpayment of a committed fine, or fine and costs.

[63 FR 4357, Jan. 28, 1998]

§ 571.51 Definitions.

(a) *Fine*—a monetary penalty associated with an offense imposed as part of a judgment and commitment. There are two types of fines.

(1) *Committed fine*—a monetary penalty imposed with a condition of imprisonment until the fine is paid.

(2) *Non-committed fine*—a monetary penalty which has no condition of confinement imposed.

(b) *Costs*—Monetary costs of the legal proceeding which the court may levy. Imposition of costs is similar in legal effect to imposition of a fine. The court may also impose costs with a condition of imprisonment.

[48 FR 48971, Oct. 21, 1983, as amended at 63 FR 4357, Jan. 28, 1998]

§ 571.52 Procedures—committed fines.

(a)(1) Promptly after the inmate's commitment, staff shall inform the inmate that there is a committed fine, or fine and costs on file, as part of the sentence. Staff shall then impound the inmate's trust fund account until the fine, or fine and costs is paid, except—

(i) The inmate may spend money from his/her trust fund account for the purchase of commissary items not exceeding the maximum monthly allowance authorized for such purchases.

(ii) Staff may authorize the inmate to make withdrawals from his/her trust fund account for emergency family, emergency personal needs or furlough purposes.

(2) This rule of impounding an inmate's trust fund account applies only when the inmate is confined in a federal institution. It does not apply to a

federal inmate confined in a state institution or a contract community-based facility.

(b) If the inmate pays the committed fine, or fine and costs, or staff have verified payment, staff shall document payment in the appropriate file and release the inmate's trust fund account from impoundment.

(c) Staff shall interview the inmate with an unpaid committed fine at least 75 days prior to the inmate's release date. Staff shall explain to the inmate that to secure release without paying the committed fine, or fine and costs in full, the inmate must make an application, on the appropriate form, to the U.S. Magistrate Judge for determination as to whether the inmate can be declared indigent under 18 U.S.C. 3569.

[63 FR 4357, Jan. 28, 1998]

§ 571.53 Determination of indigency by U.S. Magistrate—inmates in federal institutions.

(a) An inmate with a committed fine, or fine and costs who is imprisoned in a federal institution may make application for a determination of indigency directly to the U.S. Magistrate Judge in the district where the inmate is imprisoned under 18 U.S.C. 3569.

(b) After completion of the application, staff shall offer to forward the completed forms and any other applicable information the inmate chooses to the U.S. Magistrate Judge.

(c) If the U.S. Magistrate Judge finds that the inmate is indigent, the U.S. Magistrate Judge will administer the oath to the inmate. The inmate shall be released no earlier than the regularly established release date.

(d) If the U.S. Magistrate Judge finds that the inmate is not indigent, Bureau staff shall forward a referral package to the appropriate United States Attorney for a final determination as to the inmate's ability to pay the committed fine, or fine and costs.

[63 FR 4357, Jan. 28, 1998]

§ 571.54 Determination of indigency by U.S. Magistrate Judge—inmates in contract community-based facilities or state institutions.

(a) Inmates with a committed fine, or fine and costs may be transferred to contract community-based facilities, state institutions as boarders, or state institutions for service of federal sentences running concurrently with state sentences.

(b) Inmates with a committed fine, or fine and costs may be committed directly to contract community-based facilities or state institutions as boarders or may be designated to state institutions for service of federal sentences running concurrently with state sentences.

(c) An inmate with a committed fine, or fine and costs who is imprisoned in a contract community-based facility or state institution and desires to make application for a determination of ability to pay the committed fine, or fine and costs under 18 U.S.C. 3569 may make application directly to the U.S. Magistrate Judge.

(d) Upon receipt of a finding by the U.S. Magistrate Judge that the inmate is not indigent, Bureau staff shall forward a referral package to the appropriate United States Attorney for a final determination as to the inmate's ability to pay the committed fine, or fine and costs.

[63 FR 4357, Jan. 28, 1998]

Subpart G—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 3582(c)(1)(A) and 4205(g))

SOURCE: 59 FR 1238, Jan. 7, 1994, unless otherwise noted.

§ 571.60 Purpose and scope.

Under 18 U.S.C. 4205(g), a sentencing court, on motion of the Bureau of Prisons, may make an inmate with a minimum term sentence immediately eligible for parole by reducing the minimum term of the sentence to time served. Under 18 U.S.C. 3582(c)(1)(A), a sentencing court, on motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment of an inmate sentenced under the Comprehensive Crime Control Act of 1984. The Bureau uses 18 U.S.C. 4205(g) and 18 U.S.C. 3582(c)(1)(A) in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.

§ 571.61 Initiation of request—extraordinary or compelling circumstances.

(a) A request for a motion under 18 U.S.C. 4205(g) or 3582(c)(1)(A) shall be submitted to the Warden. Ordinarily, the request shall be in writing, and submitted by the inmate. An inmate may initiate a request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) only when there are particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing. The inmate's request shall at a minimum contain the following information:

(1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.

(2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.

(b) The Bureau of Prisons processes a request made by another person on behalf of an inmate in the same manner as an inmate's request. Staff shall refer a request received at the Central Office to the Warden of the institution where the inmate is confined.

[59 FR 1238, Jan. 7, 1994, as amended at 78 FR 13479, Feb. 28, 2013]

§ 571.62 Approval of request.

(a) The Bureau of Prisons makes a motion under 18 U.S.C. 4205(g) or 3582(c)(1)(A) only after review of the request by the Warden, the General Counsel, and either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals, and with the approval of the Director, Bureau of Prisons.

(1) The Warden shall promptly review a request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A). If the Warden, upon an investigation of the request determines that the request warrants approval, the Warden shall refer the matter in writing with recommendation to the Office of General Counsel.

(2) If the General Counsel determines that the request warrants approval, the General Counsel shall solicit the opinion of either the Medical Director or the Assistant Director, Correctional Programs Division depending upon the nature of the basis of the request. The General Counsel will solicit the opinion of the United States Attorney in the district in which the inmate was sentenced. With these opinions, the General Counsel shall forward the entire matter to the Director, Bureau of Prisons, for final decision, subject to the general supervision and direction of the Attorney General and Deputy Attorney General.

(3) If the Director, Bureau of Prisons, grants a request under 18 U.S.C. 4205(g), the Director will contact the U.S. Attorney in the district in which the inmate was sentenced regarding moving the sentencing court on behalf of the Bureau of Prisons to reduce the minimum term of the inmate's sentence to time served. If the Director, Bureau of Prisons, grants a request under 18 U.S.C. 3582(c)(1)(A), the Director will contact the U.S. Attorney in the district in which the inmate was sentenced regarding moving the sentencing court on behalf of the Director of the Bureau of Prisons to reduce the inmate's term of imprisonment to time served.

(b) Upon receipt of notice that the sentencing court has entered an order granting the motion under 18 U.S.C. 4205(g), the Warden of the institution where the inmate is confined shall schedule the inmate for hearing on the earliest Parole Commission docket. Upon receipt of notice that the sentencing court has entered an order granting the motion under 18 U.S.C. 3582(c)(1)(A), the Warden of the institution where the inmate is confined shall release the inmate forthwith.

(c) In the event the basis of the request is the medical condition of the inmate, staff shall expedite the request at all levels.

[59 FR 1238, Jan. 7, 1994, as amended at 78 FR 13479, Feb. 28, 2013; 78 FR 73084, Dec. 5, 2013]

§ 571.63 Denial of request.

(a) When an inmate's request is denied by the Warden, the inmate will receive written notice and a statement of

reasons for the denial. The inmate may appeal the denial through the Administrative Remedy Procedure (28 CFR part 542, subpart B).

(b) When an inmate's request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) is denied by the General Counsel, the General Counsel shall provide the inmate with a written notice and statement of reasons for the denial. This denial constitutes a final administrative decision.

(c) When the Director, Bureau of Prisons, denies an inmate's request, the Director shall provide the inmate with a written notice and statement of reasons for the denial within 20 workdays after receipt of the referral from the Office of General Counsel. A denial by the Director constitutes a final administrative decision.

(d) Because a denial by the General Counsel or Director, Bureau of Prisons, constitutes a final administrative decision, an inmate may not appeal the denial through the Administrative Remedy Procedure.

[59 FR 1238, Jan. 7, 1994, as amended at 78 FR 13479, Feb. 28, 2013]

§ 571.64 Ineligible offenders.

The Bureau of Prisons has no authority to initiate a request under 18 U.S.C. 4205(g) or 3582(c)(1)(A) on behalf of state prisoners housed in Bureau of Prisons facilities or D.C. Code offenders confined in federal institutions. The Bureau of Prisons cannot initiate such a motion on behalf of federal offenders who committed their offenses prior to November 1, 1987, and received non-parolable sentences.

Subpart H—Designation of Offenses for Purposes of 18 U.S.C. 4042(c)

SOURCE: 63 FR 69387, Dec. 16, 1998, unless otherwise noted.

§ 571.71 Purpose and scope.

The Director of the Bureau of Prisons is required to provide release and registration information (offender's name, criminal history, projected address, release conditions or restrictions) to state/local law enforcement and registration officials at least five calendar days prior to release of offenders who have been convicted of certain sexual offenses listed in 18 U.S.C. 4042(c)(4)(A) through (D). Under 18 U.S.C. 4042(c)(4)(E), the Attorney General is authorized to designate additional offenses as sexual offenses for the purpose of sex offender release notification and other related purposes. This authority has been delegated to the Director.

§ 571.72 Additional designated offenses.

The following offenses are designated as additional sexual offenses for purposes of 18 U.S.C. 4042(c):

(a) Any offense under the law of any jurisdiction that involved:

(1) Engaging in sexual contact with another person without obtaining permission to do so (forcible rape, sexual assault, or sexual battery);

(2) Possession, distribution, mailing, production, or receipt of child pornography or related paraphernalia;

(3) Any sexual contact with a minor or other person physically or mentally incapable of granting consent (indecent liberties with a minor, statutory rape, sexual abuse of the mentally ill, rape by administering a drug or substance);

(4) Any sexual act or contact not identified in paragraphs (a)(1) through (3) of this section that is aggressive or abusive in nature (rape by instrument, encouraging use of a minor for prostitution purposes, incest);

(5) An attempt to commit any of the actions described in paragraphs (a)(1) through (4) of this section.

(b) The following Defense Incident Based Reporting System (DIBRS) Code offenses under the Uniform Code of Military Justice:

(1) 120A (Rape);

(2) 120B1/2 (Carnal knowledge);

(3) 125A (Forcible sodomy);

(4) 125B1/2 (Sodomy of a minor);

(5) 133D (Conduct unbecoming an Officer [involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor]);

(6) 134–B6 (Prostitution involving a minor);

(7) 134–C1 (Indecent assault);

(8) 134–C4 (Assault with intent to commit rape);

(9) 134–C6 (Assault with intent to commit sodomy);

(10) 134–R1 (Indecent act with a minor);

(11) 134–R3 (Indecent language to a minor);

(12) 134–S1 (Kidnaping of a minor (by a person not a parent));

(13) 134–Z (Pornography involving a minor);

(14) 134–Z (Conduct prejudicial to good order and discipline (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor));

(15) 134–Y2 (Assimilative crime conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor)).

(16) 080–A (Attempt (to commit any offense listed in paragraphs (b)(1)–(15) of this section));

(17) 081–A (Conspiracy (to commit any offense listed in paragraphs (b)(1)–(15) of this section));

(18) 082–A (Solicitation (to commit any offense listed in paragraphs (b)(1)–(15) of this section)).

(c) The following District of Columbia Code offenses:

(1) § 22–501 (Assault) if it includes assault with the intent to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse;

(2) § 22–2012 (Sexual performances using minors—prohibited acts);

(3) § 22–2013 (Sexual performances using minors—penalties);

(4) § 22–2101 (Kidnaping) where the victim is a minor;

(5) § 22–2401 (Murder in the first degree) if it includes murder while committing or attempting to commit first degree sexual abuse;

(6) § 22–2704 (Abducting or enticing child from his or her home for purposes of prostitution; harboring such child);

(7) § 22–4102 (First degree sexual abuse);

(8) § 22–4103 (Second degree sexual abuse);

(9) § 22–4104 (Third degree sexual abuse);

(10) § 22–4105 (Fourth degree sexual abuse);

(11) § 22–4106 (Misdemeanor sexual abuse);

(12) § 22–4108 (First degree child sexual abuse);

(13) § 22–4109 (Second degree child sexual abuse);

(14) § 22–4110 (Enticing a child);

(15) § 22–4113 (First degree sexual abuse of a ward);

(16) § 22–4114 (Second degree sexual abuse of a ward);

(17) § 22–4115 (First degree sexual abuse of a patient or client);

(18) § 22–4116 (Second degree sexual abuse of a patient or client);

(19) § 22–4118 (Attempts to commit sexual offenses);

(20) § 22–4120 (Aggravating circumstances).

(21) § 22–103 (Attempts to commit crime) if it includes an attempt to commit any offense listed in paragraphs (c)(1)–(20) of this section.

PART 572—PAROLE

Subparts A–C [Reserved]

Subpart D—Parole and Mandatory Release Violator Reports

Sec.
572.30 Purpose and scope.
572.31 Procedures.

Subpart E—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 4205(g))

572.40 Compassionate release under 18 U.S.C. 4205(g).

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4205, 5015 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

Subparts A–C [Reserved]

Subpart D—Parole and Mandatory Release Violator Reports

§ 572.30 Purpose and scope.

The Bureau of Prisons provides the U.S. Parole Commission with a Violator Report for use at the revocation hearing of a parole or mandatory release violator, when that hearing is conducted in an institution of the Bureau of Prisons.

[45 FR 33941, May 20, 1980]

§ 572.31 Procedures.

Staff shall prepare the Violator Report to include the following information:

(a) The inmate's original offense, sentence imposed, date and district;

(b) Description of release procedure;

(c) Alleged violation(s) of parole or mandatory release;

(d) Inmate's comments concerning the alleged violation(s);

(e) An outline of the inmate's activities while under supervision on parole or mandatory release; and

(f) At the option of the inmate, statement of current release plans and available community resources.

[45 FR 33941, May 20, 1980]

Subpart E—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 4205(g))

§ 572.40 Compassionate release under 18 U.S.C. 4205(g).

18 U.S.C. 4205(g) was repealed effective November 1, 1987, but remains the controlling law for inmates whose offenses occurred prior to that date. For inmates whose offenses occurred on or after November 1, 1987, the applicable statute is 18 U.S.C. 3582(c)(1)(A). Procedures for compassionate release of an inmate under either provision are contained in 28 CFR part 571, subpart G.

[59 FR 1239, Jan. 7, 1994]

PARTS 573–599 [RESERVED]

CHAPTER VI—OFFICES OF INDEPENDENT COUNSEL, DEPARTMENT OF JUSTICE

Part		*Page*
600	General powers of Special Counsel	769
601	Jurisdiction of the Independent Counsel: Iran/Contra	772
602	Jurisdiction of the Independent Counsel: In re Franklyn C. Nofziger	772
603	Jurisdiction of the Independent Counsel: In re Madison Guaranty Savings & Loan Association	774
604–699	[Reserved]	

PART 600—GENERAL POWERS OF SPECIAL COUNSEL

Sec.
600.1 Grounds for appointing a Special Counsel.
600.2 Alternatives available to the Attorney General.
600.3 Qualifications of the Special Counsel.
600.4 Jurisdiction.
600.5 Staff.
600.6 Powers and authority.
600.7 Conduct and accountability.
600.8 Notification and reports by the Special Counsel.
600.9 Notification and reports by the Attorney General.
600.10 No creation of rights.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515–519.

SOURCE: 64 FR 37042, July 9, 1999, unless otherwise noted.

§ 600.1 Grounds for appointing a Special Counsel.

The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted and—

(a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.

§ 600.2 Alternatives available to the Attorney General.

When matters are brought to the attention of the Attorney General that might warrant consideration of appointment of a Special Counsel, the Attorney General may:

(a) Appoint a Special Counsel;

(b) Direct that an initial investigation, consisting of such factual inquiry or legal research as the Attorney General deems appropriate, be conducted in order to better inform the decision; or

(c) Conclude that under the circumstances of the matter, the public interest would not be served by removing the investigation from the normal processes of the Department, and that the appropriate component of the Department should handle the matter. If the Attorney General reaches this conclusion, he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials.

§ 600.3 Qualifications of the Special Counsel.

(a) An individual named as Special Counsel shall be a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies. The Special Counsel shall be selected from outside the United States Government. Special Counsels shall agree that their responsibilities as Special Counsel shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending on its complexity and the stage of the investigation.

(b) The Attorney General shall consult with the Assistant Attorney General for Administration to ensure an appropriate method of appointment, and to ensure that a Special Counsel undergoes an appropriate background investigation and a detailed review of ethics and conflicts of interest issues. A Special Counsel shall be appointed as a ''confidential employee'' as defined in 5 U.S.C. 7511(b)(2)(C).

§ 600.4 Jurisdiction.

(a) *Original jurisdiction.* The jurisdiction of a Special Counsel shall be established by the Attorney General. The Special Counsel will be provided with a specific factual statement of the matter to be investigated. The jurisdiction of a Special Counsel shall also include the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of

justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted.

(b) *Additional jurisdiction.* If in the course of his or her investigation the Special Counsel concludes that additional jurisdiction beyond that specified in his or her original jurisdiction is necessary in order to fully investigate and resolve the matters assigned, or to investigate new matters that come to light in the course of his or her investigation, he or she shall consult with the Attorney General, who will determine whether to include the additional matters within the Special Counsel's jurisdiction or assign them elsewhere.

(c) *Civil and administrative jurisdiction.* If in the course of his or her investigation the Special Counsel determines that administrative remedies, civil sanctions or other governmental action outside the criminal justice system might be appropriate, he or she shall consult with the Attorney General with respect to the appropriate component to take any necessary action. A Special Counsel shall not have civil or administrative authority unless specifically granted such jurisdiction by the Attorney General.

§ 600.5 Staff.

A Special Counsel may request the assignment of appropriate Department employees to assist the Special Counsel. The Department shall gather and provide the Special Counsel with the names and resumes of appropriate personnel available for detail. The Special Counsel may also request the detail of specific employees, and the office for which the designated employee works shall make reasonable efforts to accommodate the request. The Special Counsel shall assign the duties and supervise the work of such employees while they are assigned to the Special Counsel. If necessary, the Special Counsel may request that additional personnel be hired or assigned from outside the Department. All personnel in the Department shall cooperate to the fullest extent possible with the Special Counsel.

§ 600.6 Powers and authority.

Subject to the limitations in the following paragraphs, the Special Counsel shall exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney. Except as provided in this part, the Special Counsel shall determine whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of his or her duties and responsibilities.

§ 600.7 Conduct and accountability.

(a) A Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice. He or she shall consult with appropriate offices within the Department for guidance with respect to established practices, policies and procedures of the Department, including ethics and security regulations and procedures. Should the Special Counsel conclude that the extraordinary circumstances of any particular decision would render compliance with required review and approval procedures by the designated Departmental component inappropriate, he or she may consult directly with the Attorney General.

(b) The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. However, the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued. In conducting that review, the Attorney General will give great weight to the views of the Special Counsel. If the Attorney General concludes that a proposed action by a Special Counsel should not be pursued, the Attorney General shall notify Congress as specified in § 600.9(a)(3).

(c) The Special Counsel and staff shall be subject to disciplinary action for misconduct and breach of ethical duties under the same standards and to the same extent as are other employees of the Department of Justice. Inquiries into such matters shall be handled

through the appropriate office of the Department upon the approval of the Attorney General.

(d) The Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies. The Attorney General shall inform the Special Counsel in writing of the specific reason for his or her removal.

§ 600.8 Notification and reports by the Special Counsel.

(a) *Budget*. (1) A Special Counsel shall be provided all appropriate resources by the Department of Justice. Within the first 60 days of his or her appointment, the Special Counsel shall develop a proposed budget for the current fiscal year with the assistance of the Justice Management Division for the Attorney General's review and approval. Based on the proposal, the Attorney General shall establish a budget for the operations of the Special Counsel. The budget shall include a request for assignment of personnel, with a description of the qualifications needed.

(2) Thereafter, 90 days before the beginning of each fiscal year, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the following year. The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next year.

(b) *Notification of significant events*. The Special Counsel shall notify the Attorney General of events in the course of his or her investigation in conformity with the Departmental guidelines with respect to Urgent Reports.

(c) *Closing documentation*. At the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.

§ 600.9 Notification and reports by the Attorney General.

(a) The Attorney General will notify the Chairman and Ranking Minority Member of the Judiciary Committees of each House of Congress, with an explanation for each action—

(1) Upon appointing a Special Counsel;

(2) Upon removing any Special Counsel; and

(3) Upon conclusion of the Special Counsels investigation, including, to the extent consistent with applicable law, a description and explanation of instances (if any) in which the Attorney General concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.

(b) The notification requirement in paragraph (a)(1) of this section may be tolled by the Attorney General upon a finding that legitimate investigative or privacy concerns require confidentiality. At such time as confidentiality is no longer needed, the notification will be provided.

(c) The Attorney General may determine that public release of these reports would be in the public interest, to the extent that release would comply with applicable legal restrictions. All other releases of information by any Department of Justice employee, including the Special Counsel and staff, concerning matters handled by Special Counsels shall be governed by the generally applicable Departmental guidelines concerning public comment with respect to any criminal investigation, and relevant law.

§ 600.10 No creation of rights.

The regulations in this part are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative.

PART 601—JURISDICTION OF THE INDEPENDENT COUNSEL: IRAN/CONTRA

AUTHORITY: 28 U.S.C. 509, 510, and 515; 5 U.S.C. 301; Article II of the U.S. Constitution.

§ 601.1 Jurisdiction of the Independent Counsel: Iran/Contra.

(a) *The Independent Counsel.* Iran/Contra has jurisdiction to investigate to the maximum extent authorized by part 600 of this chapter whether any person or group of persons currently described in section 591 of title 28 of the U.S. Code, including Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals or organizations acting in concert with Lt. Col. North, or with other U.S. Government officials, has committed a violation of any federal criminal law, as referred to in section 591 of title 28 of the U.S. Code, relating in any way to:

(1) The direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, materiel, or funds to the Government of Iran, officials of that government, or persons, organizations or entities connected with or purporting to represent that government, or persons located in Iran;

(2) The direct or indirect sale, shipment, or transfer of military arms, materiel or funds to any government, entity, or persons acting, or purporting to act as an intermediary in any transaction above referred to in paragraph (a)(1) of this section;

(3) The financing or funding of any direct or indirect sale, shipment or transfer referred to in paragraph (a) (1) or (2) of this section;

(4) The diversion of the proceeds from any transaction described in paragraph (a) (1) or (2) of this section to or for any person, organization, foreign government, or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) The provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

(b) *The Independent Counsel.* Iran/Contra shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Oliver L. North, and any person or entity heretofore referred to, developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions who are reasonably believed to have committed a violation of any federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense.

(c) *The Independent Counsel.* Iran/Contra shall have prosecutorial jurisdiction to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of the federal criminal laws, in connection with the investigation authorized by part 600 of this chapter.

[52 FR 7272, Mar. 10, 1987; 52 FR 9241, Mar. 23, 1987]

PART 602—JURISDICTION OF THE INDEPENDENT COUNSEL: IN RE FRANKLYN C. NOFZIGER

AUTHORITY: 28 U.S.C. 509, 510, and 515; 5 U.S.C. 301.

§ 602.1 Independent Counsel: In re Franklyn C. Nofziger.

(a) The Independent Counsel: In re Franklyn C. Nofziger shall have jurisdiction to investigate to the maximum extent authorized by part 600 of this chapter whether Franklyn C. Nofziger committed a violation of any Federal criminal law, as referred to in 28 U.S.C. 591, and more specifically whether the aforesaid Franklyn C. Nofziger, who served as Assistant to the President from January 21, 1981 through January

22, 1982, and who was therefore prohibited by the provisions of 18 U.S.C. 207 from thereafter knowingly making certain types of oral or written communications, did violate any subsection of 18 U.S.C. 207 because of certain oral or written communications with departments or agencies of the U.S. Government (including but not limited to the White House or the Executive Office of the President) on behalf of Welbilt Electronic Die Corporation, Comet Rice, Inc., or any other person or entity, at any time during 1982 or 1983.

(b) The lndependent Counsel shall have jurisdiction and authority to investigate other allegations and evidence of violation of any Federal criminal law by Franklyn C. Nofziger, and/or any of his business associates who may have acted in concert with or aided or abetted Franklyn C. Nofziger, developed. during the Independent Counsel's investigation referred to in paragraph (a) of this section or connected with or arising out of that investigation, and to seek indictments and to prosecute any such persons or entities involved in any of the foregoing events or transactions that Independent Counsel believes constitute a Federal offense and that there is reasonable cause to believe that the admissible evidence probably will be sufficient to obtain and sustain a conviction (28 U.S.C. 594(f)) of any Federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including such persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense related to the prosecutorial jurisdiction of the Independent Counsel as herein established.

(c) The Independent Counsel: In re Franklyn C. Nofziger shall have jurisdiction to investigate to the maximum extent authorized by title 28 U.S.C. 594, whether the conduct of Edwin Meese III specified in this section constituted a violation of any federal criminal law, as referred to in 28 U.S.C. 591, and more specifically whether the federal conflict of interest laws, 18 U.S.C. 201–211, or any other provision of the federal criminal law, was violated by Mr. Meese's relationship or dealings at any time from 1981 to the present with any of the following: Welbilt Electronic Die Corporation/Wedtech Corporation (including any of its contracts with the U.S. Government, or efforts to obtain same); Franklyn C. Nofziger; E. Robert Wallach; W. Franklyn Chinn; and/or Financial Management International, Inc.

(d) The Independent Counsel: In re Franklyn C. Nofziger shall have jurisdiction and authority to investigate other allegations and evidence of violation of any federal criminal law by Edwin Meese III developed during the Independent Counsel's investigation referred to in paragraph (c) of this section, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions that Independent Counsel believes constitute a federal offense and that there is reasonable cause to believe that the admissible evidence probably will be sufficient to obtain and sustain a conviction (28 U.S.C. 594(f)) of any federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense related to the prosecutorial jurisdiction of the Independent Counsel as herein established.

(e) The Independent Counsel shall have prosecutorial jurisdiction to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of 28 U.S.C. 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of the Federal criminal laws, in connection with the investigation authorized by this regulation, and shall have all the powers and authority provided by the Ethics in Government Act of 1978, as amended, and specifically by 28 U.S.C. 594.

[52 FR 22439, June 12, 1987, as amended at 52 FR 22439, June 12, 1987; 52 FR 35544, Sept. 22, 1987]

PART 603—JURISDICTION OF THE INDEPENDENT COUNSEL: IN RE MADISON GUARANTY SAVINGS & LOAN ASSOCIATION

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, 543, unless otherwise noted.

§ 603.1 Jurisdiction of the Independent Counsel

(a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with:

(1) Madison Guaranty Savings & Loan Association;

(2) Whitewater Development Corporation; or

(3) Capital Management Services.

(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in paragraph (a) or (b) of this section.

(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or to bring civil actions against, any persons or entities involved in any of the matters referred to in paragraph (a), (b), or (c) of this section who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

[59 FR 5322, Feb. 4, 1994]

PARTS 604–699 [RESERVED]

CHAPTER VII—OFFICE OF INDEPENDENT COUNSEL

Part		*Page*
700	Production or disclosure of material or information of the Office of Independent Counsel	777
701	Procedures for disclosure of records under the Freedom of Information Act	787
702–799	[Reserved]	

PART 700—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION OF THE OFFICE OF INDEPENDENT COUNSEL

Subpart A—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974

Sec.
700.10 General provisions.
700.11 Request for access to records.
700.12 Responses to requests for access to records.
700.13 Form and content of Office responses.
700.14 Classified information.
700.15 Records in exempt systems of records.
700.16 Access to records.
700.17 Fees for access to records.
700.18 Appeals from denials of access.
700.19 Preservation of records.
700.20 Requests for correction of records.
700.21 Records not subject to correction.
700.22 Request for accounting of record disclosures.
700.23 Notice of subpoenas and emergency disclosures.
700.24 Security of systems of records.
700.25 Use and collection of social security numbers.
700.26 Employee standards of conduct.
700.27 Other rights and services.

Subpart B—Exemption of the Office of Independent Counsel's Systems of Records Under the Privacy Act

700.31 Exemption of the Office of Independent Counsel's systems of records—limited access.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 52 FR 48097, Dec. 18, 1987, unless otherwise noted.

Subpart A—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974

§ 700.10 General provisions.

(a) *Purpose and scope.* The subpart contains the regulations of the Office of Independent Counsel implementing the Privacy Act of 1974, 5 U.S.C. 552a. The regulations apply to all records that are contained in systems of records maintained by the Office of Independent Counsel and that are retrieved by an individual's name or personal identifier. These regulations set forth the procedures by which an individual may seek access under the Privacy Act to records pertaining to him, may request correction of such records, or may seek an accounting of disclosures of such records by the office.

(b) *Transfer of law-enforcement records.* The head of the Office, or his designee, is authorized to make written requests under 5 U.S.C. 552a(b)(7) for transfer of records maintained by other agencies that are necessary to carry out an authorized law-enforcement activity of the Office.

(c) *Definitions.* As used in this subpart, the following terms shall have the following meanings:

(1) *Agency* has the meaning given in 5 U.S.C. 551(1) and 5 U.S.C. 552a(a)(1).

(2) *Record* has the same meaning given in 5 U.S.C. 552(a)(4).

(3) *Request for access* means a request made pursuant to 5 U.S.C. 552a(d)(1).

(4) *Request for correction* means a request made pursuant to 5 U.S.C. 552a(d)(2).

(5) *Request for an accounting* means a request made pursuant to 5 U.S.C. 552a(c)(3).

(6) *Requester* means an individual who makes either a request for access, a request for correction, or a request for an accounting.

(7) *System of records* means a group of any group of any records under the control of the Office from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to that individual.

§ 700.11 Request for access to records.

(a) *Procedure for making requests for access to records.* An individual may request access to a record about him by appearing in person or by writing the Office. A requester in need of guidance in defining his request may write to the FOIA/PA Officer, Office of Independent Counsel, suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004. Both the envelope and the request itself should be marked: ''Privacy Act Request.''

(b) *Description of records sought.* A request for access to records must describe the records sought in sufficient detail to enable Office personnel to locate the system of records containing

the record with a reasonable amount of effort. Whenever possible, a request for access should describe the nature of the records sought, the date of the record or the period in which the record was compiled, and the name or identifying number of the system of records in which the requester believes the record is kept.

(c) *Agreement to pay fees.* The filing of a request for access to a record under this subpart shall be deemed to constitute an agreement to pay all applicable fees charged under § 700.17 up to $25.00. The Office shall confirm this agreement in its letter of acknowledgment to the requesters. When filing a request, a requester may specify a willingness to pay a greater amount, if applicable.

(d) *Verification of identity.* Any individual who submits a request for access to records must verify his identity in one of the following ways, unless the notice published in the FEDERAL REGISTER describing the relevant system of records provides otherwise.

(1) Any requester making a request in writing must state in his request his full name, current address, and date and place of birth. In addition, a requester must provide with his request an example of his signature, which shall be notarized. In order to facilitate the identification and location of the requested records, a requester may also, at his option, include in his request his Social Security number.

(2) Any requester submitting a request in person may provide to the Office a form of Official photographic identification, such as a passport or an identification badge. If a requester is unable to produce a form of photographic identification, he may provide to the Office two or more acceptable forms of identification (such as a driver's license or credit card) bearing his name and address.

(e) *Verification of guardianship.* The parent or guardian of a minor (or the guardian of a person judicially determined to be incompetent) who submits a request for access to the records of the minor or incompetent must establish:

(1) His own identity and the identity of the subject of the record, as required in paragraph (d) of this section,

(2) That he is the parent or guardian of the subject of the record, which may be proved by providing a copy of the subject's birth certificate showing parentage or by providing a court order establishing the guardianship, and

(3) That he seeks to act on behalf of the subject of the record.

§ 700.12 Responses to requests for access to records.

(a) *Authority to grant or deny requests.* The head of the Office, or his designee, is authorized to grant or deny any request for access to a record.

(b) *Initial action by the Office.* When the Office receives a request for access to a record in its possession, the Office shall promptly determine whether another Government agency is better able to determine whether the record is exempt, to any extent, from access. If the Office determines that it is the agency best able to determine whether the record is exempt, to any extent, from access, then the Office shall respond to the request. If the Office determines that it is not the agency best able to determine whether the record is exempt from access, the Office shall respond to the request, after consulting with the agency best able to determine whether the record is exempt from access. Under ordinary circumstances, the agency that generated or originated a requested record shall be presumed to be the agency best able to determine whether the record is exempt from access. However, nothing in this section shall prohibit the agency that generated or originated a requested record from consulting with the Office, if the agency that generated or originated the requested record determines that the Office has an interest in the requested record or the information contained therein.

(c) *Law-enforcement information.* Whenever a request for access is made for a record containing information that relates to an investigation of a possible violation of criminal law or to a criminal law-enforcement proceeding and that was generated or originated by another agency, the Office shall consult with that other agency, as appropriate.

(d) *Classified information.* Whenever a request for access is made for a record

containing information that has been classified, or that may be eligible for classification, by another agency under the provision of Executive Order 12356 or any other Executive order concerning the classification of records, the Office shall refer the responsibilities for responding to the request to the agency that classified the information or should consider the information for classification. Whenever a record contains information that has been derivatively classified by the Office because it contains information classified by another agency, the Office shall refer the responsibility for responding to the request to the agency that classified the underlying information; however, such referral shall extend only to the information classified by the other agency.

(e) *Agreements regarding consultations.* No provision of this section shall preclude formal or informal agreements between the Office and another agency, to eliminate the need for consultations concerning requests or classes of requests.

(f) *Date for determining responsive records.* In determining records responsive to a request for access, the Office ordinarily will include only those records within the Office's possession and control as of the date of its receipt of the request.

§ 700.13 Form and content of Office responses.

(a) *Form of notice granting request for access.* After the Office has made a determination to grant a request for access in whole or in part, the Office shall so notify the requester in writing. The notice shall describe the manner in which access to the record will be granted and shall inform the requester of any fees to be charged in accordance with § 700.17.

(b) *Form of notice denying request for access.* When the Office denies a request for access in whole or in part it shall so notify the requester in writing. The notice shall be signed by the head of the Office, or his designee, and shall include:

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

(2) A brief statement of the reason or reasons for the denial, including the Privacy Act exemption or exemptions that the Office has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under § 700.18(a) and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the Office shall so notify the requester in writing.

(d) *Medical records.* When an individual requests medical records pertaining to himself that are not otherwise exempt from individual access, the Office may advise the individual that the records will be provided only to a physician, designated by the individual, who requests the records and establishes his identity in writing. The designated physician shall determine which records should be provided to the individual and which records should not be disclosed to the individual because of possible harm to the individual or another person.

§ 700.14 Classified information.

In processing a request for access to a record containing information that is classified or classifiable under Executive Order 12356 or any other Executive order concerning the classification of records, the Office shall review the information to determine whether it warrants classification. Information that does not warrant classification shall not be withheld from a requester on the basis of 5 U.S.C. 552a(k)(1). The Office shall, upon receipt of any appeal involving classified or classifiable information, take appropriate action to ensure compliance with the provisions of Executive Order 12356.

§ 700.15 Records in exempt systems of records.

(a) *Law-enforcement records exempted under subsections (j)(2) and (k)(2).* Before denying a request by an individual for access to a law-enforcement record that has been exempted from access

pursuant to 5 U.S.C. 552a(k)(2), the Office must review the requested record to determine whether information in the record has been used or is being used to deny the individual any right, privilege, or benefit for which he would otherwise be eligible or to which he would otherwise be entitled under federal law. If so, the Office shall notify the requester of the existence of the record and disclose such information to the requester, except to the extent that the information would identify a confidential source. In cases when disclosure of information in a law-enforcement record could reasonably be expected to identify a confidential source, the record shall not be disclosed to the requester unless the Office is able to delete from such information all material that would identify the confidential source.

(b) *Employee background investigations.* When a requester requests access to a record pertaining to a background investigation and the record has been exempted from access pursuant to 5 U.S.C. 552a(k)(5), the record shall not be disclosed to the requester unless the Office is able to delete from such record all information that would identify a confidential source.

§ 700.16 Access to records.

(a) *Manner of access.* The Office, once it has made a determination to grant a request for access, shall grant the requester access to the requested record by—

(1) Providing the requester with a copy of the record or

(2) Making the record available for inspection by the requester at a reasonable time and place.

The Office shall in either case charge the requester applicable fees in accordance with the provisions of § 700.17. If the Office provides access to a record by making the record available for inspection by the requester, the manner of such inspection shall not unreasonably disrupt the operations of the Office.

(b) *Accompanying person.* A requester appearing in person to review his records may be accompanied by another individual of his own choosing. Both the requester and the accompanying person shall be required to sign a form stating that the Office of Independent Counsel is authorized to disclose the record in the presence of both individuals.

§ 700.17 Fees for access to records.

(a) *When charged.* The Office shall charge fees pursuant to 5 U.S.C. 552a(f)(5) for the copying of records to afford access to individuals unless the Office, in its discretion, waives or reduces the fees for good cause shown. The Office shall charge fees only at the rate of $0.10 per page. For materials other than paper copies, the Office may charge the direct costs of reproduction, but only if the requester has been notified of such costs before they are incurred. Fees shall not be charged when they would amount, in the aggregate, for one request or for a series of related requests, to less than $3.00. However, the Office may, in its discretion, increase the amount of this minimum fee.

(b) *Notice of estimated fees in excess of $25.* When the Office determines or estimates that the fees to be charged under this section may amount to more than $25, the Office shall notify the requester as soon as practicable of the actual or estimated amount of the fee, unless the requester has indicated in advance his willingness to pay a fee as high as that anticipated. (If only a portion of the fee can be estimated readily, the Office shall advise the requester that the estimated fee may be only a portion of the total fee.) When the estimated fee exceeds $25 and the Office has so notified the requester, the Office will be deemed not to have received the request for access to records until the requester has agreed to pay the anticipated fee. A notice to a requester pursuant to this paragraph shall offer him the opportunity to confer with Office personnel with the object of reformulating his request to meet his needs at a lower cost.

(c) *Form of payment.* Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(d) *Advance deposits.* (1) When the estimated fee chargeable under this section exceeds $25, the Office may require a requester to make an advance deposit of 25 percent of the estimated fee or an

advance payment of $25, whichever is greater.

(2) When a requester has previously failed to pay a fee charged under this part, the requester must pay the Office the full amount owed and make an advance deposit of the full amount of any estimated fee before the Office shall be required to process a new or pending request for access from that requester.

§ 700.18 Appeals from denials of access.

(a) *Appeals to Independent Counsel.* When the Office denies in whole or part a request for access to records, the requester may appeal the denial to Independent Counsel within 30 days of his receipt of the notice denying his request. An appeal to Independent Counsel shall be made in writing, addressed to the Office of Independent Counsel, suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004. Both the envelope and the letter of appeal itself must be clearly marked: ''Privacy Act Appeal.''

(b) *Action on appeals.* Unless Independent Counsel otherwise directs, he or his designee shall act on all appeals under this section, except that: A denial of a request for access by Independent Counsel, or his designee, shall constitute the final action of the Office on that request.

(c) *Form of action on appeal.* The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request for access shall include a brief statement of the reason or reasons for the affirmance, including each Privacy Act exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request for access is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

§ 700.19 Preservation of records.

The Office shall preserve all correspondence relating to the requests it receives under this subpart, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the U.S. Code. Under no circumstances shall records be destroyed while they are the subject of a pending request for access, appeal, or lawsuit under the Act.

§ 700.20 Requests for correction of records.

(a) *How made.* Unless a record is exempted from correction and amendment, an individual may submit a request for correction of a record pertaining to him. A request for correction must be made in writing. The request must identify the particular record in question, state the correction sought, and set forth the justification for the correction. Both the envelope and the request for correction itself must be clearly marked: ''Privacy Act Correction Request.''

(b) *Initial determination.* Within 10 working days of receiving a request for correction, the Office shall notify the requester whether his request will be granted or denied, in whole or in part. If the Office grants the request for correction in whole or in part, it shall advise the requester of his right to obtain a copy of the corrected record, in releasable form, upon request. If the Office denies the request for correction in whole or in part, it shall notify the requester in writing of the denial. The notice of denial shall state the reason or reasons for the denial and advise the requester of his right to appeal.

(c) *Appeals.* When a request for correction is denied in whole or in part, the requester may appeal the denial to Independent Counsel within 30 days of his receipt of the notice denying his request. An appeal to Independent Counsel shall be made in writing, shall set forth the specific item of information sought to be corrected, and shall include any documentation said to justify the correction. An appeal shall be addressed to the Office of Independent Counsel, suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004.

Both the envelope and the letter of appeal itself must be clearly marked: ''Privacy Act Correction Appeal.''

(d) *Determination on appeal.* Independent Counsel, or his designee, shall decide all appeals from denials or requests to correct records. All such appeals shall be decided within 30 working days of receipt of the appeal, unless there is good cause to extend this period. If the denial of a request is affirmed on appeal, the requester shall be so notified in writing and advised of—

(1) The reason or reasons the denial has been affirmed,

(2) The requester's right to file a Statement of Disagreement, as provided in paragraph (e) of this section, and

(3) The requester's right to obtain judicial review of the denial in the United States District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the record is located, or the District of Columbia.

If the denial is reversed on appeal, the requester shall be so notified and the request for correction shall be remanded to the Office for processing in accordance with the decision on appeal.

(e) *Statements of disagreement.* A requester whose appeal under this section is denied shall have the right to file a Statement of Disagreement with the Office of Independent Counsel, Suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004, within 30 days of receiving notice of denial of his appeal. Statements of disagreement may not exceed one typed page per fact disputed. Statements exceeding this limit shall be returned to the requester for condensation. Upon receipt of a statement of disagreement under this section, Independent Counsel, or his designee, shall have the statement included in the system of records in which the disputed record is maintained and shall have the disputed record marked so as to indicate—

(1) That a statement of disagreement has been filed, and

(2) Where in the system of records the statement of disagreement may be found.

(f) *Notices of correction or disagreement.* Within 30 working days of the correction of a record, the Office shall advise all agencies to which it previously disclosed the record that the record has been corrected. Whenever an individual has filed a statement of disagreement, the Office shall append a copy of the statement to the disputed record whenever the record is disclosed. The Office may also append to the disputed record any written statement it has made giving the Office's reasons for denying the request to correct the record.

§ 700.21 Records not subject to correction.

The following records are not subject to correction or amendment as provided in § 700.20:

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

(b) Transcripts of grand jury proceedings, judicial proceedings, or quasi-judicial proceedings that constitute the official record of such proceedings;

(c) Presentence records that are the property of the courts, but may be maintained by the Office in a system of records; and

(d) Records duly exempted from correction pursuant to 5 U.S.C. 552a(j) or 552a(k) by notice published in the FEDERAL REGISTER.

§ 700.22 Request for accounting of record disclosures.

(a) An individual may request the Office to provide him with an accounting of those other agencies to which the Office has disclosed the record, and the date, nature, and purpose of each disclosure. A request for an accounting must be made in writing and must identify the particular record for which the accounting is requested. The request also must be addressed to the Office and both the envelope and the request itself must clearly be marked: ''Privacy Act Accounting Request.''

(b) The Office shall not be required to provide an accounting to an individual to the extent that the accounting relates to—

(1) Records for which no accounting must be kept pursuant to 5 U.S.C. 552a(c)(1),

(2) Disclosures of records to law-enforcement agencies for lawful law-enforcement activities, pursuant to written requests from such law-enforcement agencies specifying records sought and the law-enforcement activities for which the records are sought, under 5 U.S.C. 552a (c)(3) and (b)(7), or

(3) Records for which an accounting need not be disclosed pursuant to 5 U.S.C. 552a (j) or (k).

(c) A denial of a request for an accounting may be appealed to Independent Counsel in the same manner as a denial of a request for access, with both the envelope and the letter of appeal itself clearly marked: ''Privacy Act Accounting Appeal.''

§ 700.23 Notice of subpoenas and emergency disclosures.

(a) *Subpoenas.* When records pertaining to an individual are subpoenaed by a grand jury, court, or quasi-judicial authority, the official served with the subpoena shall be responsible for ensuring that written notice of its service is forwarded to the individual. Notice shall be provided within 10 working days of the service of the subpoena or, in the case of a grand jury subpoena, within 10 working days of its becoming a matter of public record. Notice shall be mailed to the last known address of the individual and shall contain the following information: The date the subpoena is returnable, the court or quasi-judicial authority to which it is returnable, the name and number of the case of proceeding, and the nature of the records sought. Notice of the service of a subpoena is not required if the system of records has been exempted from the notice requirement of 5 U.S.C. 552a(e)(8), pursuant to 5 U.S.C. 552a(j), by a Notice of Exemption published in the FEDERAL REGISTER.

(b) *Emergency disclosures.* If the record of an individual has been disclosed to any person under compelling circumstances affecting the health or safety of any person, as described in 5 U.S.C. 552a(b)(8), the individual to whom the record pertains shall be notified of the disclosure at his last known address within 10 working days. The notice of such disclosure shall be in writing and shall state the nature of the information disclosed, the person or agency to whom it was disclosed, the date of disclosure, and the compelling circumstances justifying the disclosure. The officer who made or authorized the disclosure shall be responsible for providing such notification.

§ 700.24 Security of systems of records.

(a) The Office Administrator or Security Officer shall be responsible for issuing regulations governing the security of systems of records. To the extent that such regulations govern the security of automated systems of records, the regulations shall be consistent with the guidelines developed by the National Bureau of Standards.

(b) The Office shall establish administrative and physical controls to prevent unauthorized access to its systems of records, to prevent the unauthorized disclosure of records, and to prevent the unauthorized disclosure of records, and to prevent the physical damage or destruction of records. The stringency of such controls shall reflect the sensitivity of the records the controls protect. At a minimum, however, the Office's administrative and physical controls shall ensure that—

(1) Records are protected from public view,

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

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

(c) The Office shall establish rules restricting access to records to only those individuals within the Office who must have access to such records in order to perform their duties. The Office also shall adopt procedures to prevent the accidental disclosure of records or the accidental granting of access to records.

§ 700.25 Use and collection of social security numbers.

(a) Each system manager of a system of records that utilizes Social Security numbers as a method of identification without statutory authorization, or authorization by regulation adopted prior to January 1, 1975, shall take steps to

revise the system to avoid future collection and use of the Social Security numbers.

(b) The Office shall take such measures as are necessary to ensure that employees authorized to collect information from individuals are advised that individuals may not be required to furnish Social Security numbers without statutory or regulatory authorization and that individuals who are requested to provide Social Security numbers voluntarily must be advised that furnishing the number is not required and that no penalty or denial of benefits will flow from the refusal to provide it.

§ 700.26 Employee standards of conduct.

(a) The Office shall inform its employees of the provisions of the Privacy Act, including the Act's civil liability and criminal penalty provisions. The Office also shall notify its employees that they have a duty to—

(1) Protect the security of records,

(2) Assure the accuracy, relevance, timeliness, and completeness of records,

(3) Avoid the unauthorized disclosure, either verbal or written, of records, and

(4) Ensure that the Office maintains no system of records without public notice.

(b) Except to the extent that the Privacy Act permits such activities, an employee of the Office of Independent Counsel shall:

(1) Not collect information of a personal nature from individuals unless the employee is authorized to collect such information to perform a function or discharge a responsibility of the Office;

(2) Collect from individuals only that information that is necessary to the performance of the functions or to the discharge of the responsibilities of the Office;

(3) Collect information about an individual directly from that individual, whenever practicable;

(4) Inform each individual from whom information is collected of—

(i) The legal authority that authorizes the Office to collect such information,

(ii) The principal purposes for which the Office intends to use the information,

(iii) The routine uses the Office may make of the information, and

(iv) The effects upon the individual of not furnishing the information;

(5) Maintain all records that are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as to assure fairness to the individual in the determination;

(6) Except as to disclosures to an agency or pursuant to 5 U.S.C. 552a(b)(2), make reasonable efforts, prior to disseminating any record about an individual, to assure that such records are accurate, relevant, timely, and complete;

(7) Maintain no record concerning an individual's religious or political beliefs or activities, or his membership in associations or organizations, unless—

(i) The individual has volunteered such information for his own benefit,

(ii) A statute expressly authorizes the Office to collect, maintain, use or disseminate the information, or

(iii) The individual's beliefs, activities, or membership are pertinent to and within the scope of an authorized law-enforcement or correctional activity;

(8) Notify the head of the Office of the existence or development of any system of records that has not been disclosed to the public;

(9) When required by the Act, maintain an accounting in the prescribed form of all disclosures of records by the Office to agencies or individuals whether verbally or in writing;

(10) Disclose no record to anyone, except within the Office, for any use, unless authorized by the Act;

(11) Maintain and use records with care to prevent the inadvertent disclosure of a record to anyone; and

(12) Notify the head of the Office of any record that contains information that the Act or the foregoing provisions of this paragraph do not permit the Office to maintain.

(c) Not less than once a year, the head of each Office shall review the systems of records maintained by that Office to ensure that the Office is in

compliance with the provisions of the Privacy Act.

§ 700.27 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under 5 U.S.C. 552a.

Subpart B—Exemption of the Office of Independent Counsel's Systems of Records Under the Privacy Act

§ 700.31 Exemption of the Office of Independent Counsel's systems of records—limited access.

(a) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4); (d); (e)(1), (2) and (3); (e)(4) (G), (H) and (I); (e) (5) and (8); (f); and (g):

(1) General Files System of the Office of Independent Counsel (OIC/001).

These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1), (k)(2), and (k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest on the part of the Office of Independent Counsel as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law-enforcement personnel. Moreover, the release of the accounting of disclosures made under subsection (b) of the Act, including those disclosures permitted under the routine uses published for these systems would permit the subject of an investigation of an actual or potential criminal, civil or regulatory violation to determine whether he is the subject of an investigation or to obtain valuable information concerning the nature of the investigation, material compiled during the investigation, and the identity of witnesses and informants. Disclosure of the accounting would, therefore, present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) of the Act is specifically exempted for this system of records.

(2) From subsection (c)(4) because an exemption is being claimed under subsection (d) of the Act. This system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act. Subsection (c)(4), therefore, is inapplicable to this system of records.

(3) From subsection (d) because the records contained in this system relate to official federal investigations. Individual access to these records contained in this system would inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identities of witnesses and informants, or would provide information that could enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement because they could prevent the successful completion of the investigation, reveal confidential informants, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. Individual access also could constitute an unwarranted invasion of the personal privacy of third parties who are involved in an investigation. Amendment of the records would interfere with ongoing criminal-law enforcement proceedings and impose an impossible administrative burden.

(4) From subsections (e) (1) and (5) because, in the course of criminal or other law-enforcement investigation, cases and matters, the Office of Independent Counsel may occasionally obtain information concerning actual or potential violations of law that are not strictly within its authority or jurisdiction, or may compile information, the accuracy of which is unclear or

which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate and necessary to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigative process if it were necessary to ensure the relevance, accuracy, timeliness and completeness of all information obtained. In particular, this would restrict the ability of trained investigators, intelligence analysts, and government attorneys to exercise their judgment in reporting on information and investigations.

(5) From subsection (e)(2) because, in a criminal or other law-enforcement investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement. In such circumstances, the subject of the investigation or prosecution would be informed of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations or duties, as well as to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(6) From subsection (e)(3) because compliance with the requirements of this subsection during the course of an investigation could impede the information-gathering process, thus hampering the investigation. Furthermore, such requirements could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(7) From subsections (e)(4) (G) and (H) because this system is exempt from the individual-access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(8) From subsection (e)(4)(I) because the categories of sources of records in this system have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in these systems, exemption from this provision is necessary in order to protect the confidentiality of the sources of criminal and other law-enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(9) From subsection (e)(8) because the individual-notice requirements of subsection (e)(8) could present a serious impediment to law enforcement through interference with the Office of Independent Counsel's ability to issue subpoenas and the disclosure of its investigative techniques and procedures.

(10) From subsection (f) because this system is exempt from the individual-access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act. Furthermore, such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation or prosecution pending or future.

(11) From subsection (g) because this system is exempt from the individual-access and amendment provisions of subsection (d) and the provisions of subsection (f) pursuant to subsections (j) and (k) of the Privacy Act.

(c) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4), (G), (H) and (I); (e) (5) and (8); (f) and (g):

(1) Freedom of Information Act/Privacy Act Files (OIC/002). These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2,) and (k)(5).

(d) Because this system contains Office of Independent Counsel criminal law-enforcement investigatory records, exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting would permit the subject(s) of criminal investigations under investigation or in litigation to obtain valuable information concerning the nature of that investigation, matter or case and present a serious impediment to law-enforcement activities.

(2) From subsection (c)(4) because an exemption is being claimed for subsection (d) of the Act, rendering this subsection inapplicable to the extent that this system of records is exempted from subsection (d).

(3) From subsection (d) because access to the records contained in this system would inform the subject of criminal investigation or case of the existence of such, and provide the subject with information that might enable him to avoid detection, apprehension or legal obligations, and present a serious impediment to law enforcement and other civil remedies. Amendment of the records would interfere with ongoing criminal law-enforcement proceedings and impose an impossible administrative burden.

(4) From subsection (e)(1) because in the courses of criminal investigations, matters or cases, the Office of Independent Counsel often obtains information concerning the violation of laws other than those relating to an active case, matter, or investigation. In the interests of effective law enforcement and criminal litigation, it is necessary that the Office of Independent Counsel retain this information since it can aid in establishing patterns of activity and provide valuable leads for future cases that may be brought within the Office of Independent Counsel.

(5) From subsection (e)(2) because collecting information to the greatest extent possible from the subject individual of a criminal investigation or prosecution would present a serious impediment to law enforcement. In such circumstances, the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations and duties.

(6) From subsection (e)(3) because providing individuals supplying information with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement. In those circumstances, it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information, and endanger the life and physical safety of confidential informants.

(7) From subsection (e)(4) (G), (H) and (I) because this system of records is exempt from the individual-access and amendment provisions of subsection (d) and the rules provisions of subsection (f).

(8) From subsection (e)(5) because, in the collection of information for law-enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would inhibit the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(9) From subsection (e)(8) because the individual-notice requirements of subsection (e)(8) could present a serious impediment to law enforcement, i.e., this could interfere with the Office of Independent Counsel's ability to issue subpoenas and could reveal investigative techniques and procedures.

(10) From subsection (f) because this system has been exempted from the individual-access and amendment provisions of subsection (d).

(11) From subsection (g) because the records in this system are generally compiled for law-enforcement purposes and are exempt from the individual-access and amendment provisions of subsections (d) and (f), this rendering subsection (g) inapplicable.

PART 701—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Sec.

701.10 General provisions.
701.11 Requirements pertaining to requests.
701.12 Responses by the Office to requests.
701.13 Form and content of Office responses.
701.14 Classified information.
701.15 Business information.
701.16 Appeals.
701.17 Preservation of records.
701.18 Fees.
701.19 Other rights and services.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 53 FR 8895, Mar. 18, 1988, unless otherwise noted.

§ 701.10 General provisions.

(a) This part contains the regulations of the Office of Independent Counsel implementing the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. Information customarily furnished to the public in the regular course of the performance of official duties may continue to be furnished to the public without complying with this part, provided that the furnishing of such information would not violate the Privacy Act of 1974, 5 U.S.C. 552a, and would not be inconsistent with regulations issued pursuant to the Privacy Act. To the extent permitted by other laws, the Office will also consider making available records that it is permitted to withhold under the FOIA if it determines that such disclosure would be in the public interest and would not interfere with the functioning of the Office.

(b) As used in this part, the following terms shall have the following meanings:

(1) *Appeal* means the appeal by a requester of an adverse determination of his request, as described in 5 U.S.C. 552(a)(6)(A)(ii).

(2) *Agency* has the meaning given in 5 U.S.C. 551(1) and 5 U.S.C. 552(e).

(3) *Request* means any request for records made pursuant to 5 U.S.C. 552(a)(3).

(4) *Requester* means any person who makes a request to the Office.

(5) *Business information* means trade secrets or other commercial or financial information.

(6) *Business submitter* means any commercial entity that provides business information to the Office and that has a proprietary interest in the information.

(c) The FOIA/PA Officer of the Office of Independent Counsel shall be responsible to Independent Counsel for all matters pertaining to the administration of this part.

(d) The Office of Independent Counsel shall comply with the time limits set forth in the FOIA for responding to and processing requests and appeals, unless there are exceptional circumstances within the meaning of 5 U.S.C. 552(a)(6)(C). The Office shall notify a requester whenever it is unable to respond to or process the request or appeal within the time limits established by the FOIA. The Office shall respond to and process requests and appeals in their approximate order of receipt, to the extent consistent with sound administrative practice.

§ 701.11 Requirements pertaining to requests.

(a) *How made and addressed.* A requester may make a request under this part for a record of the Office of Independent Counsel by writing to the Office at: FOIA/PA Officer, Office of Independent counsel, Suite 701 West, 555 Thirteenth Street NW., Washington, DC 20004. A request should be sent to the Office at its proper address and both the envelope and the request itself should be clearly marked: ''Freedom of Information Act Request.''

(b) *Request must reasonably describe the records sought.* A request must describe the records sought in sufficient detail to enable Office personnel to locate the records with a reasonable amount of effort. A request for a specific category of records shall be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of Office operations. Wherever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if the request seeks records pertaining to pending litigation, the request should indicate the title of the case, the court in which the case was filed, and the nature of the case. If the Office determines that a request does not reasonably describe the records sought, the Office shall either advise the requester what additional information is needed or otherwise state why the request is insufficient. The Office also shall extend to the requester an opportunity to confer with Office personnel with the objective of reformulating the request in a manner that will meet the requirements of this section.

(c) *Agreement to pay fees.* (1) The filing of a request under this part shall be deemed to constitute an agreement by the requester to pay all applicable fees charged under § 701.18 of this part, up to $25, unless a waiver of fees is sought.

The Office shall confirm this agreement in its letter of acknowledgement to the requester. When filing a request, a requester may specify a willingness to pay a greater amount, if applicable.

(2) If a waiver of fees up to $25 is sought in the requester's request to the Office, the Office will make its determination on the fee waiver (and notify the requester as soon as possible) after receipt of the request. The submission of a request for fee waiver will not delay the Office's responsibility to search for responsive records.

(3) If the fee waiver is denied by the Office, and the fees involved total $25 or less, the Office will send the responsive documents to the requester, along with a bill for fees. The collection of the unpaid bill shall follow the procedures found herein at § 701.18 (g)(2) and (h).

§ 701.12 Responses by the Office to requests.

(a) *Authority to grant or deny requests.* The head of the Office, or his designee, is authorized to grant or deny and request for a record of the Office.

(b) *Initial action by the Office.* When the Office receives a request for a record in its possession, the Office shall promptly determine whether another agency of the Government is better able to determine whether the record is exempt, to any extent, from mandatory disclosure under the FOIA; and whether the record, if exempt to any extent from mandatory disclosure under the FOIA, should nonetheless be released to the requester as a matter of discretion. If the Office determines that it is the agency best able to determine whether to disclose the record in response to the request, then the Office shall respond to the request. If the Office determines that it is not the agency best able to determine whether to disclose the record in response to the request, the Office shall either:

(1) Respond to the request, after consulting with the other agency best able to determine whether to disclose the record and with any other agency having a substantial interest in the requested record or the information contained therein; or

(2) Refer the responsibility for responding to the request to another agency that generated or originated the record, but only if that other agency is subject to the provisions of the FOIA.

Under ordinary circumstances, the agency that generated or originated a requested record shall be presumed to be the agency best able to determine whether to disclose the record in response to the request.

(c) *Law-enforcement information.* Whenever a request is made for a record containing information that relates to an investigation of a possible violation of criminal law or to a criminal law-enforcement proceeding and that was generated or originated by another agency, the Office shall refer the responsibility for responding to the request to that other agency; however, such referral shall extend only to the information generated or originated by that other agency.

(d) *Classified information.* Whenever a request is made for a record containing information that has been classified, or that may be eligible for classification, by another agency under the provisions of Executive Order 12356 or any other Executive Order concerning the classification of records, the Office shall refer the responsibility for responding to the request to the agency that classified the information or should consider the information for classification. Whenever a record contains information that has been derivatively classified by the Office because it contains information classified by another agency, the Office shall refer the responsibility for responding to the request to the agency that classified the underlying information; however, such referral shall extend only to the information classified by the other agency.

(e) *Notice of referral.* Whenever the Office refers all or any part of the responsibility for responding to a request to another agency, the Office will consult with the other agency to obtain specific approval to notify the requester of the referral and inform the requester of the name and address of the agency to which the request has been referred and the portions of the request so referred.

(f) *Agreements regarding consultations and referrals.* No provision of this section shall preclude formal or informal

agreements between the Office and another agency to eliminate the need for consultations or referrals of requests or classes of requests.

(g) *Separate referrals of portions of a request.* Portions of a request may be referred separately to one or more other agencies whenever necessary to process the request in accordance with the provisions of this section.

(h) *Date for determining responsive records.* In determining records responsive to a request, the Office ordinarily will include only those records within the Office's possession and control as of the date of its receipt of the request.

§ 701.13 Form and content of Office responses.

(a) *Form of notice granting a request.* After the Office has made a determination to grant a request in whole or in part, the Office shall so notify the requester in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record to the requester or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection shall not unreasonably disrupt the operations of the Office. The Office shall inform the requester in the notice of any fees to be charged in accordance with the provisions of § 701.18 of this part.

(b) *Form of notice denying a request.* The Office, when denying a request in whole or in part, shall so notify the requester in writing. The notice must be signed by the FOIA/PA Officer, or her designee, and shall include:

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

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions that the Office has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under § 701.16(a) and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the Office shall so notify the requester in writing.

§ 701.14 Classified information.

In processing a request for information that is classified or classifiable under Executive Order 12356 or any other Executive Order concerning the classification of records, the Office shall review the information to determine whether it warrants classification. Information that does not warrant classification shall not be withheld from a requester on the basis of 5 U.S.C. 552(b)(1). The Office shall, upon receipt of any appeal involving classified or classifiable information, take appropriate action to ensure compliance with Executive Order 12356 or any other Executive Order concerning the classification of records.

§ 701.15 Business information.

(a) *In general.* Business information provided to the Office by a business submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Notice to business submitters.* The Office shall provide a business submitter with prompt written notice of a request encompassing its business information whenever required under paragraph (c) of this section, except as is provided in paragraph (g) of this section, and only to the extent permitted by law. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(c) *When notice is required.* For business information submitted to the Office it shall provide a business submitter with notice of a request whenever the business submitter has in good faith designated the information as commercially or financially sensitive, or the Office has reason to believe that disclosure of the information may result in commercial or financial injury to the business submitter. Notice of a request for business information falling within the former category shall be required for a period of not more than ten years after the date of submission

unless the business submitter requests, and provides acceptable justification for, a specific notice period of greater duration. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the company that the information in question is in fact confidential commercial or financial information and has not been disclosed to the public.

(d) *Opportunity to object to disclosure.* Through the notice described in paragraph (b) of this section, the Office shall afford a business submitter a reasonable period within which to provide the Office with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the FOIA and, in the case of Exemption 4, shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* (1) The Office shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the Office decides to disclose business information over the objection of a business submitter, the Office shall forward to the business submitter a written notice which shall include:

(i) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

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

(iii) A specified disclosure date.

(2) Such notice of intent to disclose shall be forwarded a reasonable number of days, as circumstances permit, prior to the specified date upon which disclosure is intended. A copy of such disclosure notice shall be forwarded to the requester at the same time.

(f) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information covered by paragraph (c) of this section, the Office shall promptly notify the business submitter.

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

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

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

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

(4) The Office is a criminal law-enforcement agency that acquired information in the course of a lawful investigation of a possible violation of criminal law.

§ 701.16 Appeals.

(a) *Appeals to Independent Counsel.* When a request for access to records or for a waiver of fees has been denied in whole or in part, or when the Office fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to Independent Counsel within 30 days of his receipt of a notice denying his request. An appeal to Independent Counsel shall be made in writing and addressed to the Office of Independent Counsel, Suite 701 West, 555 Thirteenth Street NW., Washington, DC 20004. Both the envelope and the letter of appeal itself must be clearly marked: ''Freedom of Information Act Appeal.''

(b) *Action on appeals by the Office of Independent Counsel.* Unless Independent Counsel otherwise directs, his designee shall act on behalf of the Independent Counsel on all appeals under this section, except that a denial of a request by Independent Counsel shall constitute the final action of the Office on that request.

(c) *Form of action on appeal.* The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides

or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

§ 701.17 Preservation of records.

The Office shall preserve all correspondence relating to the requests it receives under this part, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the United States Code. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 701.18 Fees.

(a) *In general.* Fees pursuant to the FOIA shall be assessed according to the schedule contained in paragraph (b) of this section for services rendered by the Office in responding to and processing requests for records under this part. All fees so assessed shall be charged to the requester, except when the charging of fees is limited under paragraph (c) of this section or when a waiver or reduction of fees is granted under paragraph (d) of this section. The Office shall collect all applicable fees before making copies of requested records available to a requester. Requesters shall pay fees by check or money order made payable to the Treasury of the United States.

(b) *Charges.* In responding to requests under this part, the following fees shall be assessed, unless a waiver or reduction of fees has been granted pursuant to paragraph (d) of this section:

(1) *Search.* (i) No search fee shall be assessed with respect to requests by educational institutions, noncommercial scientific institutions, and representatives of the news media (as defined in paragraphs (j)(6), (j)(7), and (j)(8) of this section, respectively). Search fees shall be assessed with respect to all other requests, subject to the limitations of paragraph (c) of this section. The Office may assess fees for time spent searching even if it fails to locate any respective record or when records located are subsequently determined to be entirely exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee shall be $2.25. When the search and retrieval cannot be performed entirely by clerical personnel—for example, when the identification of records within the scope of the request requires the use of professional personnel—the fee shall be $4.50 for each quarter hour of search time spent by such professional personnel. When the time of managerial personnel is required, the fee shall be $7.50 for each quarter hour of time spent by such managerial personnel.

(iii) For computer searches of records, which may be undertaken through the use of existing programming, requesters shall be charged the actual direct costs of conducting the search, although certain requesters (as defined in paragraph (c)(2) of this section) shall be entitled to the cost equivalent of two hours of manual search time without charge. These direct costs shall include the cost of operating a central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a request, as well as the costs of operator/programmer salary apportionable to the search (at no more than $4.50 per quarter hour of time so spent). The Office is not required to alter or develop programming to conduct a search.

(2) *Duplication.* Duplication fees shall be assessed with respect to all requesters, subject to the limitations of paragraph (c) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be $0.10 per page. For other methods of duplication, the Office shall charge the actual direct costs of duplicating a record.

(3) *Review.* Review fees shall be assessed with respect to only those requesters who seek records for a commercial use, as defined in paragraph (j)(5) of this section. For each quarter hour spent by agency personnel in reviewing a requested record for possible disclosure, the fee shall be $4.50, except

that when the time of professional personnel is required, the fee shall be $7.50 for each quarter hour of time spent by such managerial personnel. Review fees shall be assessed only for the initial record review, *i.e.*, all of the review undertaken when the Office analyzes the applicability of a particular exemption to a particular record or record portion at the initial request level. No charge shall be assessed for review at the administrative appeal level of an exemption already applied. However, records or record portions withheld pursuant to an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs of such a subsequent review are properly assessable, particularly when that review is made necessary by a change of circumstances.

(c) *Limitations on charging fees.* (1) No search or review fee shall be charged for a quarter-hour period unless more than half of that period is required for search or review.

(2) Except for requesters seeking records for a commercial use (as defined in paragraph (j)(5) of this section), the Office shall provide without charge

(i) The first 100 pages of duplication (or its cost equivalent), and

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

(3) Whenever a total fee calculated under this section is $8.00 or less, no fee shall be charged.

(4) The provisions of paragraphs (c)(2) and (3) of this section work together. For requesters other than those seeking records for a commercial use, no fee shall be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages exceeds $8.00.

(d) *Waiver or reduction of fees.* (1) Records responsive to a request under the FOIA shall be furnished without charge or at a charge reduced below that established under paragraph (b) of this section when the Officer determines, based upon information provided by a requester in support of a fee waiver request or otherwise made known to the Office, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis.

(2) In order to determine whether the first fee waiver requirement is met—*i.e.*, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government—the Office shall consider the following four factors in sequence:

(i) *The subject of the request: Whether the subject of the requested records concerns ''the operations or activities of the government.''* The subject matter of the requested records, in the context of the request, must specifically concern the identifiable operations of the federal government—with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; a request for access to records for their intrinsic informational content alone would not satisfy this threshold consideration.

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

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to ''public understanding.''* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow

segment of identified persons. A requester's identity and qualifications—*e.g.*, expertise in the subject area and ability and intention to convey effectively information to the general public—should be considered. It reasonably may be presumed that a representative of the news media (as defined in paragraph (j)(8) of this section) who has access to the means of public dissemination readily will be able to satisfy this consideration. Requests from libraries or other record repositories (or requesters who intend merely to disseminate information to such institutions) shall be analyzed, like those of other requesters, to identify a particular person who represents that he actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.

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

(3) In order to determine whether the second fee waiver requirement is met—*i.e.*, that disclosure of the requested information is not primarily in the commercial interest of the requester—the Office shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* The Office shall consider all commercial interests of the requester (with reference to the definition of ''commercial use'' in paragraph (j)(5) of this section), or any person on whose behalf the requester may be acting, but shall consider only those interests that would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration shall be given the role that such FOIA-disclosed information plays with respect to those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ''primarily in the commercial interest of the requester.''* A fee waiver or reduction is warranted only when, once the ''public interest'' standard set out in paragraph (d)(2) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. The Office shall ordinarily presume that, where a news media requester has satisfied the ''public interest'' standard, that will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who compile and market governmental information for direct economic return shall not be presumed to serve primarily the ''public interest.''

(4) When only a portion of the requested records satisfies both of the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(5) Requests for the waiver or reduction of fees shall address each of the factors listed in paragraphs (d) (2) and (3) of this section, as they apply to each record request.

(e) *Notice of anticipated fees in excess of $25.00.* When the Office determines or estimates that the fees to be assessed under this section may amount to more than $25.00, the Office shall notify the requester as soon as practicable of the actual or estimated amount of the fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. (If only a portion of the fee can be estimated readily, the Office shall advise the requester that the estimated fee may be

only a portion of the total fee.) In cases when a requester has been notified that actual or estimated fees may amount to more than $25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to the requester pursuant to this paragraph shall offer him the opportunity to confer with Office personnel in order to reformulate his request to meet his needs at a lower cost.

(f) *Aggregating requests.* When the Office reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of evading the assessment of fees, the Office may aggregate any such requests and charge accordingly. The Office may presume that multiple requests of this type made within a 30-day period have been made in order to evade fees. When requests are separated by a longer period, the Office shall aggregate them only when there exists a solid basis for determining that such aggregation is warranted, *e.g.*, when the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(g) *Advance payments.* (1) When the Office estimates that a total fee to be assessed under this section is likely to exceed $250.00, it may require the requester to make an advance payment of an amount up to the entire estimated fee before beginning to process the request, except when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment or where a fee waiver, or reduction of fees, has been requested. In the case where a fee waiver or reduction of fees has been requested, the requester shall submit the advance payment, if required by the agency. This prepayment will not affect the Office's responsibility for speedy determination of the fee waiver, or reduction of fees, nor be deemed in derogation of the request for the fee waiver or reduction of fees. If the agency approves the fee waiver, or reduction of fees, the appropriate sum will be reimbursed to the requester, with no accumulated interest, if any.

(2) When a requester has previously failed to pay a records access fee within 30 days of the date of billing, the Office may require the requester to pay the full amount owned, plus any applicable interest (as provided for in paragraph (h) of this section), and to make an advance payment of the full amount of may estimated fee before the Office begins to process a new request or continues to process a pending request from that requester.

(3) For requests other than those described in paragraphs (g) (1) and (2) of this section, the Office shall not require the requester to make an advance payment, *i.e.*, a payment made before work is commenced or continued on a request. Payment owed for work already completed is not an advance payment.

(4) When a component acts under paragraphs (g) (1) or (2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA for the processing of an initial request or an appeal, plus permissible extensions of these time limits, shall be deemed not to begin to run until the Office has received payment of the assessed fee.

(h) *Charging interest.* The Office may assess interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent to the requester. Once a fee payment has been received by the Office, even if not processed, the accrual of interest shall be stayed. Interest charges shall be assessed at the rate prescribed in section 3717 of title 31 U.S.C. and shall accrue from the date of the billing. The Office shall follow the provisions of the Debt Collection Act of 1982, Public Law 97–265 (Oct. 25, 1982), 96 Stat. 1749, and its implementing procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Other statutes specifically providing for fees.* (1) The fee schedule of this section does not apply with respect to the charging of fees under a statute specifically providing for setting the level of fees for particular types of records—*i.e.*, any statute that specifically requires a government printing entity such as the Government Printing Office or the National Technical Information Service to set and collect fees for

particular types of records—in order to:

(i) Serve both the general public and private sector organizations by conveniently making available government information;

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

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

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

(2) When records responsive to requests are maintained for distribution by agencies operating statutorily based fee schedule programs, the Office shall inform requesters of the steps necessary to obtain records from those sources.

(j) *Definitions.* For the purpose of this section:

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

(2) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The Office shall ensure, however, that searches are undertaken in the most efficient and least expensive manner reasonably possible; thus, for example, the Office shall not engage in line-by-line search when merely duplicating an entire document would be quicker and less expensive.

(3) The term *duplication* refers to the process of making a copy of a record necessary to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audio-visual materials, or machine-readable documentation (*e.g.*, magnetic tape or disk), among others. The copy provided shall be in a form that is reasonably usable by requesters.

(4) The term *review* refers to the process of examining a record located in response to a request in order to determine whether any portion of it is permitted to be withheld. It also includes processing any record for disclosure, *e.g.*, doing all that is necessary to excise it and otherwise prepare it for release, although review costs shall be recoverable even where there ultimately is no disclosure of a record. Review time does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term *commercial use* in the context of a request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. The Office shall determine, as well as reasonably possible, the use to which a requester will put the records requested. When the circumstances of a request suggest that the requester will put the records sought to a commercial use, either because of the nature of the request itself or because the Office otherwise has reasonable cause to doubt a requester's stated use, the Office shall provide the requester a reasonable opportunity to submit further clarification.

(6) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, and institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. 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 and that the records are not sought for a commercial use, but are

sought in furtherance of scholarly research.

(7) The term *noncommercial scientific institution* refers to an institution that is not operated on a ''commercial'' basis as that term is referenced in paragraph (j)(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. 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 and that the records are not sought for a commercial use, but are sought in furtherance of scientific research.

(8) The term *representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. For ''freelance'' journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization; a publication contract would be the clearest proof, but the Office shall also look to the past publication record of a requester in making this determination. To be eligible for inclusion in this category, a requester also must not be seeking the requested records for a commercial use. In this regard, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.

(k) *Charges for other services and materials.* Apart from the other provisions of this section, when the Office elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending them other than by ordinary mail, the actual direct costs of providing the service or materials shall be charged.

§ 701.19 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under 5 U.S.C. 552.

PARTS 702–799 [RESERVED]

CHAPTER VIII—COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Part		*Page*
800	Organization and functions	801
801	Federal Tort Claims Act procedure	802
802	Disclosure of records	804
803	Agency seal	821
804	Acceptance of gifts	822
810	Community supervision: administrative sanctions	824
811	Sex offender registration	825
812	Collection and use of DNA information	832
813–899	[Reserved]	

PART 800—ORGANIZATION AND FUNCTIONS

Sec.
800.1 Statutory authorization.
800.2 Mission.
800.3 Functions and responsibilities.
800.4 Director.
800.5 Agency components.
APPENDIX A TO PART 800—AGENCY ADDRESSES

AUTHORITY: 5 U.S.C. 301; Pub. L. 105–33, 111 Stat. 251, 712 (D.C. Code 24–1232, 24–1233).

SOURCE: 66 FR 1261, Jan. 8, 2001, unless otherwise noted.

§ 800.1 Statutory authorization.

The National Capital Revitalization and Self-Government Improvement Act of 1997 (''Revitalization Act'') established the Court Services and Offender Supervision Agency for the District of Columbia (''CSOSA'') within the federal government as an independent executive branch agency and placed the District of Columbia Pretrial Services Agency as an independent entity within CSOSA. In addition, the District of Columbia Public Defender Service, an independent District of Columbia agency, receives its appropriated federal funds through a transfer from CSOSA.

§ 800.2 Mission.

CSOSA's mission is to increase public safety, prevent crime, reduce recidivism, and support the fair administration of justice in close collaboration with the community.

§ 800.3 Functions and responsibilities.

(a) *Community Supervision Services.* (1) The Revitalization Act requires CSOSA to provide supervision, through qualified supervision officers, to offenders on probation, parole, and supervised release for violation of District of Columbia Code offenses. The Agency carries out its responsibilities on behalf of the court or agency having jurisdiction over the person being supervised. Accordingly, CSOSA supervises all offenders placed on probation by the Superior Court of the District of Columbia, and all individuals on parole pursuant to the District of Columbia Code. CSOSA supervises offenders from other jurisdictions in accordance with the provisions of the Interstate Parole and Probation Compact.

(2) CSOSA is also required to determine uniform supervision and reporting practices, develop and operate intermediate sanctions programs for sentenced offenders, and arrange for the supervision of District of Columbia Code offenders in jurisdictions outside the District of Columbia.

(3) In accordance with its supervisory functions and as authorized by the Sex Offender Registration Act of 1999 (D.C. Law 13–137, D.C. Code 24–1101 *et seq.*), CSOSA operates and maintains the sex offender registry for the District of Columbia.

(b) *Pretrial Services.* (1) The District of Columbia Pretrial Services Agency (''PSA'') assists the trial and appellate levels of both the federal and local courts in determining eligibility for pretrial release by providing verified background information and criminal histories on all arrestees and recommendations about available release options.

(2) PSA is further responsible for supervising defendants released from custody during the pretrial period by monitoring compliance with conditions of release and by ensuring that they appear for scheduled court hearings.

(3) PSA also provides defendants with the opportunity to participate in a variety of social intervention programs that decrease the likelihood of future criminal behavior.

§ 800.4 Director.

(a) CSOSA is headed by a Director appointed by the President, by and with the advice and consent of the Senate, for a term of six years.

(b) PSA is headed by a Director appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit and the Chief Judge of the United States District Court for the District of Columbia in consultation with an Executive Committee. The Executive Committee includes the four chief judges of the local and Federal trial and appellate courts, the United States Attorney for the District of Columbia, the Director of the District of Columbia Public Defender Service, and the Director of CSOSA.

§ 800.5 Agency components.

(a) *CSOSA*. (1) Office of the Director (including the Deputy Director).

(2) Office of the General Counsel.

(3) Community Supervision Services.

(4) Office of Community Justice Programs.

(5) Special Criminal Justice Projects.

(6) Office of Planning and Evaluation.

(7) Office of Professional Responsibility.

(8) Equal Employment Opportunity, Diversity, and Special Programs.

(9) Office of Legislative, Intergovernmental, and Public Affairs.

(10) Information Technology Services.

(11) Office of Management and Administration.

(12) Office of Human Resources.

(b) *PSA*. (1) Office of the Director (including the Deputy Director).

(2) Planning, Analysis and Evaluation.

(3) Community Justice Programs.

(4) Office of Operations (including Information Technology and Forensic Toxicology and Drug Testing Laboratory).

(5) Human Resources Management.

(6) Finance and Administration.

APPENDIX A TO PART 800—AGENCY ADDRESSES

I. CENTRAL OFFICES

Court Services and Offender Supervision Agency for the District of Columbia, 633 Indiana Avenue, NW., Washington, DC 20004

CSOSA Community Supervision Services, 300 Indiana Avenue, NW., Washington, DC 20001

District of Columbia Pretrial Services Agency, 633 Indiana Avenue, NW., Washington, DC 20004

II. FIELD OFFICES

Court Services and Offender Supervision Agency for the District of Columbia/Community Supervision Services

CSS Field Office, 409 E. Street, NW., Washington, DC 20001

CSS Field Office, 401 New York Avenue, NE., Washington, DC 20002

CSS Field Office, 1707 Kalorama Road, NW., Washington, DC 20009

CSS Field Office, 1418 Good Hope Road, SE., Washington, DC 20020

CSS Field Office, 3850 S. Capitol Street, SE., Washington, DC 20032

CSS Field Office, 1230 Taylor Street, NW., Washington, DC 20011

District of Columbia Pretrial Services Agency

Office of Operations Branch, 300 Indiana Avenue, NW., Washington, DC 20001

Office of Operations Branch, 500 Indiana Avenue, NW., Washington, DC 20001

Office of Operations Branch, 333 Constitution Avenue, NW., Washington, DC 20001

Office of Operations Branch, 601 Indiana Avenue, NW., Washington, DC 20004

III. FOIA/PA REQUESTS (CSOSA AND PSA)

Office of the General Counsel (FOIA), Court Services and Offender Supervision Agency for the District of Columbia, 633 Indiana Avenue, NW., Washington, DC 20004

IV. SERVICE OF PROCESS (CSOSA AND PSA, EXCEPT FOR PSA SUBPOENAS)

Office of the General Counsel, Court Services and Offender Supervision Agency for the District of Columbia, 633 Indiana Avenue, NW., Washington, DC 20004

V. TORT CLAIMS (CSOSA AND PSA)

Office of the General Counsel, Court Services and Offender Supervision Agency for the District of Columbia, 633 Indiana Avenue, NW., Washington, DC 20004

PART 801—FEDERAL TORT CLAIMS ACT PROCEDURE

Sec.
801.1 Claims filed under the Federal Tort Claims Act.
801.2 Filing a claim.
801.3 Processing the claim.
801.4 Final disposition of claim.

AUTHORITY: 5 U.S.C. 301; Pub. L. 105–33, 111 Stat. 251, 712 (D.C. Code 24–1233); 28 CFR 14.11.

SOURCE: 67 FR 57948, Sept. 13, 2002, unless otherwise noted.

§ 801.1 Claims filed under the Federal Tort Claims Act.

If an agency employee is acting within the scope of his or her employment and causes injury to a member of the public, any claim for money damages for personal injury, death, damage to property, or loss of property caused by the employee's negligent or wrongful act or omission is a claim against the United States and must first be presented by the injured party to the appropriate federal agency for administrative action under the Federal Tort Claims Act. General provisions for

processing such administrative claims are contained in 28 CFR part 14. The provisions in this part supplement the general provisions in order to describe specific procedures to follow when filing a claim with the Court Services and Offender Supervision Agency for the District of Columbia (''CSOSA'') or the District of Columbia Pretrial Services Agency (''PSA'').

§ 801.2 Filing a claim.

(a) *Who may file the claim?* You may file a claim for money damages against CSOSA or PSA if you believe that a CSOSA or PSA employee has injured you or has damaged or lost property that you own. You may file a claim on behalf of an injured or deceased person or owner of damaged or lost property if you are acting as agent, executor, administrator, parent, guardian, legal or other representative provided you submit evidence of your authority to act on behalf of the claimant.

(b) *What information do you need to submit in your claim?* (1) The easiest way to ensure that you will include all necessary information for your claim is to submit a completed Standard Form 95 (''SF 95''). The SF 95 is available from the Office of the General Counsel, CSOSA, (see address in paragraph (c) of this section) and on the Internet at *http://www.usdoj.gov/civil/forms/forms.htm.*

(2) If you do not use the SF 95, you must submit written notification of the incident that resulted in the injury, loss, or damage. Along with this notification, you must present a claim for money damages in a sum certain (that is, a precise dollar amount) for injury to or loss of property, personal injury, or death alleged to have occurred on the basis of the incident. Failure to include the precise dollar amount for your claim may mean that you will have difficulty pursuing your claim in court.

(c) *Where do you submit the claim?* You should submit the claim (whether against CSOSA or PSA) directly to the Office of the General Counsel, CSOSA, 633 Indiana Avenue NW., Washington, DC 20004. Claims submitted to any other office of CSOSA or PSA are forwarded to the Office of the General Counsel.

(d) *When must you submit the claim?* You must submit the claim so that CSOSA/PSA receives the claim within 2 years after the claim accrues. Mailing the claim by that date is not sufficient if CSOSA/PSA does not receive the claim by that date. Generally speaking, a claim accrues at the time of the injury. In those instances where neither the injury nor its cause is immediately apparent, the claim accrues when you discover (or reasonably should discover) the injury and its cause.

(e) *May you amend your claim?* Yes, you may amend your claim at any time prior to final agency action or prior to your filing suit in court.

§ 801.3 Processing the claim.

(a) *Will CSOSA/PSA contact you about your claim?* (1) If you have provided all necessary information to process your claim, you will receive an acknowledgement indicating the filing date (that is, the date CSOSA/PSA received your claim) and the assigned claim number. Refer to the claim number in any further correspondence you may have with CSOSA/PSA on the claim.

(2) If you have failed to include all necessary information, CSOSA/PSA will return your claim to you with a request for the necessary additional information.

(3) If your claim should have been filed with another agency, CSOSA/PSA will forward the claim to the appropriate agency and notify you of the transfer, or return the claim to you if the appropriate agency cannot be determined or if the transfer is otherwise not feasible.

(b) *Who is responsible for offering settlement or denial on the claim?* The General Counsel is responsible for investigating the claim and, after consultation with PSA (if the claim is against PSA) and the Department of Justice when appropriate, determining whether the claim should be settled or denied.

(c) *How long does CSOSA/PSA have to consider your claim?* CSOSA/PSA has 6 months from the date of filing to make a settlement offer or to deny your claim. If you amend your claim (see § 801.2(e)) or request that your claim be reconsidered (see § 801.4(b)(1)), CSOSA/PSA has an additional 6 months from

the date of the amendment or the filing of the request for reconsideration to make a final disposition of the claim.

(d) *Will appreciation or depreciation be considered?* Yes, appreciation or depreciation is considered in settling a claim for lost or damaged property.

§ 801.4 Final disposition of claim.

(a) *What if you accept the settlement offer?* If you accept a settlement offer, you give up your right to bring a lawsuit against the United States or against any employee of the government whose action or lack of action gave rise to your claim.

(b) *What if your claim is denied?* (1) If your claim is denied, you have 30 days from the date of CSOSA/PSA's written notification to make a written request that the agency reconsider the denial.

(2) If your claim is denied or you reject the settlement offer, you have 6 months from the date of mailing of CSOSA/PSA's notice of denial to file a civil action in the appropriate U.S. District Court.

(c) *What if you do not hear from CSOSA/PSA within 6 months of the filing date?* If you do not hear from CSOSA/PSA within 6 months of the filing date for the claim, you may consider your claim denied. You may then proceed with filing a civil action in the appropriate U.S. District Court.

PART 802—DISCLOSURE OF RECORDS

Subpart A—General

Sec.
802.1 Introduction.

Subpart B—Freedom of Information Act.

802.2 Purpose and scope.
802.3 Guidelines for disclosure.
802.4 Definitions.
802.5 Freedom of Information Act requests.
802.6 Documents from other agencies.
802.7 Denial of request.
802.8 Expedited processing.
802.9 Business information.
802.10 Fee schedule.

Subpart C—Privacy Act

802.11 Purpose and scope.
802.12 Definitions.
802.13 Verifying your identity.
802.14 Requests for access to records.
802.15 Denial of request.
802.16 Administrative appeal.
802.17 Documents from other agencies.
802.18 Correction or amendment of record.
802.19 Appeal of denial to correct or amend.
802.20 Accounting of disclosures.
802.21 Appeals.
802.22 Fees.
802.23 Use and disclosure of social security numbers.

Subpart D—Subpoenas or Other Legal Demands for Testimony or the Production or Disclosure of Records or Other Information

802.24 Purpose and scope.
802.25 Definitions.
802.26 Receipt of demand.
802.27 Compliance/noncompliance.

Subpart E—Exemption of Record Systems Under the Privacy Act

802.28 Exemption of the Court Services and Offender Supervision System—limited access.
802.29 Exemption of the Pretrial Services Agency System.

AUTHORITY: 5 U.S.C. 301, 552, 552a; Pub. L. 105–33, 111 Stat. 251, 712 (D.C. Code 24–1232, 24–1233).

SOURCE: 68 FR 32986, June 3, 2003, unless otherwise noted.

Subpart A—General

§ 802.1 Introduction.

This part contains regulations of the Court Services and Offender Supervision Agency for the District of Columbia (''CSOSA'' or ''Agency'') and the District of Columbia Pretrial Services Agency (''PSA'' or ''Agency'') which implement the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a, and provide for the production of records in response to a demand from a court or other non-congressional authority in connection with a proceeding to which the Agency is not a party.

Subpart B—Freedom of Information Act

§ 802.2 Purpose and scope.

The purpose of this subpart is to establish procedures for the release of records in the possession of the Agency pursuant to the provisions of the FOIA.

§ 802.3 Guidelines for disclosure.

(a) The authority to release or deny access to records and information under the FOIA is limited to the General Counsel and his or her designee.

(b) An agency record will be released in response to a written request, unless a valid legal exemption to disclosure is asserted.

(1) Any applicable exemption to disclosure which is provided under the FOIA in 5 U.S.C. 552 may be asserted.

(2) A record must exist and be in the possession and control of the agency at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request.

(3) Hard copy of electronic records that are subject to FOIA requests under 5 U.S.C. 552(a)(3), and that are available to the public through an established distribution system or through the FEDERAL REGISTER or the Internet, normally need not be processed under the provisions of the FOIA. However, if the requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA.

§ 802.4 Definitions.

As used in this subpart, the following terms have the following meanings:

(a) *Agency* has the meaning given in 5 U.S.C. 551(1) and 5 U.S.C. 552(f).

(b) *Appeal* means a request for a review of the agency's determination with regard to a fee waiver, category of requester, expedited processing, or denial in whole or in part of a request for access to a record or records.

(c) *Business information* means trade secrets or other commercial or financial information.

(d) *Business submitter* means any entity which provides business information to the Agency and which has a proprietary interest in the information.

(e) *Computer software* means tools by which records are created, stored, and retrieved. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of medium, are not agency records. Proprietary (or copyrighted) software is not an agency record.

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

(g) *Duplication* refers to the process of making a copy of a record in order to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine-readable documentation (*e.g.*, magnetic tape or disk), among others.

(h) *Electronic records* mean those records and information which are created, stored, and retrievable by electronic means. This ordinarily does not include computer software, which is a tool by which to create, store, or retrieve electronic records.

(i) *Request* means any request for records made pursuant to 5 U.S.C. 552(a)(3).

(j) *Requester* means any person who makes a request for access to records.

(k) *Review*, for fee purposes, refers to the process of examining records located in response to a commercial use request to determine whether any portion of any record located is permitted to be withheld. It also includes processing any records for disclosure; *e.g.*, doing all that is necessary to excise them and otherwise prepare them for release.

(l) *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 records. Searches may be done manually or by automated means.

§ 802.5 Freedom of Information Act requests.

(a) *Submission, processing, and release procedures.* (1) Requests for any record (including policy) ordinarily will be processed pursuant to the Freedom of Information Act, 5 U.S.C. 552. Your request must be made in writing and addressed to the FOIA Officer, Office of the General Counsel, Court Services and Offender Supervision Agency, 633 Indiana Avenue, NW., Washington, DC 20004. The requester should clearly mark on the face of the letter and the

envelope ''Freedom of Information Request.''

(2) Your request will be considered received as of the date it is received by the FOIA Office. For quickest possible handling, you should mark both your request letter and the envelope ''Freedom of Information Act Request.''

(3) Generally, all FOIA requests will be processed in the approximate order of receipt, unless the requester shows exceptional circumstances exist to justify an expedited response (*see* § 802.8).

(4) You must state in your request a firm agreement to pay the fees for search, duplication, and review as may ultimately be determined. The agreement may state the upper limit (but not less than $25) that the requester is willing to pay for processing the request. A request that fees be waived or reduced may accompany the agreement to pay fees and will be considered to the extent that such request is made in accordance with § 802.4(b) and provides supporting information to be measured against the fee waiver standard set forth in § 802.9(g). The requester shall be notified in writing of the decision to grant or deny the fee waiver. If a requester has an outstanding balance of search, review, or duplication fees due for FOIA request processing, the requirements of this paragraph are not met until the requester has remitted the outstanding balance due.

(b) *Description of records sought.* You must describe the records that you seek in enough detail to enable Agency personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient and subject matter of the record. As a general rule, the more specific you are about the records or type of records that you want, the more likely the Agency will be able to locate the records in response to your request. If a determination is made that your request does not reasonably describe records, the Agency will tell you either what additional information is needed or why your request is otherwise insufficient. You will be given the opportunity to discuss your request so that you may modify it to meet the requirements of this section.

(1) If a document contains information exempt from disclosure, any reasonably segregable portion of the record will be provided to you after deletion of the exempt portions.

(2) You will be notified of the decision on the request within 20 days after its receipt (excluding Saturdays, Sundays, and legal public holidays).

§ 802.6 Documents from other agencies.

(a) *Documents from or relating to Federal agencies.* (1) When a request for records includes a document from another Federal agency, the document will be referred to the originating Federal agency for a determination of its releasability. The requester will be informed of the referral. This is not a denial of a FOIA request; thus no appeal rights accrue to the requester.

(2) When a FOIA request is received for a record created by the Agency that includes information originated by another federal agency, the record will be referred to the originating agency for review and recommendation on disclosure. The Agency will not release any such record without prior consultation with the originating agency.

(b) *Documents from non-Federal agencies.* When a request for records includes a document from a non-Federal agency, CSOSA staff must make a determination of its releasability.

§ 802.7 Denial of request.

(a) *Denial in whole or in part.* If it is determined that the request for records should be denied in whole or in part, the requester shall be notified by mail. The letter of notification shall:

(1) State the exemptions relied on in not granting the request;

(2) If technically feasible, indicate the amount of information deleted at the place in the record where such deletion is made (unless providing such indication would harm an interest protected by the exemption relied upon to deny such material);

(3) Set forth the name and title or position of the responsible official;

(4) Advise the requester of the right to administrative appeal in accordance with paragraph (c) of this section; and

(5) Specify the official or office to which such appeal shall be submitted.

(b) *No records found.* If it is determined, after a thorough search for records by the responsible official or his delegate, that no records have been found to exist, the responsible official will so notify the requester in writing. The letter of notification will advise the requester of the right to administratively appeal the determination that no records exist (*i.e.*, to challenge the adequacy of the search for responsive records) in accordance with paragraph (c) of this section. The response shall specify the official or office to which the appeal shall be submitted for review.

(c) *Administrative appeal.* (1) A requester may appeal an initial determination when:

(i) Access to records has been denied in whole or in part;

(ii) There has been an adverse determination of the requester's category as provided in § 802.10(d);

(iii) A request for fee waiver or reduction has been denied; or

(iv) It has been determined that no responsive records exist.

(2) Appeals must be made within 30 days of the receipt of the letter denying the request. Both the envelope and the letter of appeal should be sent to the Office of the General Counsel, Court Services and Offender Supervision Agency, 633 Indiana Avenue, NW., Room 1220, Washington, DC 20004 and must be clearly marked ''Freedom of Information Act Appeal.''

(3) The General Counsel will make an appeal determination within 20 days (excluding Saturdays, Sundays, and holidays) from the date of receipt of the appeal. However, for a good reason, this time limit may be extended up to an additional 10 days. If, after review, the General Counsel determines that additional information should be released, it will accompany the appeal response. If, after review, the General Counsel determines to uphold the initial review, we will inform you.

§ 802.8 Expedited processing.

(a) Requests and appeals will be taken out of order and given expedited treatment whenever staff determines that they involve:

(1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The requester must fully explain the circumstances warranting such an expected threat so that the Agency may make a reasoned determination.

(2) With respect to a request made by a person primarily engaged in disseminating information, a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence. A person ''primarily engaged in disseminating information'' does not include individuals who are engaged only incidentally in the dissemination of information. The standard of ''widespread and exceptional media interest'' requires that the records requested pertain to a matter of current exigency to the American public and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the general public. The requester must adequately explain the matter or activity and why it is necessary to provide the records being sought on an expedited basis.

(b) If you seek expedited processing, you must submit a statement, certified to be true and correct to the best of your knowledge and belief. The statement must be in the form prescribed by 28 U.S.C. 1746, ''I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date].''

(c) The determination as to whether to grant or deny the request for expedited processing will be made, and the requester notified, within ten days after the date of the request. Because a decision to take a FOIA request out of order delays other requests, simple fairness demands that such a decision be made by the FOIA Officer only upon careful scrutiny of truly exceptional circumstances. The decision will be made solely based on the information contained in the initial letter requesting expedited processing.

(d) Appeals of initial determinations to deny expedited processing must be made promptly. Both the envelope and the letter of appeal should be sent to the Office of the General Counsel,

Court Services and Offender Supervision Agency, 633 Indiana Avenue, NW., Room 1220, Washington, DC 2004 and must be clearly marked ''Expedited Processing Appeal.''

(e) The General Counsel will make an appeal determination regarding expedited processing as soon as practicable.

§ 802.9 Business information.

(a) *In general.* Business information provided to the Agency by a business submitter will not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section. Any claim of confidentiality must be supported by a statement by an authorized representative of the company providing specific justification that the information in question is in fact confidential commercial or financial information and has not been disclosed to the public.

(b) *Notice to business submitters.* The Agency will provide a business submitter with prompt written notice of receipt of a request or appeal encompassing its business information whenever required in accordance with paragraph (c) of this section, and except as is provided in paragraph (g) of this section. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions of records containing the business information.

(c) *When notice is required.* (1) Notice of a request for business information falling within paragraph (c)(2)(i) or (ii) of this section will be required for a period of not more than ten years after the date of submission unless the business submitter had requested, and provided acceptable justification for, a specific notice period of greater duration.

(2) The Agency shall provide a business submitter with notice of receipt of a request or appeal whenever:

(i) The business submitter has in good faith designated the information as commercially or financially sensitive information, or

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

(d) *Opportunity to object to disclosure.* (1) Through the notice described in paragraph (b) of this section, the Agency shall afford a business submitter ten days from the date of the notice (exclusive of Saturdays, Sundays, and legal public holidays) to provide a detailed statement of any objection to disclosure. Such statement shall specify why the business submitter believes the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a business submitter pursuant to this paragraph might itself be subject to disclosure under the FOIA.

(2) When notice is given to a submitter under this section, the requester shall be advised that such notice has been given to the submitter. The requester shall be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. However, the requester will be invited to agree to a voluntary extension of time so that staff may review the business submitter's objection to disclose.

(e) *Notice of intent to disclose.* The Agency will consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever a decision to disclose business information over the objection of a business submitter is made, the Agency shall forward to the business submitter a written notice which shall include:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

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

(3) A specified disclosure date which is not less than ten days (exclusive of Saturdays, Sundays, and legal public holidays) after the notice of the final decision to release the requested information has been mailed to the submitter.

(f) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information covered by paragraph (c) of this section,

the Agency shall promptly notify the business submitter.

(g) *Exception to notice requirement.* The notice requirements of this section shall not apply if:

(1) The Agency determines that the information shall not be disclosed;

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

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

§ 802.10 Fee schedule.

(a) The fees described in this section conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines. They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. However, for each of these categories, the fees may be limited, waived, or reduced for the reasons given below or for other reasons.

(b) The term *direct costs* means those expenditures the agency actually makes in searching for, review (in the case of commercial requesters), and duplicating documents to respond to a FOIA request.

(c) Fees shall be charged in accordance with the schedule contained in paragraph (i) of this section for services rendered in responding to requests for records, unless any one of the following applies:

(1) Services were performed without charge;

(2) The fees were waived or reduced in accordance with paragraph (f) of this section.

(d) Specific levels of fees are prescribed for each of the following categories of requesters.

(1) *Commercial use requesters.* These requesters are assessed charges, which recover the full direct costs of searching for, reviewing, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of duplication of documents. Moreover, when a request is received for disclosure that is primarily in the commercial interest of the requester, the Agency is not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the public interest. The Agency may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records, or no records are located.

(2) *Educational and non-commercial scientific institution requesters.* Records shall be provided to requesters in these categories for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible, requesters must show that the request is made 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. These categories do not include requesters who want records for use in meeting individual academic research or study requirements.

(3) *Requesters who are representatives of the news media.* Records shall be provided to requesters in this category for the cost of duplication alone, excluding charges for the first 100 pages.

(4) *All other requesters.* Requesters who do not fit any of the categories described in paragraphs (d)(1) through (3) of this section shall be charged fees that will recover the full direct cost of searching for and duplicating records that are responsive to the request, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge. The Agency may recover the cost of searching for records even if there is ultimately no disclosure of records, or no records are located. Requests from persons for records about themselves filed in a systems of records shall continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for duplication.

(e) *Fee waiver determination.* Where the initial request includes a request for reduction or waiver of fees, the responsible official shall determine whether to grant the request for reduction or waiver before processing the request and notify the requester of this decision. If the decision does not waive all fees, the responsible official shall

advise the requester of the fact that fees shall be assessed and, if applicable, payment must be made in advance pursuant to paragraph (g) of this section.

(f) *Waiver or reduction of fees.* (1) Fees may be waived or reduced on a case-by-case basis in accordance with this paragraph by the official who determines the availability of the records, provided such waiver or reduction has been requested in writing. Fees shall be waived or reduced by this official when it is determined, based upon the submission of the requester, that a waiver or reduction of the fees is in the public interest because furnishing the information 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. Fee waiver/reduction requests shall be evaluated against the current fee waiver policy guidance issued by the Department of Justice.

(2) Appeals from denials of requests for waiver or reduction of fees shall be decided in accordance with the criteria set forth in this section by the official authorized to decide appeals from denials of access to records. Appeals shall be addressed in writing to the Office of the General Counsel, Court Services and Offender Supervision Agency, Office of the General Counsel, 633 Indiana Avenue, NW., Washington, DC 20004 within 30 days of the denial of the initial request for waiver or reduction and shall be decided within 20 days (excluding Saturdays, Sundays and holidays).

(3) Appeals from an adverse determination of the requester's category as described in paragraphs (d)(1) through (3) of this section shall be decided by the official authorized to decide appeals from denials of access to records and shall be based upon a review of the requester's submission and the Agency's own records. Appeals shall be addressed in writing to the office or officer specified in § 802.7(c)(2) within 30 days of the receipt of the Agency's determination of the requester's category and shall be decided within 20 days (excluding Saturdays, Sundays, and holidays).

(g) *Advance notice of fees.* (1) When the fees for processing the request are estimated to exceed the limit set by the requester, and that amount is less than $250.00, the requester shall be notified of the estimated costs. The requester must provide an agreement to pay the estimated costs; however, the requester will also be given an opportunity to reformulate the request in an attempt to reduce fees.

(2) If the requester has failed to state a limit and the costs are estimated to exceed $250.00, the requester shall be notified of the estimated costs and must pre-pay such amount prior to the processing of the request, or provide satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees. The requester will also be given an opportunity to reformulate the request in an attempt to reduce fees.

(h) *Form of payment.* (1) Payment may be made by check or money order payable to the Treasury of the United States.

(2) The Court Services and Offender Supervision Agency reserves the right to request prepayment after a request is processed and before documents are released in the following circumstances.

(i) When costs are estimated or determined to exceed $250.00, the Agency shall either obtain satisfactory assurance of full payment of the estimated cost where the requester has a history of prompt payment of FOIA fees or require the requester to make an advance payment of the entire estimated or determined fee before continuing to process the request.

(ii) If a requester has previously failed to pay a fee within 30 days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Agency begins to process a new request or the pending request. Whenever interest is charged, the Agency shall begin assessing interest on the 31st day following the day on which billing was sent. Interest shall be at the rate prescribed in 31 U.S.C. 3717.

(i) *Amounts to be charged for specific services.* The fees for services performed by an employee of the Agency shall be imposed and collected as set forth in this paragraph.

(1) *Duplicating records*. All requesters, except commercial requesters, shall receive the first 100 pages duplicated without charge; the first two hours of search time free; or charge which total $10.00 or less. Fees for the copies are to be calculated as follows:

(i) The duplication cost is calculated by multiplying the number of pages in excess of 100 by $0.25.

(ii) Photographs, films, and other materials—actual cost of duplication.

(iii) Other types of duplication services not mentioned above—actual cost.

(iv) Material provided to a private contractor for copying shall be charged to the requester at the actual cost charged by the private contractor.

(2) *Search services*. The cost of search time is calculated by multiplying the number of quarter hours in excess of two hours by the following rates for the staff conducting the search:

(i) $7.00 per quarter hour for clerical staff;

(ii) $10.00 per quarter hour for professional staff; and

(iii) $14.00 per quarter hour for managerial personnel.

(3) *Only fees in excess of $10.00 will be assessed*. This means that the total cost must be greater than $10.00, either for the cost of the search (for time in excess of two hours), for the cost of duplication (for pages in excess of 100), or for both costs combined.

(j) *Searches for electronic records*. The Agency shall charge for actual direct cost of the search, including computer search time, runs, and the operator's salary. The fee for computer output shall be actual direct costs. For requesters in the ''all other'' category, when the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search (*i.e.*, the operator), the charge for the computer search will begin.

(k) *Aggregating requests*. 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 shall aggregate any such requests and charge accordingly.

Subpart C—Privacy Act

§ 802.11 Purpose and scope.

The regulations in this subpart apply to all records which are contained in a system of records maintained by the Agency and which are retrieved by an individual's name or personal identifier. This subpart implements the Privacy Act by establishing Agency policy and procedures providing for the maintenance of and guaranteed access to records. Under these procedures:

(a) You can ask us whether we maintain records about you or obtain access to your records; and

(b) You may seek to have your record corrected or amended if you believe that your record is not accurate, timely, complete, or relevant.

§ 802.12 Definitions.

As used in this subpart, the following terms shall have the following meanings:

(a) *Agency* has the meaning as defined in 5 U.S.C. 552(e).

(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 Agency. This includes, but is not limited to, the individual's education, financial transactions, medical history, and criminal or employment history and that contains the name, or an identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or a photograph.

(e) *System of records* means a group of any records under the control of the 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.

(f) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or part in making any determination about an identifiable individual, except as provided by 13 U.S.C. 8.

(g) *Routine use* means the disclosure of a record that is compatible with the purpose for which the record was collected.

(h) *Request for access* means a request made pursuant to 5 U.S.C. 552a(d)(1).

(i) *Request for amendment* means a request made pursuant to 5 U.S.C. 552a(d)(2).

(j) *Request for accounting* means a request made pursuant to 5 U.S.C. 552a(c)(3).

§ 802.13 Verifying your identity.

(a) *Requests for your own records.* When you make a request for access to records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746. In order to help the identification and location of requested records, you may also, at your option, include your social security number.

(b) *Requests on behalf of another.* Information that concerns an individual and that is contained in a system of records maintained by the Agency shall not be disclosed to any person, or to another agency, except under the provisions of the Privacy Act, 5 U.S.C. 552a, or the Freedom of Information Act, 5 U.S.C. 552.

(c) *Disclosure criteria.* Staff may disclose information from an agency system of records only if one or more of the following criteria apply:

(1) With the written consent of the individual to whom the record pertains.

(2) Pursuant to a specific exception listed under the Privacy Act (5 U.S.C. 552a(b)). For example, specific exceptions allow disclosure:

(i) To employees within the Agency who have a need for the record in the performance of their duties.

(ii) If disclosure is required under FOIA when the public interest in disclosure of the information outweighs the privacy interest involved.

(iii) For a routine use described in the agency system of records as published in the FEDERAL REGISTER.

(A) The published notices for these systems describe the records contained in each system and the routine uses for disclosing these records without first obtaining the consent of the person to whom the records pertain.

(B) CSOSA publishes notices of system of records, including all pertinent routine uses, in the FEDERAL REGISTER.

§ 802.14 Requests for access to records.

(a) *Submission and processing procedures.* (1) Requests for any agency record about yourself ordinarily will be processed pursuant to the Privacy Act, 5 U.S.C. 552a. Such a request must be made in writing and addressed to the FOIA Officer, Office of the General Counsel, Court Services and Offender Supervision Agency, 633 Indiana Avenue, NW., Washington, DC 20004. The requester should clearly mark on the face of the letter and the envelope ''Privacy Act Request.''

(2) Your request will be considered received as of the date it is received by the Office of the General Counsel. For quickest possible handling, you should mark both your request letter and the envelope ''Privacy Act Request.''

(3) You must describe the records that you seek in enough detail to enable Agency personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient and subject matter of the record. As a general rule, the more specific you are about the records or type of records that you want, the more likely the Agency will be able to locate the records in response to your request. If a determination is made that your request does not reasonably describe records, the Agency will tell you either what additional information is needed or why your request is otherwise insufficient. You will be given the opportunity to discuss your request so that you may modify it to meet the requirements of this section.

(b) *Release and review procedures.* Upon written request by an individual to gain access to his or her records which are not otherwise exempted, CSOSA shall permit the individual and, upon the individual's request, a person of his or her choosing to accompany him or her, to review the record and have a copy of all or any portion of the

record. If a document contains information exempt from disclosure under the Privacy Act, any reasonably segregable portion of the record will be provided to the requester after deletion of the exempt portions.

(2) A requester will be notified of the decision on the request in writing.

(3) Generally, all Privacy Act requests will be processed in the approximate order of receipt, unless the requester shows exceptional circumstances exist to justify an expedited response (*see* § 802.8).

§ 802.15 Denial of request.

(a) *Denial in whole or in part.* If it is determined that the request for records should be denied in whole or in part, the requester shall be notified by mail. The letter of notification shall:

(1) State the PA and FOIA exemptions relied on in not granting the request;

(2) If technically feasible, indicate the amount of information deleted at the place in the record where such deletion is made (unless providing such indication would harm an interest protected by the exemption relied upon to deny such material);

(3) Set forth the name and title or position of the responsible official;

(4) Advise the requester of the right to an administrative appeal in accordance with § 802.16; and

(5) Specify the official or office to which such appeal shall be submitted.

(b) *No records found.* If it is determined, after a thorough search for records by the responsible official or his delegate, that no records have been found to exist, the responsible official will so notify the requester in writing. The letter of notification will advise the requester of the right to administratively appeal the determination that no records exist (*i.e.*, to challenge the adequacy of the search for responsive records) in accordance with § 802.16. The notification shall specify the official or office to which the appeal shall be submitted for review.

§ 802.16 Administrative appeal.

(a) A requester may appeal an Agency initial determination when:

(1) Access to records has been denied in whole or in part; or

(2) It has been determined that no responsive records exist.

(b) Appeals of initial determinations must be made within 30 days of the receipt of the letter denying the request. Both the envelope and the letter of appeal should be sent to the Office of the General Counsel, Court Services and Offender Supervision Agency, 633 Indiana Avenue, NW., Room 1220, Washington, DC 20004 and must be clearly marked ''Privacy Act Appeal.''

(c) The General Counsel will make an appeal determination within 30 days (excluding Saturdays, Sundays, and holidays) from the date of receipt of the appeal. However, for a good reason, this time limit may be extended. If, after review, the General Counsel determines that additional information should be released, it will accompany the appeal response. If, after review, the General Counsel determines to uphold the initial review, we will inform you of that decision.

§ 802.17 Documents from other agencies.

(a)(1) *Documents from or pertaining to Federal agencies.* When a request for records includes a document from another Federal agency, the document will be referred to the originating Federal agency for a determination of its releasability. The requester will be informed of the referral. This is not a denial of a Privacy Act request; thus no appeal rights accrue to the requester.

(2) When a Privacy Act request is received for a record created by the Agency that includes information originated by another Federal agency, the record will be referred to the originating agency for review and recommendation on disclosure. The Agency will not release any such record without prior consultation with the originating agency.

(b) *Documents from non-Federal agencies.* When a request for records includes a document from a non-Federal agency, CSOSA staff must make a determination of its releasability.

§ 802.18 Correction or amendment of records.

This section applies to all records kept by the Agency except for records of earnings. If you believe your record

is not accurate, relevant, timely, or complete, you may request that your record be corrected or amended. A request for correction or amendment must identify the particular record in question, state the correction or amendment sought, and set forth the justification for the correction. To amend or correct your record, you should write to the Office of the General Counsel identified in § 802.14(a)(1). You should submit any available evidence to support your request. Both the request and the envelope must be clearly marked ''Privacy Act Correction Request.'' Your request should indicate:

(a) The system of records from which the record is retrieved;

(b) The particular record which you want to correct or amend;

(c) Whether you want to add, delete or substitute information in the records; and

(d) Your reasons for believing that your record should be corrected or amended.

§ 802.19 Appeal of denial to correct or amend.

(a) The system manager may grant or deny requests for correction of agency records. One basis for denial may be that the records are contained in an agency system of records that has been published in the FEDERAL REGISTER and exempted from the Privacy Act provisions allowing amendment and correction.

(1) Any denial of a request for correction should contain a statement of the reason for denial and notice to the requester that the denial may be appealed to the General Counsel by filing a written appeal.

(2) The appeal should be marked on the face of the letter and the envelope, ''PRIVACY APPEAL—DENIAL OF CORRECTION,'' and be addressed to the Office of the General Counsel, address cited at § 802.14(a)(1).

(3) The General Counsel will review your request within 30 days from the date of receipt. However, for a good reason, this time limit may be extended. If, after review, the General Counsel determines that the record should be corrected, the record will be corrected. If, after review, the General Counsel refuses to amend the record exactly as you requested, we will inform you:

(i) That your request has been refused and the reason;

(ii) That this refusal is the Agency's final decision;

(iii) That you have a right to seek court review of this request to amend the record; and

(iv) That you have a right to file a statement of disagreement with the decision. Your statement should include the reason you disagree. We will make your statement available to anyone to whom the record is subsequently disclosed, together with a statement of our reasons for refusing to amend the record.

(b) Requests for correction of records prepared by other federal agencies shall be forwarded to that agency for appropriate action and the requester will be immediately notified of the referral in writing.

(c) When the request is for correction of non-Federal records, the requester will be advised to write to that non-Federal entity.

§ 802.20 Accounting of disclosures.

(a) We will provide an accounting of all disclosures of a record for five years or until the record is destroyed, whichever is longer, except that no accounting will be provided to the record subject for disclosures made to law enforcement agencies and no accounting will be made for:

(1) Disclosures made under the FOIA;

(2) Disclosures made within the agency; and

(3) Disclosures of your record made with your written consent.

(b) The accounting will include:

(1) The date, nature, and purpose of the disclosure; and

(2) The name and address of the person or entity to whom the disclosure is made.

(c) You may request access to an accounting of disclosures of your record. Your request should be in accordance with the procedures in § 802.14. You will be granted access to an accounting of the disclosures of your record in accordance with the procedures of this part which govern access to the related record, excepting disclosures made for

an authorized civil or criminal law enforcement agency as provided by subsection (c)(3) of the Privacy Act. You will be required to provide reasonable identification.

§ 802.21 Appeals.

You may appeal a denial of a request for an accounting to the Office of the General Counsel in the same manner as a denial of a request for access to records (See § 802.16) and the same procedures will be followed.

§ 802.22 Fees.

The Agency shall charge fees under the Privacy Act for duplication of records only. These fees shall be at the same rate the Agency charges for duplication fees under the Freedom of Information Act (*See* § 802.10(i)(1)).

§ 802.23 Use and disclosure of social security numbers.

(a) *In general*. An individual shall not be denied any right, benefit, or privilege provided by law because of such individual's refusal to disclose his or her social security number.

(b) *Exceptions*. The provisions of paragraph (a) of this section do not apply with respect to:

(1) Any disclosure which is required by Federal statute, or

(2) The disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(c) *Requests for disclosure of social security number*. If the Agency requests an individual to disclose his or her social security account number, we shall inform that individual whether:

(1) Disclosure is mandatory or voluntary.

(2) By what statutory or other authority such number is solicited, and

(3) What uses will be made of it.

Subpart D—Subpoenas or Other Legal Demands for Testimony or the Production or Disclosure of Records or Other Information

§ 802.24 Purpose and scope.

(a) These regulations state the procedures which the Court Services and Offender Supervision Agency (''CSOSA'' or ''Agency'') and the District of Columbia Pretrial Services Agency (''PSA'' or ''Agency'') follow in response to a demand from a Federal, state, or local administrative body for the production and disclosure of material in connection with a proceeding to which the Agency is not a party.

(b) These regulations do not apply to congressional requests. Neither do these regulations apply in the case of an employee making an appearance solely in his or her private capacity in judicial or administrative proceedings that do not relate to the Agency (such as cases arising out of traffic accidents, domestic relations, etc.).

(c) This part is not intended 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 United States or specifically CSOSA or PSA.

§ 802.25 Definitions.

Demand means a request, order, or subpoena for testimony or documents to use in a legal proceeding.

Employee includes a person employed in any capacity by CSOSA or PSA, currently or in the past; any person appointed by, or subject to the supervision, jurisdiction, or control of the head of the Agency, or any Agency official, currently or in the past. A person who is subject to the Agency's jurisdiction or control includes any person who hired as a contractor by the agency, any person performing services for the agency under an agreement, and any consultant, contractor, or subcontractor of such person. A former employee is also considered an employee only when the matter about which the person would testify is one in which he or she was personally involved while at

the Agency, or where the matter concerns official information that the employee acquired while working at the Agency, such as sensitive or confidential agency information.

Legal Proceeding includes any pretrial, trial, and post-trial state of any existing or reasonably anticipated judicial or administrative action, hearing, investigation, or similar proceeding before a court, commission, board, agency, or other tribunal, authority or entity, foreign or domestic. Legal proceeding also includes any deposition or other pretrial proceeding, including a formal or informal request for testimony made by an attorney or other person, or a request for documents gathered or drafted by an employee.

§ 802.26 Receipt of demand.

If, in connection with a proceeding to which the Agency is not a party, an employee receives a demand from a court or other authority for material contained in the Agency's files, any information relating to material contained in the Agency's files, or any information or material acquired by an employee as a part of the performance of that person's official duties or because of that person's official status, the employee must:

(a) Immediately notify the Office of the General Counsel and forward the demand to the General Counsel if the demand pertains to CSOSA; or

(b) Immediately notify the Deputy Director of PSA and forward the demand to the Deputy Director if the demand pertains to PSA.

§ 802.27 Compliance/noncompliance.

The General Counsel is responsible for determining if CSOSA should comply or not comply with the demand, and the Deputy Director of PSA is responsible for determining if PSA should comply with the demand.

(a) An employee may not produce any documents, or provide testimony regarding any information relating to, or based upon Agency documents, or disclose any information or produce materials acquired as part of the performance of that employee's official duties, or because of that employee's official status without prior authorization from the General Counsel or Deputy Director. The reasons for this policy are as follows:

(1) To conserve the time of the agency for conducting official business;

(2) To minimize the possibility of involving the agency in controversial issues that are not related to the agency's mission;

(3) To prevent the possibility that the public will misconstrue variances between personal opinions of agency employees and agency policies;

(4) To avoid spending the time and money of the United States for private purposes;

(5) To preserve the integrity of the administrative process; and

(6) To protect confidential, sensitive information and the deliberative process of the agency.

(b) An attorney from the Office of the General Counsel shall appear with any CSOSA employee upon whom the demand has been made (and with any PSA employee if so requested by the Deputy Director), and shall provide the court or other authority with a copy of the regulations contained in this part. The attorney shall also inform the court or authority that the demand has been or is being referred for prompt consideration by the General Counsel or Deputy Director. The court or other authority will be requested respectfully to stay the demand pending receipt of the requested instructions from the General Counsel or Deputy Director.

(c) If the court or other authority declines to stay the effect of the demand pending receipt of instructions from the General Counsel or Deputy Director, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel or Deputy Director not to produce the material or disclose the information sought, the employee upon whom the demand was made shall respectfully decline to produce the information under *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). In this case, the Supreme Court held that a government employee could not be held in contempt for following an agency regulation requiring agency approval before producing government information in response to a court order.

(d) To achieve the purposes noted in paragraphs (a)(1) through (6) of this section, the agency will consider factors such as the following in determining whether a demand should be complied with:

(1) The Privacy Act, 5 U.S.C. 522a;

(2) Department of Health and Human Services statute and regulations concerning drug and alcohol treatment programs found at 42 U.S.C. 290dd and 42 CFR 2.1 *et seq.;*

(3) The Victims Rights Act, 42 U.S.C. 10606(b);

(4) D.C. statutes and regulations;

(5) Any other state or federal statute or regulation;

(6) Whether disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose;

(7) Whether disclosure is appropriate under the relevant substantive law concerning privilege;

(8) Whether disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection; and

(9) Whether disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired.

Subpart E—Exemption of Records Systems Under the Privacy Act

§ 802.28 Exemption of the Court Services and Offender Supervision Agency System—limited access.

The Privacy Act permits specific systems of records to be exempt from some of its requirements.

(a)(1) The following systems of records are exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1)–(3), (4)(G)–(I), (5) and (8), (f) and (g):

(i) Background Investigation (CSOSA–2).

(ii) Supervision Offender Case File (CSOSA–9).

(iii) Pre-Sentence Investigations (CSOSA–10).

(iv) Supervision & Management Automated Record Tracking (SMART) (CSOSA–11).

(v) Recidivism Tracking Database (CSOSA–12).

(vi) [Reserved]

(vii) Substance Abuse Treatment Database (CSOSA–15).

(viii) Screener (CSOSA–16).

(ix) Sex Offender Registry (CSOSA–18).

(2) Exemptions from the particular subsections are justified for the following reasons:

(i) From subsection (c)(3) because offenders will not be permitted to gain access or to contest contents of these record systems under the provisions of subsection (d) of 5 U.S.C. 552a. Revealing disclosure accountings can compromise legitimate law enforcement activities and CSOSA responsibilities.

(ii) From subsection (c)(4) because exemption from provisions of subsection (d) will make notification of formal disputes inapplicable.

(iii) From subsection (d), (e)(4)(G) through (e)(4)(I), (f) and (g) because exemption from this subsection is essential to protect internal processes by which CSOSA personnel are able to formulate decisions and policies with regard to offenders, to prevent disclosure of information to offenders that would jeopardize legitimate correctional interests of rehabilitation, and to permit receipt of relevant information from other federal agencies, state and local law enforcement agencies, and federal and state probation and judicial offices.

(iv) From subsection (e)(1) because primary collection of information directly from offenders about criminal history or criminal records is highly impractical and inappropriate.

(A) It is not possible in all instances to determine relevancy or necessity of specific information in the early stages of a criminal or other investigation.

(B) Relevance and necessity are questions of judgment and timing; what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after the information is assessed that its relevancy and necessity in a specific investigative activity can be established.

(C) In interviewing individuals or obtaining other forms of evidence or information during an investigation, information could be obtained, the nature of which would leave in doubt its relevancy and necessity. Such information, however, could be relevant to another investigation or to an investigative activity under the jurisdiction of another agency.

(v) From subsection (e)(2) because the nature of criminal and other investigative activities is such that vital information about an individual can only be obtained from other persons who are familiar with such individual and his/her activities. In such investigations it is not feasible to rely upon information furnished by the individual concerning his/her own activities.

(vi) From subsection (e)(3) because disclosure would provide the subject with substantial information which could impede or compromise the investigation. The individual could seriously interfere with investigative activities and could take appropriate steps to evade the investigation or flee a specific area.

(vii) From subsection (e)(8) because the notice requirements of this provision could seriously interfere with a law enforcement activity by alerting the subject of a criminal or other investigation of existing investigative interest.

(viii) Those sections would otherwise require CSOSA to notify an individual of investigatory materials contained in a record pertaining to him/her, permit access to such record, permit requests for its correction (section 552a(d), (e)(4)(G), and (H)); make available to him/her any required accounting of disclosures made of the record (section 552a(c)(3)), publish the sources of records in the system (section 552a(4)(I)); and screen records to insure that there is maintained only such information about an individual as is relevant to accomplish a required purpose of the Agency (section 552(e)(1)). In addition, screening for relevancy to Agency purposes, a correction or attempted correction of such materials could require excessive amounts of time and effort on the part of all concerned.

(b)(1) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1)–(e)(3), (4)(H), (5), (8) and (g):

(i) Office of Professional Responsibility Record (OPR) (CSOSA–17).

(ii) [Reserved]

(2) Exemptions from the particular subsections are justified for the following reasons:

(i) From subsection (c)(3) because release of disclosure accounting could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation and the fact that they are subjects of the investigation, and reveal investigative interest by not only the OPR but also by the recipient agency. Since release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, release could result in activities that would impede or compromise law enforcement such as: the destruction of documentary evidence; improper influencing of witnesses; endangerment of the physical safety of confidential sources, witnesses, and law enforcement personnel; fabrication of testimony; and flight of the subject from the area. In addition, release of disclosure accounting could result in the release of properly classified information which could compromise the national defense or disrupt foreign policy.

(ii) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(iii) From the access and amendment provisions of subsection (d) because access to the records contained in this system of records could provide the subject of an investigation with information concerning law enforcement activities such as that relating to an actual or potential criminal, civil or regulatory violation; the existence of an investigation; the nature and scope of the information and evidence obtained as to his activities; the identity of confidential sources, witnesses, and law enforcement personnel; and information that may enable the subject to avoid detection or apprehension. Such

disclosure would present a serious impediment to effective law enforcement where they prevent the successful completion of the investigation; endanger the physical safety of confidential sources, witnesses, and law enforcement personnel; and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose security-sensitive or confidential business information or information that would constitute an unwarranted invasion of the personal privacy of third parties. Amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

(iv) From subsection (e)(1) because the application of this provision could impair investigations and interfere with the law enforcement responsibilities of the OPR for the following reasons:

(A) It is not possible to detect relevance or necessity of specific information in the early stages of a civil, criminal or other law enforcement investigation, case, or matter, including investigations in which use is made of properly classified information. Relevance and necessity are questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

(B) During the course of any investigation, the OPR may obtain information concerning actual or potential violations of laws other than those within the scope of its jurisdiction. In the interest of effective law enforcement, the OPR should retain this information as it may aid in establishing patterns of criminal activity, and can provide valuable leads for Federal and other law enforcement agencies.

(C) In interviewing individuals or obtaining other forms of evidence during an investigation, information may be supplied to an investigator which relates to matters incidental to the primary purpose of the investigation but which may relate also to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

(v) From subsection (e)(2) because, in some instances, the application of this provision would present a serious impediment to law enforcement for the following reasons:

(A) The subject of an investigation would be placed on notice as to the existence of an investigation and would therefore be able to avoid detection or apprehension, to improperly influence witnesses, to destroy evidence, or to fabricate testimony.

(B) In certain circumstances the subject of an investigation cannot be required to provide information to investigators, and information relating to a subject's illegal acts, violations of rules of conduct, or any other misconduct must be obtained from other sources.

(C) In any investigation it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to verify the evidence necessary for successful litigation.

(vi) From subsection (e)(3) because the application of this provision would provide the subject of an investigation with substantial information which could impede or compromise the investigation. Providing such notice to a subject of an investigation could interfere with an undercover investigation by revealing its existence, and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(vii) From subsection (e)(5) because the application of this provision would prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Material which may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as an investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigation report, and thereby impede effective law enforcement.

(viii) From subsection (e)(8) because the application of this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation, and could reveal investigation techniques, procedures, and/or evidence.

(ix) From subsection (g) to the extent that this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j)(2), (k)(1), and (k)(2) of the Privacy Act.

§ 802.29 Exemption of the Pretrial Services Agency System.

The Privacy Act permits specific systems of records to be exempt from some of its requirements.

(a)(1) The following systems of records are exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1)–(3), (4)(G)–(I), (5) and (8), (f) and (g):

(i) Automated Bail Agency Database (ABADABA) (CSOSA/PSA–1).

(ii) Drug Test Management System (DTMS) (CSOSA/PSA–2).

(iii) Interview and Treatment Files (CSOSA/PSA–3).

(iv) Pretrial Realtime Information Systems Manager (PRISM) (CSOSA/PSA–6).

(2) Exemptions from the particular subsections are justified for the following reasons:

(i) From subsection (c)(3) because defendants/offenders will not be permitted to gain access or to contest contents of these record systems under the provisions of subsection (d) of 5 U.S.C. 552a. Revealing disclosure accountings can compromise legitimate law enforcement activities and CSOSA/PSA responsibilities.

(ii) From subsection (c)(4) because exemption from provisions of subsection (d) will make notification of formal disputes inapplicable.

(iii) From subsection (d), (e)(4)(G) through (e)(4)(I), (f) and (g) because exemption from this subsection is essential to protect internal processes by which CSOSA/PSA personnel are able to formulate decisions and policies with regard to defendants/offenders, to prevent disclosure of information to defendants/offenders that would jeopardize legitimate correctional interests of rehabilitation, and to permit receipt of relevant information from other federal agencies, state and local law enforcement agencies, and federal and state probation and judicial offices.

(iv) From subsection (e)(1) because primary collection of information directly from defendants/offenders about criminal history or criminal records is highly impractical and inappropriate.

(A) It is not possible in all instances to determine relevancy or necessity of specific information in the early stages of a criminal or other investigation.

(B) Relevancy and necessity are questions of judgment and timing; what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after the information is assessed that its relevancy and necessity in a specific investigative activity can be established.

(C) In interviewing individuals or obtaining other forms of evidence or information during an investigation, information could be obtained, the nature of which would leave in doubt its relevancy and necessity. Such information, however, could be relevant to another investigation or to an investigative activity under the jurisdiction of another agency.

(v) From subsection (e)(2) because the nature of criminal and other investigative activities is such that vital information about an individual can only be obtained from other persons who are familiar with such individual and his/her activities. In such investigations it is not feasible to rely upon information furnished by the individual concerning his/her own activities.

(vi) From subsection (e)(3) because disclosure would provide the subject with substantial information which could impede or compromise the investigation. The individual could seriously interfere with investigative activities and could take appropriate steps to evade the investigation or flee a specific area.

(vii) From subsection (e)(8) because the notice requirements of this provision could seriously interfere with a law enforcement activity by alerting the subject of a criminal or other investigation of existing investigative interest.

(viii) Those sections would otherwise require CSOSA to notify an individual

of investigatory materials contained in a record pertaining to him/her, permit access to such record, permit requests for its correction (section 552a(d), (e)(4)(G), and (H)); make available to him/her any required accounting of disclosures made of the record (section 552a(c)(3)), publish the sources of records in the system (section 552a(4)(I)); and screen records to insure that there is maintained only such information about an individual as is relevant to accomplish a required purpose of the Agency (section 552(e)(1)). In addition, screening for relevancy to Agency purposes, a correction or attempted correction of such materials could require excessive amounts of time and effort on the part of all concerned.

(b) [Reserved]

PART 803—AGENCY SEAL

Sec.
803.1 Description.
803.2 Authority to affix seal.
803.3 Use of the seal.

AUTHORITY: 5 U.S.C. 301, Pub L. 105–33, 111 Stat. 251, 712, D.C. Code 24–133.

SOURCE: 69 FR 21059, Apr. 20, 2004, unless otherwise noted.

§ 803.1 Description.

(a) The Agency seal of the Court Services and Offender Supervision Agency for the District of Columbia (CSOSA or Agency) is described as follows: General George Washington's coat of arms in red and white bounded by an outline of the District of Columbia and superimposed upon a blue field together with the dome of the United States Capitol building in gold; encircled by a banner with the words ''Community, Accountability, and Justice'' and gold laurel branches, with gold edges bearing the inscription ''COURT SERVICES AND OFFENDER SUPERVISION AGENCY'' above three stars at either side of the words ''DISTRICT OF COLUMBIA'' in smaller letters in the base; letters and stars in gold. A reproduction of the Agency seal in black and white appears as follows.

(b) The Agency seal of the Pretrial Services Agency for the District of Columbia (PSA or Agency) is described as follows: Two crossed flags, the United States flag on the left and the District of Columbia flag on the right superimposed upon the United States Capitol dome and two laurel branches both in gold which appear on a blue field bearing a white banner edged and lettered in gold with the inscription ''COMMUNITY, ACCOUNTABILITY, JUSTICE''; bearing the inscription ''PRETRIAL SERVICES AGENCY'' at the top, and ''DISTRICT OF COLUMBIA'' at the bottom surrounded by three gold stars on either side; letters and stars in gold. A reproduction of the Agency seal in black and white appears below.

[69 FR 21059, Apr. 20, 2004, as amended at 77 FR 59082, Sept. 26, 2012]

§ 803.2 Authority to affix seal.

The Director of CSOSA or PSA (as appropriate) and each Director's designees are authorized to affix their respective Agency seal (including replicas and reproductions) to appropriate documents, certifications, and other materials for all purposes authorized by this part.

[77 FR 59082, Sept. 26, 2012]

§ 803.3 Use of the seal.

(a) Each Agency's seal is used by that Agency's staff for official Agency business as approved by the appropriate Director or designee in accordance with all subparts of 28 CFR 803.3.

(b) Use of the Agency seal by any person or organization outside of the Agency may be made only with the appropriate prior written approval.

(1) Any request for such use must be made in writing to the Office of the General Counsel, Court Services and Offender Supervision Agency for the District of Columbia, 633 Indiana Avenue, NW., Washington, DC 20004, and must specify, in detail, the exact use to be made. Any permission granted by the appropriate Director or designee applies only to the specific use for which it was granted and is not to be construed as permission for any other use.

(2) The decision whether to grant such a request is made on a case-by-case basis, with consideration of all relevant factors, which may include: the benefit or cost to the government of granting the request; the unintended appearance of endorsement or authentication by the Agency; the potential for misuse; the effect upon Agency security; the reputability of the use; the extent of the control by the Agency over the ultimate use; and the extent of control by the Agency over distribution of any products or publications bearing the Agency seal.

(c) Falsely making, forging, counterfeiting, mutilating, or altering the Agency seal or reproduction, or knowingly using or possessing with fraudulent intent an altered Agency seal or reproduction is punishable under 28 U.S.C. 506.

(d) Any person using the Agency seal or reproduction in a manner inconsistent with the provisions of this part is subject to the provisions of 18 U.S.C. 1017, which states penalties for the wrongful use of an Agency seal, and other provisions of law as applicable.

[69 FR 21059, Apr. 20, 2004, as amended at 77 FR 59082, Sept. 26, 2012]

PART 804—ACCEPTANCE OF GIFTS

Sec.

804.1 Purpose.
804.2 Delegation of authority.
804.3 Restrictions.
804.4 Submission and approval.
804.5 Audit and public inspection.

AUTHORITY: 5 U.S.C. 301; Public Law 107–96, 115 Stat. 923, 931.

SOURCE: 69 FR 21060, Apr. 20, 2004, unless otherwise noted.

§ 804.1 Purpose.

By statute, the Director of the Court Services and Offender Supervision Agency (CSOSA or Agency) is authorized to accept and use gifts in the form of in-kind contributions of space and hospitality to support offender and defendant programs, and of equipment and vocational training services to educate and train offenders and defendants. The purpose of this part is to:

(a) Inform the public of the procedures to follow when offering a gift;

(b) Establish criteria for accepting and using gifts;

(c) Establish procedures for audit and public inspection of records pertaining to the acceptance and use of gifts; and

(d) Delegate gift acceptance authority to the Director of the Pretrial Services Agency (PSA or Agency).

§ 804.2 Delegation of authority.

The Director of CSOSA hereby delegates to the Director of PSA the authority to accept and use gifts in the form of in-kind contributions of space and hospitality to support defendant programs, and of equipment and vocational training services to educate and train defendants in accordance with the requirements of this part. This delegation of authority may not be further delegated.

§ 804.3 Restrictions.

(a) The Agency is not authorized to accept gifts of money, stock, bonds, personal or real property, or devises or bequests of such items, except as provided in this part.

(b) Agency employees may not solicit any type of gift to the Agency.

§ 804.4 Submission and approval.

(a) *Offender programs and equipment and vocational training services.* (1) Any person or organization wishing to donate as a gift in-kind contributions of space or hospitality to support offender programs, or equipment or vocational training services to educate and train offenders may submit the following information in writing to the Agency's Ethics Officer in the Office of the General Counsel:

(i) The name of the person or organization offering the gift;

(ii) A description of the gift;

(iii) The estimated value of the gift;

(iv) Any restrictions on the gift placed by the donor; and

(v) A signed statement that the gift is unsolicited.

(2) The Director, after consultation with the Agency's Ethics Officer, shall determine whether to accept or reject the gift.

(3) CSOSA staff shall advise the person offering the gift of the Agency's determination, including, if applicable, the reason for rejection. Reasons for rejecting a gift include findings that:

(i) There is a conflict of interest in accepting the gift;

(ii) Acceptance of the gift is otherwise unlawful or would create the appearance of impropriety;

(iii) Acceptance of the gift would obligate the Agency to an unbudgeted expenditure of funds; or

(iv) Operation of the program, equipment, or vocational training services would not be practicable.

(b) *Defendant programs and equipment and vocational training services.* (1) Any person or organization wishing to donate as a gift in-kind contributions of space or hospitality to support defendant programs, or equipment or vocational training services to educate and train defendants may submit the following information in writing to the Agency's Ethics Officer in the Office of the General Counsel:

(i) The name of the person or organization offering the gift;

(ii) A description of the gift;

(iii) The estimated value of the gift;

(iv) Any restrictions on the gift placed by the donor; and

(v) A signed statement that the gift is unsolicited.

(2) The General Counsel shall forward the request to PSA's Director with a recommendation whether to accept or reject the gift.

(3) PSA staff shall advise the person offering the gift of the Agency's determination, including the reason for rejection. Reasons for rejecting a gift include findings that:

(i) There is a conflict of interest in accepting the gift;

(ii) Acceptance of the gift is otherwise unlawful or would create the appearance of impropriety;

(iii) Acceptance of the gift would obligate the Agency to an unbudgeted expenditure of funds; or

(iv) Operation of the program, equipment, or vocational training services would not be practicable.

§ 804.5 Audit and public inspection.

(a) Records regarding the acceptance and use of gifts shall be made available for Federal Government audit.

(b) Public inspection of records regarding the acceptance and use of gifts shall be afforded through Freedom of Information Act requests (*see* 28 CFR part 802).

PART 810—COMMUNITY SUPERVISION: ADMINISTRATIVE SANCTIONS

Sec.
810.1 Supervision contact requirements.
810.2 Accountability contract.
810.3 Consequences of violating the conditions of supervision.

AUTHORITY: Pub. L. 105–33, 111 Stat. 712 (D.C. Code 24–1233(b)(2)(B)).

SOURCE: 66 FR 48337, Sept. 20, 2001, unless otherwise noted.

§ 810.1 Supervision contact requirements.

If you are an offender under supervision by the Court Services and Offender Supervision Agency for the District of Columbia (''CSOSA''), CSOSA will establish a supervision level for you and your minimum contact requirement (that is, the minimum frequency of face-to-face interactions between you and a Community Supervision Officer (''CSO'')).

§ 810.2 Accountability contract.

(a) Your CSO will instruct you to acknowledge your responsibilities and obligations of being under supervision (whether through probation, parole, or supervised release as granted by the releasing authority) by agreeing to an accountability contract with CSOSA.

(b) The CSO is responsible for monitoring your compliance with the conditions of supervision. The accountability contract identifies the following specific activities constituting substance abuse or non-criminal violations of your conditions of supervision.

(1) *Substance abuse violations.*

(i) Positive drug test.

(ii) Failure to report for drug testing.

(iii) Failure to appear for treatment sessions.

(iv) Failure to complete inpatient/outpatient treatment programming.

(2) *Non-criminal violations.*

(i) Failure to report to the CSO.

(ii) Leaving the judicial district without the permission of the court or the CSO.

(iii) Failure to work regularly or attend training and/or school.

(iv) Failure to notify the CSO of change of address and/or employment.

(v) Frequenting places where controlled substances are illegally sold, used, distributed, or administered.

(vi) Associating with persons engaged in criminal activity.

(vii) Associating with a person convicted of a felony without the permission of the CSO.

(viii) Failure to notify the CSO within 48 hours of being arrested or questioned by a law enforcement officer.

(ix) Entering into an agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court or the United States Parole Commission (''USPC'').

(x) Failure to adhere to any general or special condition of release.

(c) The accountability contract will identify a schedule of administrative sanctions (*see* § 810.3(b)) which may be imposed for your first violation and for subsequent violations.

(d) The accountability contract will provide for a reduction in your supervision level and/or the removal of previously imposed sanctions if:

(1) You maintain compliance for at least ninety days,

(2) The Supervisory Community Supervision Officer concurs with this assessment, and

(3) There are no additional reasons unrelated to the imposed sanction requiring the higher supervision level.

§ 810.3 Consequences of violating the conditions of supervision.

(a) If your CSO has reason to believe that you are failing to abide by the general or specific conditions of release

or you are engaging in criminal activity, you will be in violation of the conditions of your supervision. Your CSO may then impose administrative sanctions (see paragraph (b) of this section) and/or request a hearing by the releasing authority. This hearing may result in the revocation of your release or changes to the conditions of your release.

(b) Administrative sanctions available to the CSO include:

(1) Daily check-in with supervision for a specified period of time;

(2) Increased group activities for a specified period of time;

(3) Increased drug testing;

(4) Increased supervision contact requirements;

(5) Referral for substance abuse addiction or other specialized assessments;

(6) Electronic monitoring for a specified period of time;

(7) Community service for a specified number of hours;

(8) Placement in a residential sanctions facility or residential treatment facility for a specified period of time.

(9) Travel restrictions.

(c) You remain subject to further action by the releasing authority. For example, the USPC may override the imposition of any of the sanctions in paragraph (b) of this section and issue a warrant or summons if you are a parolee and it finds that you are a risk to the public safety or that you are not complying in good faith with the sanctions (*see* 28 CFR 2.85(a)(15)).

PART 811—SEX OFFENDER REGISTRATION

Sec.

811.1 Purpose and scope; relation to District of Columbia regulations.
811.2 Applicability.
811.3 Notice of obligation to register.
811.4 Determination of the obligation to register and the length of registration.
811.5 Commencement of the obligation to register.
811.6 Duration of the obligation to register.
811.7 Initial registration.
811.8 Review of determination to register.
811.9 Periodic verification of registration information.
811.10 Changes in registration information.
811.11 Compliance.
811.12 Penalties.
811.13 Notices and appearances.
811.14 Definitions.
APPENDIX A TO PART 811—LISTING OF SEX OFFENDER REGISTRATION OFFENSES BY CLASS

AUTHORITY: DC ST sec. 24–133 and the District of Columbia Sex Offender Registration Act of 1999, D.C. Law 13–137.

SOURCE: 67 FR 54095, Aug. 21, 2002, unless otherwise note.

§811.1 Purpose and scope; relation to District of Columbia regulations.

(a) In accordance with its sex offender registration functions authorized by section 166(a) of the Consolidated Appropriations Act, 2000 (Pub. L. 106–113, sec. 166(a), 113 Stat. 1530; D.C. Official Code secs. 24–133(c)(5)) and as further authorized by the Sex Offender Registration Act of 1999 (''the Act,'' D.C. Law 13–137, D.C. Official Code, secs. 22–4001 *et seq.*), the Court Services and Offender Supervision Agency for the District of Columbia (''CSOSA'') operates and maintains the sex offender registry for the District of Columbia. The regulations in this part set forth procedures and requirements relating to registration, verification, and changes in information for sex offenders who live, reside, work, or attend school in the District of Columbia.

(b) Chapter 4 of Title 6A, District of Columbia Municipal Regulations (DCMR)(47 D.C. Reg. 10042, December 22, 2000), contains regulations issued by the government of the District of Columbia for the sex offender registration system in the District of Columbia (''District of Columbia regulations''). Chapter 4 of Title 6A, DCMR (47 D.C. Reg. 10042, December 22, 2000) is incorporated by reference in this part with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Chapter 4 of Title 6A, DCMR, is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. Copies of Chapter 4 of Title 6A, DCMR, may be obtained from the District of Columbia's Office of Documents and Administrative

Issuances, 441 4th Street, NW., Room 520S, Washington, DC 20001. CSOSA hereby adopts all powers and authorities that the District of Columbia regulations authorize CSOSA to exercise, and hereby adopts all procedures and requirements that the District of Columbia regulations state that CSOSA shall adopt or carry out, including but not limited to all such powers, authorities, procedures and requirements relating to registration, verification, and changes in information.

[67 FR 54095, Aug. 21, 2002, as amended at 69 FR 18803, Apr. 9, 2004]

§ 811.2 Applicability.

(a) Sex offender registration requirements apply to all persons who live, reside, work, or attend school in the District of Columbia, and who:

(1) committed a registration offense on or after July 11, 2000;

(2) committed a registration offense at any time and were in custody or under supervision on or after July 11, 2000;

(3) were required to register under the law of the District of Columbia as was in effect on July 10, 2000; or

(4) committed a registration offense at any time in another jurisdiction and, within the registration period (see §§ 811.5 and 811.6), entered the District of Columbia to live, reside, work or attend school.

(b) ''Committed a registration offense'' means that a person was found guilty or found not guilty by reason of insanity of a registration offense or was determined to be a sexual psychopath. Registration offenses are defined in section 2(8) of the Sex Offender Registration Act of 1999 (D.C. Official Code § 22–4001(8)), subject to the exceptions in section 17(b) of that Act (D.C. Official Code section 22–4016), and are listed descriptively in the Appendix to Part 811 (which also provides information on registration and notification classes). Any future revision to the statutory provisions designating registration offenses will be effective notwithstanding the timing of any conforming revision of these regulations, including the Appendix.

§ 811.3 Notice of obligation to register.

(a) Sex offenders may be notified of their obligation to register under various provisions of law. See sections 4, 6 and 8 of the Sex Offender Registration Act of 1999 (D.C. Official Code sections 22–4003, 4005, 4007) (relating to notice by the District of Columbia Superior Court, Department of Corrections, or CSOSA); 18 U.S.C. 4042(c) (relating to notice by Federal Bureau of Prisons and probation offices); 18 U.S.C. 3563(a)(8), 3583(d), 4209(a) (inclusion of registration requirements as conditions of release under federal law); 42 U.S.C. 14071(b)(1) (notice under federal law standards for state sex offender registration programs).

(b) In some cases, sex offenders may not be notified of their obligation to register. Lack of notice does not excuse a failure to register because sex offenders have an independent obligation to register. Persons who have been convicted or found not guilty by reason of insanity of a sex offense or who have been determined to be a sexual psychopath should report to CSOSA in order to ascertain whether they are required to register.

§ 811.4 Determination of the obligation to register and the length of registration.

(a) If the Superior Court finds that a person committed a registration offense, the Superior Court enters an order certifying that the person is a sex offender and that the person is subject to registration for a prescribed period of time (see § 811.6).

(b) If a court order has not been entered certifying that a person is a sex offender and that the person is subject to registration for a prescribed period of time, CSOSA makes those determinations. CSOSA also determines the notification classification if the Court has not done so. Facts on which CSOSA's determination may be based include:

(1) The offense or offenses of conviction (or finding of not guilty by reason of insanity) or a determination that the person is a sexual psychopath;

(2) For certain offenses, facts that may not be apparent on the face of the conviction (or finding of not guilty by reason of insanity), such as:

(i) the age of the victim;

(ii) whether force was involved; or

(iii) whether the offense involved an undercover law enforcement officer who was believed to be an adult;

(3) Prior criminal history;

(4) For an offense committed in or prosecuted under the law of another jurisdiction, whether the offense involved conduct that was the same as or substantially similar to a District of Columbia registration offense; and

(5) The amount of time that has elapsed as computed under §811.6.

§811.5 Commencement of the obligation to register.

(a) A sex offender's obligation to register starts when the sex offender is found guilty or not guilty by reason of insanity of a registration offense or is determined to be a sexual psychopath. However, CSOSA may suspend registration requirements during any period of time in which a sex offender is detained, incarcerated, confined, civilly committed, or hospitalized in a secure facility.

(b) A sex offender must register if the sex offender is placed on probation, parole, supervised release, or convalescent leave, is conditionally or unconditionally released from a secure facility, is granted unaccompanied grounds privileges or other unaccompanied leave, absconds or escapes, is otherwise not detained, incarcerated, confined, civilly committed, or hospitalized in a secure facility, or enters the District of Columbia from another jurisdiction to live, reside, work, or attend school. Registration shall be effectuated as provided in §811.7 and may be carried out prior to the occurrence of a circumstance described in this paragraph, including the release of or granting of leave to a sex offender.

§811.6 Duration of the obligation to register.

(a) *Lifetime registration*. The registration period for a sex offender who is required to register for life shall end upon the sex offender's death.

(b) *Term of years registration*. (1) The registration period for any other sex offender shall end upon the expiration of the sex offender's probation, parole, supervised release, conditional release, or convalescent leave, or ten years after the sex offender is placed on probation, parole, supervised release, conditional release, or convalescent leave, or is unconditionally released from a correctional facility, prison, hospital or other place of confinement, whichever is latest.

(2) In computing ten years, CSOSA will not count:

(i) Any time in which the sex offender has failed to register or otherwise failed to comply with requirements of the Act or any procedures, requirements, rules, or regulations promulgated under the Act, including these regulations and the District of Columbia regulations;

(ii) Any time in which a sex offender is detained, incarcerated, confined, civilly committed, or hospitalized in a mental health facility; and

(iii) Any time in which a sex offender was registered prior to a revocation of probation, parole, supervised release, conditional release, or convalescent leave.

(3) In computing ten years, CSOSA will count any time in which a sex offender was registered in another jurisdiction unless that time is not counted because of a circumstance set forth in paragraph (b)(2) of this section.

(c) *Reversal, vacation, or pardon*. A person's obligation to register terminates if the person's conviction, finding of not guilty by reason of insanity, or finding that the person is a sexual psychopath is reversed or vacated, or if the person has been pardoned for the offense on the ground of innocence, and the person has committed no other offenses for which registration is required.

(d) *Termination of obligation to register in the District of Columbia under other circumstances*. A sex offender's obligation to register in the District of Columbia terminates if the sex offender no longer lives, resides, works or attends school in the District of Columbia. However, the obligation to register in the District of Columbia resumes if the sex offender re-enters the District of Columbia within the registration period to live, reside, work or attend school.

§ 811.7 Initial registration.

(a) *Duties of sex offender*. (1) A sex offender must notify CSOSA within 3 days of the occurrence of any circumstance described in § 811.5(b), including but not limited to being sentenced to probation, being released (including any escape or abscondance) from incarceration or confinement, or entering the District of Columbia to live, reside, work, or attend school.

(2) A sex offender must meet with a responsible officer or official, as directed by CSOSA, for the purpose of registration, and must cooperate in such a meeting, including:

(i) Providing any information required for registration and cooperating in photographing and fingerprinting;

(ii) Reviewing information obtained by CSOSA pursuant to paragraph (b) of this section as CSOSA directs and either attesting to its accuracy or setting forth in writing, under penalties of perjury, the exact portion or portions that are not accurate; and

(iii) Acknowledging receipt of information concerning the sex offender's duties under the Act, including reading (or, if the sex offender cannot read, listening to a reading of) and signing a form or forms stating that these duties have been explained to the sex offender.

(3) In case of disagreement with CSOSA's determination that the person must register or with CSOSA's determination of the person's classification for purposes of registration or notification, the person must follow the review procedures set forth in § 811.8.

(b) *Duties of CSOSA*. (1) CSOSA shall obtain information relating to the sex offender for the purpose of registration including:

(i) Name(s) and alias(es);

(ii) Date of birth;

(iii) Physical description such as sex, race, height, weight, eye color, hair color, tattoos, scars, or other marks or characteristics;

(iv) Social security, PDID, DCDC and FBI numbers;

(v) Driver's license number and make, model, color, and license plate number of any motor vehicle(s) the sex offender owns;

(vi) A photograph and set of fingerprints;

(vii) Current and/or anticipated home, school, work address(es) and telephone number(s); and

(viii) Other information that may assist CSOSA or the Metropolitan Police Department in locating the sex offender.

(2) CSOSA shall also obtain a detailed description of the offense(s) on the basis of which a sex offender is required to register, the presentence report(s), the victim impact statement(s), the date(s) of conviction and any sentence(s) imposed, the sex offender's criminal record and a detailed description of any relevant offense or offenses, pertinent statutes and case law in other jurisdictions, and any other information it deems useful in order to determine a sex offender's obligation to register, term of registration, and notification classification, to verify the accuracy of the information provided, to assist other jurisdictions' sex offender registration agencies and authorities, or to assist the Metropolitan Police Department in its law enforcement functions.

(3) CSOSA shall inform a sex offender of the sex offender's duty to:

(i) Comply with the requirements set forth in paragraph (a) of this section for initial registration;

(ii) Periodically verify the address(es) at which the sex offender lives, resides, works, and/or attends school, and other information, as provided in § 811.9;

(iii) Report any change of address and any other changes in registration information (including changes in appearance), as provided in § 811.10;

(iv) Notify CSOSA if the sex offender is moving to another jurisdiction or works or attends school in another jurisdiction and to register in any such jurisdiction; and

(v) Comply with the requirements of the Act and any procedures, requirements, rules, or regulations promulgated under the Act, including these regulations and the District of Columbia regulations.

(4) CSOSA shall inform the sex offender of the penalties for failure to comply with the sex offender's duties.

(5) If the Superior Court has not entered an order certifying that a person is a sex offender, CSOSA shall inform

the person that, if the person disagrees with CSOSA's determination that the person must register or CSOSA's determination of the person's classification for purposes of registration or notification, then the person must follow the review procedures set forth in § 811.8. CSOSA shall provide the person with a form to notify CSOSA of an intent to seek such review.

§ 811.8 Review of determination to register.

(a) If a person, other than a person who has been certified as a sex offender by the Court, disagrees with CSOSA's determination that the person is subject to registration or with CSOSA's determination of the person's classification for purposes of registration or notification, the person may seek judicial review of the determination, subject to the limitations of section 5(a)(1) of the Act (D.C. Official Code § 22–4004(a)(1)), by:

(1) Immediately providing CSOSA with a notice of intent to seek review upon being informed of the determination; and

(2) Within 30 calendar days of the date on which the person is informed of CSOSA's determination, filing a motion in the Superior Court setting forth the disputed facts and attaching any documents or affidavits upon which the person intends to rely.

(b) A person who fails to comply with paragraph (a) of this section may seek review of CSOSA's determination only in conformity with the limitations of section 5(a)(1) of the Act (D.C. Official Code Section 4004(a)(1)) and for good cause shown and to prevent manifest injustice by filing a motion in the Court within three years of the date on which the person is informed of CSOSA's determination.

§ 811.9 Periodic verification of registration information.

(a) Sex offenders who are required to register for life must verify registration information quarterly pursuant to the procedures set forth in paragraph (d) of this section.

(b) All other sex offenders must verify registration information annually pursuant to the procedures set forth in paragraph (d) of this section.

(c) Quarterly or annually, as appropriate, CSOSA will send a certified letter with return receipt requested to the home of the sex offender.

(d) The sex offender must correct any information on the form which is inaccurate or out of date and must sign, thumb-print, and return the form to CSOSA no later than 14 calendar days after the date on which CSOSA placed it in the mail. The sex offender has the option of returning the form by mail or in person unless:

(1) The sex offender is also on probation, parole, or supervised release or otherwise must report to CSOSA, and CSOSA directs the sex offender to verify the registration information in person;

(2) CSOSA directs the sex offender to appear in person because the sex offender has previously failed to submit a timely verification or submitted an incomplete or inaccurate verification; or

(3) CSOSA directs the sex offender to appear in person for the purpose of taking a new photograph documenting a significant change in physical appearance or updating a photograph that is five or more years old.

(e) CSOSA, either on its own accord or with its law enforcement partners, will conduct home verifications of registered sex offenders pursuant to the following schedule:

(1) Semi-annually, at least every six months, for all registered Class A sex offenders without supervision obligation.

(2) Annually, for all registered Class B sex offenders without a supervision obligation.

(3) As directed by CSOSA and consistent with Agency policy for all Class A and B sex offenders with supervision obligation.

[67 FR 54095, Aug. 21, 2002, as amended at 78 FR 23836, Apr. 23, 2013]

§ 811.10 Changes in registration information.

(a)(1) A sex offender must notify CSOSA if the sex offender:

(i) Ceases to live or reside at the registered address or moves to a different address;

(ii) leaves a job or obtains a new job, or leaves a school or enrolls in a new school; or

(iii) ceases to own or becomes an owner of any motor vehicle.

(2) A sex offender must notify CSOSA if there is a significant change in the sex offender's appearance and report as directed for the purpose of having a new photograph taken. Any question regarding whether a change in physical appearance is significant is to be referred to CSOSA.

(3) A sex offender must notify CSOSA if the sex offender is moving to another jurisdiction or if the sex offender works or attends school in another jurisdiction and must register in any such jurisdiction.

(b) Notice of the changes described in paragraph (a) of this section must be in writing and must be provided prior to the change if feasible and in any event within three days of the change. Notices of change in address or place of work or school attendance must include new address, location, and phone number information. Notice relating to ownership of a motor vehicle must include the make, model, color, and license plate number of the vehicle.

§ 811.11 Compliance.

(a) A sex offender may be excused from strict compliance with the time limits set forth in these regulations if the sex offender notifies CSOSA in advance of circumstances that will interfere with compliance and makes alternative arrangements to satisfy the requirements or, in the case of an emergency, notifies CSOSA as soon as the sex offender is able to do so.

(b) CSOSA may direct that a sex offender meet with a responsible officer or official for the purpose of securing compliance or discussing non-compliance with any requirements of the Act or any procedures, requirements, rules, or regulations promulgated under the Act, including these regulations and the District of Columbia regulations.

§ 811.12 Penalties.

A violation of the requirements of the Act or any procedures, requirements, rules, or regulations promulgated under the Act, including these regulations and the District of Columbia regulations, may result in criminal prosecution under section 16 of the Act (D.C. Official Code Section 22–4015), revocation of probation, parole, supervised release, or conditional release, and extension of the registration period under § 811.6(b)(2).

§ 811.13 Notices and appearances.

Unless otherwise directed by the Court or CSOSA,

(a) Notices or reports that are required to be submitted in writing should be sent to: Sex Offender Registration Unit, Court Services and Offender Supervision Agency, Room 2002, 300 Indiana Avenue, NW., Washington, DC 20001.

(b) A person who is required to report in person should go to: Sex Offender Supervision Office, Court Services and Offender Supervision Agency, Room 2002, 300 Indiana Avenue, NW., Washington, DC 20001.

§ 811.14 Definitions.

(a) The terms ''attends school,'' ''Court,'' ''in custody or under supervision,'' ''sex offender,'' and ''works'' shall have the same meaning as set forth in Section 2 of the Sex Offender Registration Act of 1999 (D.C. Official Code Section 22–4001).

(b) The term ''the Act'' means the Sex Offender Registration Act of 1999 (D.C. Official Code Section 22–4001 *et seq.*).

(c) The term ''days'' means business days unless otherwise specified.

(d) In relation to a motor vehicle, the term ''owns'' includes both exclusive ownership and co-ownership, and the term ''owner'' includes both exclusive owners and co-owners.

APPENDIX A TO PART 811—LISTING OF SEX OFFENDER REGISTRATION OFFENSES BY CLASS

CLASS A OFFENDERS—ALL LIFETIME REGISTRANTS

(D.C. Official Code Secs. 22–4001(6), 4002(b), 4011(b)(2)(A))

1. Class A includes offenders who have been convicted or found not guilty by reason of insanity of:

(a) First degree sexual abuse;

(b) Second degree sexual abuse;

(c) Rape;

(d) Forcible sodomy;

(e) First degree child sexual abuse committed against a child under 12;

(f) Carnal knowledge (statutory rape) committed against a child under 12;
(g) Sodomy committed against a child under 12;
(h) Murder committed before, during, or after engaging in or attempting to engage in a sexual act or contact or rape;
(i) Manslaughter committed before, during, or after engaging in or attempting to engage in a sexual act or contact or rape;
(j) Attempting to commit any of the foregoing offenses;
(k) Conspiring to commit any of the foregoing offenses; or
(l) Assault with intent to commit any of the foregoing offenses.

2. Class A also includes offenders who:
(a) In two or more trials or plea proceedings, have been convicted or found not guilty by reason of insanity of a felony registration offense or any registration offense against a minor. (Recidivism).
(b) In a single trial or plea proceeding, have been convicted or found not guilty by reason of insanity of registration offenses against two or more victims where each offense is a felony or committed against a minor (Multiple victims).
(c) Have been determined to be sexual psychopaths.

3. Class A also includes offenders who have been convicted or found not guilty by reason of insanity under the law of another jurisdiction of offenses that involved conduct that is the same as or substantially similar to that above.

CLASS B OFFENDERS—''TEN YEAR'' REGISTRANTS

(Other Offenses Against Minors, Wards, Patients, or Clients)

(D.C. Official Code Secs. 22–4001(8), 4002(a), 4011(b)(2)(B))

1. Class B includes offenders who are not included in Class A and have been convicted or found not guilty by reason of insanity of any of the following crimes against a minor (that is, a person under the age of 18):
(a) Third degree sexual abuse;
(b) Fourth degree sexual abuse;
(c) Misdemeanor sexual abuse;
(d) First degree child sexual abuse;
(e) Second degree child sexual abuse;
(f) Carnal knowledge (statutory rape);
(g) Sodomy committed against a minor;
(h) Indecent acts on a child;
(i) Enticing a child;
(j) Lewd, indecent or obscene acts;
(k) Sexual performance using a minor;
(l) Incest;
(m) Obscenity;
(n) Prostitution/Pandering;
(o) Assault (unwanted sexual touching);
(p) Threatening to commit a sexual offense;
(q) First or second degree burglary with intent to commit sex offense;
(r) Kidnapping (does not require a sexual purpose);
(s) Assault with intent to commit any of the foregoing offenses;
(t) Attempting to commit any of the foregoing offenses;
(u) Conspiring to commit any of the foregoing offenses; or
(v) Any offense against a minor for which the offender agreed in a plea agreement to be subject to sex offender registration requirements.

2. Class B also includes offenders who are not included in Class A and have been convicted or found not guilty by reason of insanity of any of the following crimes regardless of the age of the victim:
(a) First degree sexual abuse of a ward or resident of a hospital, treatment facility or other institution.
(b) Second degree sexual abuse of a ward or resident of a hospital, treatment facility or other institution.
(c) First degree sexual abuse of a patient or client.
(d) Second degree sexual abuse of a patient or client.

3. Class B also includes offenders who are not included in Class A and have been convicted or found not guilty by reason of insanity under the law of another jurisdiction of offenses that involved conduct that is the same as or substantially similar to that above.

CLASS C OFFENDERS—''TEN YEAR'' REGISTRANTS

(Other Offenses Against Adult Victims)

(D.C. Official Code Secs. 22–4001(8), 4002(a), 4011(b)(2)(C))

1. Class C includes offenders who are not included in Class A or Class B and have committed any of the following crimes against an adult (that is, a person 18 years of age or older):
(a) Third degree sexual abuse;
(b) Fourth degree sexual abuse;
(c) First or second degree burglary with intent to commit sex offense;
(d) Kidnapping with intent to commit sex offense;
(e) Threatening to commit a sexual offense (felony);
(f) Assault with intent to commit any of the foregoing offenses;
(g) Attempting to commit any of the foregoing offenses;
(h) Conspiring to commit any of the foregoing offenses, or;
(i) Any offense for which the offender agreed in a plea agreement to be subject to sex offender registration requirements.

2. Class C also includes offenders who are not included in Class A or Class B and have been convicted or found not guilty by reason of insanity under the law of another jurisdiction of offenses that involved conduct that is the same as or substantially similar to that above.

EXCEPTIONS (D.C. OFFICIAL CODE SEC. 22–4016(b))

The following do not constitute registration offenses:

1. Any sexual offense between consenting adults or an attempt, conspiracy or solicitation to commit such an offense, except for offenses to which consent is not a defense as provided in Section 218 of the Anti-Sexual Abuse Act of 1994 (D.C. Official Code §22–3017).

2. Any misdemeanor offense that involved a person's sexual touching or attempted or solicited sexual touching of an undercover law enforcement officer where the person believed that the officer was an adult.

3. Any misdemeanor offense committed against an adult, except where the offender agrees in a plea agreement to be subject to sex offender registration requirements.

PART 812—COLLECTION AND USE OF DNA INFORMATION

Sec.
812.1 Purpose.
812.2 Individuals subject to DNA collection.
812.3 Coordination with the Federal Bureau of Prisons.
812.4 Collection procedures.
APPENDIX A TO PART 812—QUALIFYING DISTRICT OF COLUMBIA CODE OFFENSES

AUTHORITY: 5 U.S.C. 301; Pub. L. 106–546 (114 Stat. 2726).

SOURCE: 67 FR 54100, Aug. 21, 2002, unless otherwise noted.

§ 812.1 Purpose.

The Court Services and Offender Supervision Agency for the District of Columbia (''CSOSA'') cooperates with other federal agencies to ensure that DNA samples from offenders are appropriately furnished to the Federal Bureau of Investigation (''FBI'') for DNA analysis. The results of the DNA analyses are to be included in the Combined DNA Index System (''CODIS'').

§ 812.2 Individuals subject to DNA collection.

CSOSA is responsible for collecting a DNA sample from each individual under its supervision who is, or has been, convicted of a qualifying District of Columbia Code offense. Qualifying District of Columbia Code offenses were designated by the Council of the District of Columbia in the ''DNA Sample Collection Act of 2001.'' CSOSA provides a listing of these offenses in the Appendix to this part. The list is presented for informational purposes only. Any future revision to the District of Columbia Code sections designating the qualifying offenses will be effective notwithstanding the timing of a conforming revision of the Appendix by CSOSA. CSOSA may choose not to collect a sample from an individual if it determines that CODIS already contains a DNA analysis for the individual.

§ 812.3 Coordination with the Federal Bureau of Prisons.

(a) CSOSA will coordinate with the Federal Bureau of Prisons in order to obtain documentation regarding the collection of a DNA sample when the Federal Bureau of Prisons releases an inmate to CSOSA's supervision or as requested by CSOSA.

(b) CSOSA shall provide the Federal Bureau of Prisons with documentation regarding the collection of a DNA sample from a District of Columbia Code offender when CSOSA returns the District of Columbia Code offender to the custody of the Federal Bureau of Prisons or as requested by the Federal Bureau of Prisons.

§ 812.4 Collection procedures.

(a) DNA samples will be collected, handled, preserved, and submitted to the FBI in accordance with FBI guidelines.

(b) CSOSA has the authority to use such means as are reasonably necessary to collect a sample from an individual who refuses to cooperate in the collection of the sample. Unless CSOSA determines that there are mitigating circumstances, CSOSA will consider that an individual is refusing to cooperate if:

(1) The individual is being ordered or transferred to CSOSA's supervision, but fails to report to CSOSA for collection of the sample within 15 business days of being sentenced to probation or

being discharged from a correctional institution; or

(2) The individual is already under CSOSA supervision and has been notified by his or her Community Supervision Officer of the time to report for collection of the sample, but fails to report for collection of the sample; or

(3) The individual has reported to CSOSA for collection of the sample, but fails to provide the sample after being given a minimum of one hour to do so; or

(4) The individual specifically states that he or she will not cooperate.

(c) When an individual has refused to cooperate in the collection of the sample, CSOSA deems the following to be reasonably necessary means for obtaining the sample:

(1) Impose administrative sanctions;

(2) Request a revocation hearing by the releasing authority; and/or

(3) Refer the individual who refuses to cooperate for criminal prosecution for a class A misdemeanor pursuant to section 4(a)(5) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135b(a)(5)).

[67 FR 54100, Aug. 21, 2002, as amended at 68 FR 19742, Apr. 22, 2003]

APPENDIX A TO PART 812—QUALIFYING DISTRICT OF COLUMBIA CODE OFFENSES

As enacted by the Council of the District of Columbia, the DNA Sample Collection Act of 2001 identifies the criminal offenses listed in Table 1 of this appendix as ''qualifying District of Columbia offenses'' for the purposes of the DNA Analysis Backlog Elimination Act of 2000 (Pub. L. 106–546, 114 Stat. 2726). Table 2 of this Appendix lists these same offenses in numerical order under the D.C. Code, 1981 Edition. Table 3 of this Appendix lists these same offenses in numerical order under the D.C. Official Code, 2001 Edition. The tables follow:

TABLE 1. OFFENSE LISTING

(1) Section 820 of An Act To establish a code of law for the District of Columbia (arson);

(2) Section 821 of An Act To establish a code of law for the District of Columbia (burning of one's own property with intent to defraud or injure another);

(3) Section 848 of An Act To establish a code of law for the District of Columbia (malicious burning, destruction, or injury of another's property);

(4) Section 803 of An Act To establish a code of law for the District of Columbia (assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse);

(5) Section 804 of An Act To establish a code of law for the District of Columbia, (assault with intent to commit mayhem or with dangerous weapon);

(6) Section 806a of An Act To establish a code of law for the District of Columbia (aggravated assault);

(7) Section 432(b) of the Revised Statutes, relating to the District of Columbia (assault on member of police force, campus or university special police, or fire department using a deadly or dangerous weapon);

(8) Section 807 of An Act To establish a code of law for the District of Columbia (mayhem or maliciously disfiguring);

(9) Section 3 of An Act for the protection of children in the District of Columbia and for other purposes (cruelty to children);

(10) Section 9 of An Act for the preservation of the public peace and the protection of property within the District of Columbia (lewd, indecent, or obscene acts (knowingly in the presence of a child under the age of 16 years));

(11) Section 823 of An Act To establish a code of law for the District of Columbia (burglary);

(12) Section 875 of An Act To establish a code of law for the District of Columbia (incest);

(13) Section 872 of An Act To establish a code of law for the District of Columbia (certain obscene activities involving minors);

(14) Section 3 of the District of Columbia Protection of Minors Act of 1982 (sexual performances using minors);

(15) Section 812 of An Act To establish a code of law for the District of Columbia (kidnapping);

(16) Section 798 of An Act To establish a code of law for the District of Columbia (murder in the first degree);

(17) Section 799 of An Act To establish a code of law for the District of Columbia (murder in the first degree—obstructing railroad);

(18) Section 800 of An Act To establish a code of law for the District of Columbia (murder in the second degree);

(19) Section 802 of An Act To establish a code of law for the District of Columbia (voluntary manslaughter only);

(20) Section 802a of An Act To establish a code of law for the District of Columbia (murder of a law enforcement officer);

(21) Section 813 of An Act To establish a code of law for the District of Columbia (abducting, enticing, or harboring a child for prostitution);

(22) Section 1 of An Act In relation to pandering, to define and prohibit the same and

to provide for the punishment thereof (pandering; inducing or compelling an individual to engage in prostitution);

(23) Section 2 of An Act In relation to pandering, to define and prohibit the same and to provide for the punishment thereof (compelling an individual to live life of prostitution against his or her will);

(24) Section 4 of An Act In relation to pandering, to define and prohibit the same and to provide for the punishment thereof (causing spouse to live in prostitution);

(25) Section 5 of An Act In relation to pandering, to define and prohibit the same and to provide for the punishment thereof (detaining an individual in disorderly house for debt there contracted);

(26) Forcible rape, carnal knowledge or statutory rape as these offenses were proscribed until May 23, 1995 by section 808 of An Act To establish a code of law for the District of Columbia;

(27) Section 810 of An Act To establish a code of law for the District of Columbia (robbery);

(28) Section 811 of An Act To establish a code of law for the District of Columbia (attempted robbery);

(29) Section 811a of An Act To establish a code of law for the District of Columbia (carjacking);

(30) Indecent acts with children as this offense was proscribed until May 23, 1995 by section 103(a) of An Act To provide for the treatment of sexual psychopaths in the District of Columbia, and for other purposes;

(31) Enticing a child as this offense was proscribed until May 23, 1995 by section 103(b) of An Act To provide for the treatment of sexual psychopaths in the District of Columbia, and for other purposes;

(32) Sodomy as this offense was proscribed until May 23, 1995 by section 104(a) of An Act To provide for the treatment of sexual psychopaths in the District of Columbia, and for other purposes where the offense was forcible or committed against a minor;

(33) Section 201 of the Anti-Sexual Abuse Act of 1994 (first degree sexual abuse);

(34) Section 202 of the Anti-Sexual Abuse Act of 1994 (second degree sexual abuse);

(35) Section 203 of the Anti-Sexual Abuse Act of 1994 (third degree sexual abuse);

(36) Section 204 of the Anti-Sexual Abuse Act of 1994 (fourth degree sexual abuse);

(37) Section 205 of the Anti-Sexual Abuse Act of 1994 (misdemeanor sexual abuse);

(38) Section 207 of the Anti-Sexual Abuse Act of 1994 (first degree child sexual abuse);

(39) Section 208 of the Anti-Sexual Abuse Act of 1994 (second degree child sexual abuse);

(40) Section 209 of the Anti-Sexual Abuse Act of 1994 (enticing a child);

(41) Section 212 of the Anti-Sexual Abuse Act of 1994 (first degree sexual abuse of a ward);

(42) Section 213 of the Anti-Sexual Abuse Act of 1994 (second degree sexual abuse of a ward);

(43) Section 214 of the Anti-Sexual Abuse Act of 1994 (first degree sexual abuse of a patient or client);

(44) Section 215 of the Anti-Sexual Abuse Act of 1994 (second degree sexual abuse of a patient or client);

(45) Section 217 of the Anti-Sexual Abuse Act of 1994 (attempts to commit sexual offenses); and

(46) Attempt or conspiracy to commit any of the offenses listed in items (1) through (45) of this table.

TABLE 2. OFFENSE LISTING (D.C. OFFICIAL CODE, 1981 EDITION)

(1) D.C. Code section 22–401—arson;

(2) D.C. Code section 22–402—burning of one's own property with intent to defraud or injure another;

(3) D.C. Code section 22–403—malicious burning, destruction or injury of another's property;

(4) D.C. Code section 22–501—assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse;

(5) D.C. Code section 22–502—assault with intent to commit mayhem or with dangerous weapon;

(6) D.C. Code section 22–504.1—aggravated assault;

(7) D.C. Code section 22–505(b)—assault on member of police force, campus or university special police, or fire department using a deadly or dangerous weapon;

(8) D.C. Code section 22–506—mayhem or maliciously disfiguring;

(9) D.C. Code section 22–901—cruelty to children;

(10) D.C. Code section 22–1112(b)—lewd, indecent or obscene acts (knowingly in the presence of a child under the age of 16 years);

(11) D.C. Code section 22–1801—burglary;

(12) D.C. Code section 22–1901—incest;

(13) D.C. Code section 22–2001—certain obscene activities involving a minor;

(14) D.C. Code section 22–2012—sexual performances using minors;

(15) D.C. Code section 22–2101—kidnapping;

(16) D.C. Code section 22–2401—murder in the first degree;

(17) D.C. Code section 22–2402—murder in the first degree (obstructing railroad);

(18) D.C. Code section 22–2403—murder in the second degree;

(19) D.C. Code section 22–2405—voluntary manslaughter only;

(20) D.C. Code section 22–2406—murder of a law enforcement officer;

(21) D.C. Code section 22–2704—abducting, enticing, or harboring a child for prostitution;

(22) D.C. Code section 22–2705—pandering; inducing or compelling an individual to engage in prostitution;

(23) D.C. Code section 22–2706—compelling an individual to live life of prostitution against his or her will;

(24) D.C. Code section 22–2708—causing spouse to live in prostitution;

(25) D.C. Code section 22–2709—detaining an individual in disorderly house for debt there contracted;

(26) D.C. Code section 22–2801 [repealed May 23, 1995]—forcible rape, carnal knowledge or statutory rape;

(27) D.C. Code section 22–2901—robbery;

(28) D.C. Code section 22–2902—attempted robbery;

(29) D.C. Code section 22–2903—carjacking;

(30) D.C. Code section 22–3501(a) [repealed May 23, 1995]—indecent acts with children;

(31) D.C. Code section 22–3501(b) [repealed May 23, 1995]—enticing a child;

(32) D.C. Code section 22–3502(a) [repealed May 23, 1995]—sodomy where the offense was forcible or committed against a minor;

(33) D.C. Code section 22–4102—first degree sexual abuse;

(34) D.C. Code section 22–4103—second degree sexual abuse;

(35) D.C. Code section 22–4104—third degree sexual abuse;

(36) D.C. Code section 22–4105—fourth degree sexual abuse;

(37) D.C. Code section 22–4106—misdemeanor sexual abuse;

(38) D.C. Code section 22–4108—first degree child sexual abuse;

(39) D.C. Code section 22–4109—second degree child sexual abuse;

(40) D.C. Code section 22–4110—enticing a child;

(41) D.C. Code section 22–4113—first degree sexual abuse of a ward;

(42) D.C. Code section 22–4114—second degree sexual abuse of a ward;

(43) D.C. Code section 22–4115—first degree sexual abuse of a patient or client;

(44) D.C. Code section 22–4116—second degree sexual abuse of a patient or client;

(45) D.C. Code section 22–4118—attempts to commit sexual offenses;

(46) Attempt or conspiracy to commit any of the offenses listed in items (1) through (45) of this table.

TABLE 3. OFFENSE LISTING (D.C. OFFICIAL CODE, 2001 EDITION)

(1) D.C. Code section 22–301—arson;

(2) D.C. Code section 22–302—burning of one's own property with intent to defraud or injure another;

(3) D.C. Code section 22–303—malicious burning, destruction, or injury of another's property;

(4) D.C. Code section 22–401—assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse;

(5) D.C. Code section 22–402—assault with intent to commit mayhem or with dangerous weapon;

(6) D.C. Code section 22–404.01—aggravated assault;

(7) D.C. Code section 22–405(b)—assault on member of police force, campus or university special police, or fire department using a deadly or dangerous weapon;

(8) D.C. Code section 22–406—mayhem or maliciously disfiguring;

(9) D.C. Code section 22–801—burglary;

(10) D.C. Code section 22–1101—cruelty to children;

(11) D.C. Code section 22–1312(b)—lewd, indecent, or obscene acts (knowingly in the presence of a child under the age of 16 years);

(12) D.C. Code section 22–1901—incest;

(13) D.C. Code section 22–2001—kidnapping;

(14) D.C. Code section 22–2101—murder in the first degree;

(15) D.C. Code section 22–2102—murder in the first degree—obstructing railroad;

(16) D.C. Code section 22–2103—murder in the second degree;

(17) D.C. Code section 22–2105—voluntary manslaughter only;

(18) D.C. Code section 22–2106—murder of a law enforcement officer;

(19) D.C. Code section 22–2201—certain obscene activities involving minors;

(20) D.C. Code section 22–2704—abducting, enticing, or harboring a child for prostitution;

(21) D.C. Code section 22–2705—pandering; inducing or compelling an individual to engage in prostitution;

(22) D.C. Code section 22–2706—compelling an individual to live life of prostitution against his or her will;

(23) D.C. Code section 22–2708—causing spouse to live in prostitution;

(24) D.C. Code section 22–2709—detaining an individual in disorderly house for debt there contracted;

(25) D.C. Code section 22–2801—robbery;

(26) D.C. Code section 22–2802—attempted robbery;

(27) D.C. Code section 22–2803—carjacking;

(28) D.C. Code section 22–3002—first degree sexual abuse;

(29) D.C. Code section 22–3003—second degree sexual abuse;

(30) D.C. Code section 22–3004—third degree sexual abuse;

(31) D.C. Code section 22–3005—fourth degree sexual abuse;

(32) D.C. Code section 22–3006—misdemeanor sexual abuse;

(33) D.C. Code section 22–3008—first degree child sexual abuse;

(34) D.C. Code section 22–3009—second degree child sexual abuse;

(35) D.C. Code section 22–3010—enticing a child;

(36) D.C. Code section 22–3013—first degree sexual abuse of a ward;

(37) D.C. Code section 22–3014—second degree sexual abuse of a ward;

(38) D.C. Code section 22–3015—first degree sexual abuse of a patient or client;

(39) D.C. Code section 22–3016—second degree sexual abuse of a patient or client;

(40) D.C. Code section 22–3018—attempts to commit sexual offenses;

(41) D.C. Code section 22–3102—sexual performances using minors;

(42) D.C. Code section 22–3801(a) [repealed May 23, 1995]—indecent acts with children;

(43) D.C. Code section 22–3801(b) [repealed May 23, 1995]—enticing a child;

(44) D.C. Code section 22–3802(a) [repealed May 23, 1995]—sodomy where the offense was forcible or committed against a minor;

(45) D.C. Code section 22–4801 [repealed May 23, 1995]—forcible rape, carnal knowledge or statutory rape;

(46) D.C. Code section 22–1803 or section 22–1805a—attempt or conspiracy to commit any of the offenses listed in items (1) through (45) of this table.

[67 FR 54100, Aug. 21, 2002, as amended at 68 FR 19742, Apr. 22, 2003]

PARTS 813–899 [RESERVED]

CHAPTER IX—NATIONAL CRIME PREVENTION AND PRIVACY COMPACT COUNCIL

Part		*Page*
900	[Reserved]	
901	Fingerprint submission requirements	839
902	Dispute adjudication procedures	840
904	State criminal history record screening standards	842
905	National Fingerprint File (NFF) program qualification requirements	843
906	Outsourcing of noncriminal justice administrative functions	843
907	Compact council procedures for compliant conduct and responsible use of the Interstate Identification Index (III) System for noncriminal justice purposes	844
908–999	[Reserved]	

PART 900 [RESERVED]

PART 901—FINGERPRINT SUBMISSION REQUIREMENTS

Sec.
901.1 Purpose and authority.
901.2 Interpretation of fingerprint submission requirements.
901.3 Approval of delayed fingerprint submission requests.
901.4 Audits.

AUTHORITY: 42 U.S.C. 14616.

SOURCE: 70 FR 36027, June 22, 2005, unless otherwise noted.

§ 901.1 Purpose and authority.

The Compact Council is established pursuant to the National Crime Prevention and Privacy Compact (Compact), title 42, U.S.C., chapter 140, subchapter II, section 14616. The purpose of these provisions is to interpret the Compact, as it applies to the required submission of fingerprints, along with requests for Interstate Identification Index (III) records, by agencies authorized to access and receive criminal history records under Public Law 92–544, and to establish protocols and procedures applicable to the III and its use for noncriminal justice purposes.

§ 901.2 Interpretation of fingerprint submission requirements.

(a) Article V of the Compact requires the submission of fingerprints or other approved forms of positive identification with requests for criminal history record checks for noncriminal justice purposes. The requirement for the submission of fingerprints may be satisfied in two ways:

(1) The fingerprints should be submitted contemporaneously with the request for criminal history information, or

(2) For purposes approved by the Compact Council, a delayed submission of fingerprints may be permissible under exigent circumstances.

(b) A preliminary III name based check may be made pending the receipt of the delayed submission of the fingerprints. The state repository may authorize terminal access to authorized agencies designated by the state, to enable them to conduct such checks. Such access must be made pursuant to the security policy set forth by the state's Criminal Justice Information Services (CJIS) Systems Agency (formerly known as the Control Terminal Agency).

§ 901.3 Approval of delayed fingerprint submission requests.

(a) A state may, based upon exigent circumstances, apply for delayed submission of fingerprints supporting requests for III records by agencies authorized to access and receive criminal history records under Public Law 92–544. Such applications must be sent to the Compact Council Chairman and include information sufficient to fully describe the emergency nature of the situation in which delayed submission authority is being sought, the risk to health and safety of the individuals involved, and the reasons why the submission of fingerprints contemporaneously with the search request is not feasible.

(b) In evaluating requests for delayed submissions, the Compact Council must utilize the following criteria:

(1) The risk to health and safety; and

(2) The emergency nature of the request.

(c) Upon approval of the application by the Compact Council, the authorized agency may conduct a III name check pending submission of the fingerprints. The fingerprints must be submitted within the time frame specified by the Compact Council. For the purposes of this part, ''time frame'' means the number of days that elapse between the date on which the name search was conducted and the date on which the state repository either positively identifies the fingerprint subject or forwards the fingerprints to the FBI or the date a Federal agency forwards the fingerprints to the FBI.

(d) Once a specific proposal has been approved by the Compact Council, another state may apply for delayed fingerprint submission consistent with the approved proposal, provided that the state has a related Public Law 92–544 approved state statute, by submitting the application to the FBI Compact Officer, 1000 Custer Hollow Road, Module C–3, Clarksburg, WV 26306–0001.

(e) Part 901 is also applicable to any federal agency authorized to access

criminal history records pursuant to Federal statute or Executive Order for noncriminal justice purposes.

§ 901.4 Audits.

(a) Audits of authorized State agencies that access the III System shall be conducted by the State's Compact Officer or, in the absence of a Compact Officer, the chief administrator for the criminal history record repository. The responsible Federal CJIS Systems Officer shall ensure that similar audits are conducted of authorized Federal agencies. Such audits shall be conducted to verify adherence to the provisions of part 901 and the FBI's CJIS Security Policy.

(b) Authorized agencies shall cause to be collected an appropriate record of each instance of III System access through a manual or electronic log. The log shall be maintained for a minimum one-year period to facilitate the audits and compliance reviews. Such records shall be maintained in accordance with the CJIS Security Policy. (For information on this security policy, contact your CJIS Systems Officer.)

(c) The audit and compliance reviews must include mechanisms to determine whether fingerprints were submitted within the time frame specified by the Compact Council.

(d) In addition to the audits as stated above, the FBI CJIS Audit staff shall also conduct routine systematic compliance reviews of State repositories, Federal agencies, and as necessary other authorized III System user agencies.

PART 902—DISPUTE ADJUDICATION PROCEDURES

Sec.

902.1 Purpose and authority.
902.2 Raising disputes.
902.3 Referral to Dispute Resolution Committee.
902.4 Action by Council Chairman.
902.5 Hearing procedures.
902.6 Appeal to the Attorney General.
902.7 Court action.

AUTHORITY: 42 U.S.C. 14616.

SOURCE: 68 FR 66341, Nov. 26, 2003, unless otherwise noted.

§ 902.1 Purpose and authority.

The purpose of Part 902 is to establish protocols and procedures for the adjudication of disputes by the Compact Council. The Compact Council is established pursuant to the National Crime Prevention and Privacy Compact (Compact), Title 42, U.S.C., Chapter 140, Subchapter II, Section 14616.

§ 902.2 Raising disputes.

(a) Cognizable disputes may be based upon:

(1) A claim that the Council has misinterpreted the Compact or one of the Council's rules or standards established under Article VI of the Compact;

(2) A claim that the Council has exceeded its authority under the Compact;

(3) A claim that in establishing a rule or standard or in taking other action, the Council has failed to comply with its bylaws or other applicable procedures established by the Council; or the rule, standard or action is not otherwise in accordance with applicable law; or

(4) A claim by a Compact Party that another Compact Party has failed to comply with a provision of the Compact or with any rule or standard established by the Council.

(b) Only a Party State, the FBI, or a person, organization, or government entity directly aggrieved by the Council's interpretation of the Compact or any rule or standard established by the Council pursuant to the Compact, or in connection with a matter covered under Section 902.2(a)(4), may raise a cognizable dispute. Such disputants may request a hearing on a dispute by contacting the Compact Council Chairman in writing at the Compact Council Office, Module C3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.

(c) The Chairman may ask the requester for more particulars, supporting documentation or materials as the circumstances warrant.

(d) A dispute may not be based solely upon a disagreement with the merits (substantive wisdom or advisability) of a rule or standard validly established by the Council within the scope of its authority under the Compact. However, nothing in this rule prohibits further discussion of the merits of a rule

or standard at any regularly scheduled Council meeting.

§902.3 Referral to Dispute Resolution Committee.

(a) The five person Dispute Resolution Committee membership shall be determined according to Compact Article VI (g). Should a dispute arise with an apparent conflict of interest between the disputant and a Committee member, the Committee member shall recuse himself/herself and the Compact Council Chairman shall determine an appropriate substitute for that particular dispute. In the case when the Compact Council Chairman is the committee member with the conflict, the Chairman shall take appropriate steps to appoint a replacement that resolves the conflict.

(b) The Compact Council Chairman shall refer the dispute, together with all supporting documents and materials, to the Council's Dispute Resolution Committee.

(c) The Dispute Resolution Committee shall recommend hearings to all disputants who raise issues that are not clearly frivolous or without merit. If the Committee recommends denying a hearing, it must articulate its reason or reasons for doing so in writing.

(d) The Dispute Resolution Committee shall consider the matter and:

(1) Refer it to the Council for a hearing;

(2) Recommend that the Council deny a hearing if the Committee concludes that the matter does not constitute a cognizable dispute under §902.2(a); or

(3) Request more information from the person or organization raising the dispute or from other persons or organizations.

§902.4 Action by Council Chairman.

(a) The Chairman shall communicate the decision of the Dispute Resolution Committee to the person or organization that raised the dispute.

(b) If a hearing is not granted, the disputant may appeal this decision to the Attorney General. If the Attorney General believes the disputant has raised an issue that is not frivolous or without merit, the Attorney General may order the Compact Council Chairman to grant a hearing.

(c) If a hearing is granted, the Chairman shall:

(1) Include the dispute on the agenda of a scheduled meeting of the Council or, at the Chairman's discretion, schedule a special Council meeting;

(2) Notify the person or organization raising the dispute as to the date of the hearing and the rights of disputants under §902.5 (Hearing Procedures); and

(3) Include the matter of the dispute in the prior public notice of the Council meeting required by Article VI (d)(1) of the Compact.

§902.5 Hearing procedures.

(a) The hearing shall be open to the public pursuant to Article VI (d)(1) of the Compact.

(b) The Council Chairman or his/her designee shall preside over the hearing and may limit the number of, and the length of time allowed to, presenters or witnesses.

(c) The person or organization raising the dispute or a Compact Party charged under the provisions of §902.2(a)(4) shall be entitled to:

(1) File additional written materials with the Council at least ten days prior to the hearing;

(2) Appear at the hearing, in person and/or by counsel;

(3) Make an oral presentation; and

(4) Call and cross-examine witnesses.

(d) Subject to the discretion of the Chairman, other persons and organizations may be permitted to appear and make oral presentations at the hearing or provide written materials to the Council concerning the dispute.

(e) All Council members, including a member or members who raised the dispute that is the subject of the hearing shall be entitled to participate fully in the hearing and vote on the final Council decision concerning the dispute.

(f) The Council shall, if necessary, continue the hearing to a subsequent Council meeting.

(g) Summary minutes of the hearing shall be made and transcribed and shall be available for inspection by any person at the Council office within the Federal Bureau of Investigation.

(h) The proceedings of the hearing shall be recorded and, as necessary, transcribed. A transcript of the hearing

will be made and forwarded to the Attorney General if an appeal is filed pursuant to Section (c) of Article XI of the Compact.

(i) The Council's decision on the dispute shall be based upon a majority vote of Council members or their proxies present (as per Compact Article VI and Council Bylaws) and voting at the hearing. The Council's decision on the dispute shall be published in the FEDERAL REGISTER as provided by Section (a)(2) of Article XI and Section (e) of Article VI.

(j) The Council Chairman shall advise Council members and hearing participants of the right of appeal provided by Section (c) of Article XI of the Compact.

§ 902.6 Appeal to the Attorney General.

(a) The Federal Bureau of Investigation or a Compact Party State may appeal the decision of the Council to the U.S. Attorney General pursuant to Section (c) of Article XI of the Compact.

(b) Appeals shall be filed and conducted pursuant to rules and procedures that may be established by the Attorney General.

(c) Appropriate notice of an appeal shall be communicated to the Council Chairman by the appealing party.

§ 902.7 Court action.

Pursuant to Section (c) of Article XI of the Compact, a decision by the Attorney General on an appeal under § 902.6 may be appealed by filing a suit seeking to have the decision reversed in the appropriate district court of the United States.

PART 904—STATE CRIMINAL HISTORY RECORD SCREENING STANDARDS

Sec.

904.1 Purpose and authority.
904.2 Interpretation of the criminal history record screening requirement.
904.3 State criminal history record screening standards.

AUTHORITY: 42 U.S.C. 14616.

SOURCE: 70 FR 36028, June 22, 2005, unless otherwise noted.

§ 904.1 Purpose and authority.

Pursuant to the National Crime Prevention and Privacy Compact (Compact), title 42, U.S.C., chapter 140, subchapter II, section 14616, Article IV (c), the Compact Council hereby establishes record screening standards for criminal history record information received by means of the III System for noncriminal justice purposes.

§ 904.2 Interpretation of the criminal history record screening requirement.

Compact Article IV(c) provides that ''Any record obtained under this Compact may be used only for the official purposes for which the record was requested.'' Further, Article III(b)(1)(C) requires that each Party State appoint a Compact officer who shall ''regulate the in-State use of records received by means of the III System from the FBI or from other Party States.'' To ensure compliance with this requirement, Compact Officers receiving records from the FBI or other Party States are specifically required to ''ensure that record entries that may not legally be used for a particular noncriminal justice purpose are deleted from the response and, if no information authorized for release remains, an appropriate 'no record' response is communicated to the requesting official.'' Compact Article IV(c)(3).

§ 904.3 State criminal history record screening standards.

The following record screening standards relate to criminal history record information received for noncriminal justice purposes as a result of a national search subject to the Compact utilizing the III System.

(a) The State Criminal History Record Repository or an authorized agency in the receiving state will complete the record screening required under § 904.2 for all noncriminal justice purposes.

(b) Authorized officials performing record screening under § 904.3(a) shall screen the record to determine what information may legally be disseminated for the authorized purpose for which the record was requested. Such record screening will be conducted pursuant

to the receiving state's applicable statute, executive order, regulation, formal determination or directive of the state attorney general, or other applicable legal authority.

(c) If the state receiving the record has no law, regulation, executive order, state attorney general directive, or other legal authority providing guidance on the screening of criminal history record information received from the FBI or another state as a result of a national search, then the record screening under §904.3(a) shall be performed in the same manner in which the state screens its own records for noncriminal justice purposes.

PART 905—NATIONAL FINGERPRINT FILE (NFF) PROGRAM QUALIFICATION REQUIREMENTS

Sec.
905.1 Definition.
905.2 Purpose and authority.
905.3 Participation in the NFF Program.

AUTHORITY: 42 U.S.C. 14616.

SOURCE: 70 FR 73587, Dec. 13, 2005, unless otherwise noted.

§905.1 Definition.

''National Fingerprint File'' means a database of fingerprints, or other uniquely personal identifying information, relating to an arrested or charged individual maintained by the FBI to provide positive identification of record subjects indexed in the III System.

§905.2 Purpose and authority.

The purpose of this part 905 is to require each National Fingerprint File (NFF) participant to meet the standards set forth in the NFF Qualification Requirements as established by the Compact Council (Council). The Council is established pursuant to the National Crime Prevention and Privacy Compact Act (Compact), title 42, U.S.C., §14616.

§905.3 Participation in the NFF Program.

Each NFF Program participant shall meet the standards set forth in the NFF Qualification Requirements as established by the Council and endorsed by the FBI's Criminal Justice Information Services Advisory Policy Board; however, such standards shall not interfere or conflict with the FBI's administration of the III, including the NFF, for criminal justice purposes. Each participant's performance will be audited and measured by criteria designed to assess compliance with those requirements. Measurements by which to determine compliance to the NFF Qualification Requirements are outlined in the FBI and State Sampling Standards. (For a copy of the standards, contact the FBI Compact Officer, 1000 Custer Hollow Road, Module C–3, Clarksburg, WV 26306–0001.)

PART 906—OUTSOURCING OF NONCRIMINAL JUSTICE ADMINISTRATIVE FUNCTIONS

Sec.
906.1 Purpose and authority.
906.2 Third party handling of criminal history record information.

AUTHORITY: 42 U.S.C. 14616.

SOURCE: 69 FR 75245, Dec. 16, 2004, unless otherwise noted.

§906.1 Purpose and authority.

The purpose of this part 906 is to establish rules and procedures for third parties to perform noncriminal justice administrative functions involving access to Interstate Identification Index (III) information. The Compact Council is establishing this rule pursuant to the National Crime Prevention and Privacy Compact (Compact), title 42, U.S.C., chapter 140, subchapter II, section 14616. The scope of this rule is limited to noncriminal justice background checks in so far as they are governed by the provisions of the Compact as set forth in 42 U.S.C. 14614 and 14616.

§906.2 Third party handling of criminal history record information.

(a) Except as prohibited in paragraph (b) of this section, criminal history record information obtained from the III System for noncriminal justice purposes may be made available:

(1) To a governmental agency pursuant to a contract or agreement under which the agency performs activities or functions for another governmental

agency that is authorized to obtain criminal history record information by a federal statute, federal executive order or a state statute that has been approved by the United States Attorney General; and

(2) To a private contractor, or other nongovernmental entity or organization, pursuant to a contractual agreement under which the entity or organization performs activities or functions for a governmental agency authorized to obtain criminal history record information as identified in paragraph (a)(1) of this section or for a nongovernmental entity authorized to obtain such information by federal statute or executive order.

(b) Criminal history record information provided in response to fingerprint-based III System record requests initiated by authorized governmental agencies or nongovernmental entities for noncriminal justice purposes may be made available to contracting agencies or organizations manually or electronically for such authorized purposes. Such contractors, agencies, or organizations shall not be permitted to have direct access to the III System by computer terminal or other automated means which would enable them to initiate record requests, provided however, the foregoing restriction shall not apply with respect to: (1) Persons, agencies, or organizations that may enter into contracts with the FBI or State criminal history record repositories for the performance of authorized functions requiring direct access to criminal history record information; and (2) any direct access to records covered by 42 U.S.C. 14614(b).

(c) The contracts or agreements authorized by paragraphs (a)(1) and (a)(2) of this section shall specifically describe the purposes for which criminal history record information may be made available to the contractor and shall incorporate by reference a security and management control outsourcing standard approved by the Compact Council after consultation with the United States Attorney General. The security and management control outsourcing standard shall specifically authorize access to criminal history record information; limit the use of the information to the purposes for which it is provided; prohibit retention and/or dissemination of the information except as specifically authorized in the security and management control outsourcing standard; ensure the security and confidentiality of the information; provide for audits and sanctions; provide conditions for termination of the contractual agreement; and contain such other provisions as the Compact Council, after consultation with the United States Attorney General, may require.

(d) The exchange of criminal history record information with an authorized governmental or nongovernmental entity or contractor pursuant to this part is subject to cancellation for use, retention or dissemination of the information in violation of federal statute, regulation or executive order, or rule, procedure or standard established by the Compact Council in consultation with the United States Attorney General.

PART 907—COMPACT COUNCIL PROCEDURES FOR COMPLIANT CONDUCT AND RESPONSIBLE USE OF THE INTERSTATE IDENTIFICATION INDEX (III) SYSTEM FOR NONCRIMINAL JUSTICE PURPOSES

Sec.

907.1 Purpose and authority.
907.2 Applicability.
907.3 Assessing compliance.
907.4 Methodology for resolving noncompliance.
907.5 Sanction adjudication.

AUTHORITY: 42 U.S.C. 14616.

SOURCE: 70 FR 69898, Nov. 18, 2005, unless otherwise noted.

§ 907.1 Purpose and authority.

Part 907 establishes policies and procedures to ensure that use of the III System for noncriminal justice purposes complies with the National Crime Prevention and Privacy Compact (Compact) and with rules, standards, and procedures established by the Compact Council regarding application and response procedures, record dissemination and use, response times,

data quality, system security, accuracy, privacy protection, and other aspects of III System operation for noncriminal justice purposes. The rule is established pursuant to Article VI of the Compact, which authorizes the Compact Council to promulgate rules, procedures, and standards governing the use of the III System for noncriminal justice purposes. The rule requires responsible authorized access to the System and proper use of records that are obtained from the System. The rule provides comprehensive procedures for a coordinated compliance effort among the Compact Council, the FBI, and local, State and Federal government agencies, and encourages the cooperation of all affected parties.

§907.2 Applicability.

This rule applies to III System access for noncriminal justice purposes as covered by the Compact, *see* 42 U.S.C. 14614 and 14616, and use of information obtained by means of the System for such purposes. The rule establishes procedures for ensuring that the FBI's and Compact Party States' criminal history record repositories carry out their responsibilities under the Compact, as set out in the National Fingerprint File (NFF) Qualification Requirements, and that local, State and Federal government agencies using the III System for noncriminal justice purposes comply with the Compact and with applicable Compact Council rules.

§907.3 Assessing compliance.

(a) The FBI CJIS Division staff regularly conducts systematic compliance reviews of state repositories. These reviews may include, as necessary, reviews of III System user agencies, including governmental and nongovernmental noncriminal justice entities that submit fingerprints to the State repositories and criminal justice and noncriminal justice agencies with direct access to the III System. These reviews may include, as necessary, the governmental and nongovernmental noncriminal justice entities authorized to submit fingerprints directly to the FBI. The reviews may consist of systematic analyses and evaluations, including on-site investigations, and shall be as comprehensive as necessary to adequately ensure compliance with the Compact and Compact Council rules. Violations may also be reported or detected independently of a review.

(b) The FBI CJIS Division staff or the audit team established to review the FBI's noncriminal justice use of the III System shall prepare a draft report describing the nature and results of each review and set out all findings of compliance and noncompliance, including any reasons for noncompliance and the circumstances surrounding the noncompliance. If the agency under review is the FBI or another Federal agency, the draft report shall be forwarded to the FBI Compact Officer. If the agency under review is a State or local agency in a Party State, the draft report shall be forwarded to the State Compact Officer. If the agency under review is a State or local agency in a Nonparty State, the draft report shall be forwarded to the chief administrator of the State repository.

(c) The Compact Officer of the FBI or a Party State or the chief administrator of the State repository in a Nonparty State shall be afforded the opportunity to forward comments and supporting materials to the FBI CJIS Division staff or to the audit team.

(d) The FBI CJIS Division staff or the audit team shall review any comments and materials received and shall incorporate applicable revisions into a final report. The final report shall be provided to the Compact Officer of the FBI or a Party State or the chief administrator of the State repository in a Nonparty State to whom the draft report was sent. If the agency under review is a State or local agency, a copy of the report shall be provided to the FBI Compact Officer. If the agency under review is being reviewed for the first time, the letter transmitting the report shall provide that sanctions will not be imposed regarding any deficiencies set out in the report. The letter shall also advise, however, that the deficiencies must be remedied and failure to do so before the agency is reviewed again will result in the initiation of remedial action pursuant to §907.4.

§ 907.4 Methodology for resolving noncompliance.

(a) Subsequent to each compliance review that is not a first-time agency review, the final report shall be forwarded to the Compact Council Sanctions Committee (Sanctions Committee). The Sanctions Committee shall review the report and if it concludes that no violations occurred or no violations occurred that are serious enough to require further action, it shall forward its conclusions and recommendations to the Compact Council Chairman. If the Compact Council Chairman approves the Sanctions Committee's recommendations, the Compact Council Chairman shall send a letter to this effect to the FBI or Party State Compact Officer or the chief administrator of the state repository in a Nonparty State that has executed a Memorandum of Understanding. For all remaining states, the Compact Council Chairman shall forward the recommendations to the FBI Director or Designee who, upon approval of the recommendations, shall send a letter to this effect to the chief administrator of the state repository. If the agency under review is a state or local agency, a copy of the Compact Council Chairman's or FBI Director's or Designee's letter shall be provided to the FBI Compact Officer.

(b) Should the Sanctions Committee conclude that a violation has occurred that is serious enough to require redress, the Sanctions Committee shall recommend to the Compact Council a course of action necessary to bring the offending agency into compliance and require the offending agency to provide assurances that subsequent violations will not occur. In making its recommendation, the Sanctions Committee shall consider the minimal action necessary to ensure compliance or shall explain why corrective action is not required. This may include, but not be limited to, requiring a plan of action by the offending agency to achieve compliance, with benchmarks and performance measures, and/or requiring the agency to seek technical assistance to identify sources of the problem and proposed resolutions. If the Compact Council or, when applicable, the FBI Director or Designee approves the Sanctions Committee's recommendations, progressive actions shall be initiated as set forth below. The letters referred to in this paragraph (907.4(b)) shall be from the Compact Council Chairman when the offending agency is the FBI or another federal agency, a state or local agency in a Party State, or a state or local agency in a Nonparty State that has executed a Memorandum of Understanding. The documentation and written responses from the aforementioned agencies to such letters shall be sent to the Compact Council Chairman. For all remaining states, the Compact Council Chairman shall forward the Compact Council's recommendations to the FBI Director or Designee who, upon approval of the recommendations, shall send the letters; accordingly, all documentation and written responses relating to the FBI Director's or Designee's letters shall be sent to the FBI Director or Designee who shall make such letters available to the Compact Council Chairman. If the offending agency is an agency other than the FBI or a state repository, any response letters from the offending agency shall be sent to the Compact Officer of the FBI or Party State or the chief administrator of the state repository in a Nonparty State and shall outline the course of action the offending agency will undertake to correct the deficiencies and provide assurances that subsequent violations will not recur.

(1) As noted above, a letter shall be sent to the Compact Officer of the FBI or Party State or the chief administrator of the state repository in a Nonparty State identifying the violations and setting out the actions necessary to come into compliance. The letter shall provide that if compliance is not achieved and assurances provided that minimize the probability that subsequent violations will occur, and non-compliance is not excused, the Compact Council may authorize the FBI to refuse to process requests for criminal history record checks for noncriminal justice purposes from the offending agency and, if the offending agency is a criminal justice agency, may request the Director of the FBI to

take appropriate action against the offending agency consistent with the recommendations of the Compact Council. The letter shall direct the Compact Officer of the FBI or Party State or the chief administrator of the state repository in a Nonparty State to submit a written response within 30 calendar days from the date of the letter, unless a more expeditious response is required. If the offending agency is a state or local agency, a copy of the Compact Council Chairman's or FBI Director's or Designee's letter shall be provided to the FBI Compact Officer. The Compact Council Chairman shall refer the response letter to the Sanctions Committee for appropriate action.

(2) If the Sanctions Committee deems the response letter under paragraph (b)(1) of this section to be insufficient, or if no response is received within the allotted time, the Sanctions Committee shall report its finding to the Compact Council. If the Compact Council agrees with the Sanctions Committee's finding, a letter shall be sent to the Director of the FBI (if the offending agency is the FBI or another federal agency) or to the head of the state agency in which the state repository resides (if the offending agency is a state or local agency), requesting assistance in correcting the deficiencies. The letter shall provide that the offending agency is being placed on probationary status. A copy of the letter shall be sent to the Compact Officer of the FBI or Party State or the chief administrator of the state repository in a Nonparty State. If the offending agency is a state or local agency, a copy of the Compact Council Chairman's or FBI Director's or Designee's letter shall be provided to the FBI Compact Officer. A written response to the letter shall be required within 20 calendar days from the date of the letter unless a more expeditious response is required. The Compact Council Chairman shall refer the response letter to the Sanctions Committee for appropriate action.

(3) If the Sanctions Committee deems the response letter under paragraph (b)(2) of this section to be insufficient, or if no response is received within the allotted time, the Sanctions Committee shall report its finding to the Compact Council. If the Compact Council agrees with the Sanctions Committee's finding, a letter shall be sent to the U. S. Attorney General (if the offending agency is the FBI or another federal agency) or to the elected/appointed state official who has oversight of the department in which the state repository resides (if the offending agency is a state or local agency), requesting assistance in correcting the deficiencies. If the state official is not the Governor, a copy of the letter shall be sent to the Governor. A copy of the letter shall also be sent to the FBI Compact Officer and (if the offending agency is a state or local agency) to the State Compact Officer or the chief administrator of the state repository in a Nonparty State. The letter shall provide that a written response is required within 20 calendar days of the date of the letter, and that if a sufficient response is not received within that time, sanctions may be imposed that could result in suspension of the offending agency's access to the III System for noncriminal justice purposes. The Compact Council Chairman shall refer the response letter to the Sanctions Committee for appropriate action.

(4) If no response letter is received under paragraph (b)(3) of this section within the allotted time, or if the Sanctions Committee deems the response to be insufficient, the Sanctions Committee shall report its finding to the Compact Council. If the Compact Council agrees with the Sanctions Committee's finding, the Compact Council Chairman or the FBI Director or Designee shall direct the FBI Compact Officer to take appropriate action to suspend noncriminal justice access to the III System by the offending agency. If the offending agency is a criminal justice agency, the Compact Council Chairman shall request the Director of the FBI to take appropriate action to suspend noncriminal justice access to the III System by the offending agency.

(5) Reinstatement of full service by the FBI shall occur after the Compact Officer of the FBI or a Party State or the chief administrator of the state repository in a Nonparty State provides

satisfactory documentation that the deficiencies have been corrected or a process has been initiated to correct the deficiencies. Upon approval of the documentation by the Sanctions Committee in consultation with the Compact Council Chairman, the Compact Council Chairman or the FBI Director or Designee shall request the FBI Compact Officer to take appropriate action to reinstate full service. Letters to this effect shall be sent to all persons who have previously received letters relating to the deficiencies and resulting suspension of service. The decision to reinstate full service shall be considered for ratification by the Compact Council at its next regularly scheduled meeting.

(c) For good cause, the Compact Council Chairman and the FBI Director or Designee shall be authorized to extend the number of days allowed for the response letters required by paragraphs (b)(1) through (3) of this section.

§ 907.5 Sanction adjudication.

(a) A Compact Officer of the FBI or a Party State or the chief administrator of the state repository in a Nonparty State may dispute a sanction under this Part by asking the Compact Council Chairman for an opportunity to address the Compact Council.

(b) Unresolved disputes based on the Compact Council's issuance of sanctions under this Part may be referred to the Compact Council Dispute Adjudication Committee when pertaining to disputes described under ARTICLE XI(a) of the Compact.

(c) Nothing prohibits the Compact Council from requesting the FBI to exercise immediate and necessary action to preserve the integrity of the III System pursuant to Article XI(b) of the Compact.

PARTS 908–999 [RESERVED]

CHAPTER XI—DEPARTMENT OF JUSTICE AND DEPARTMENT OF STATE

Part		*Page*
1100	Trafficking in persons	851
1101–1199	[Reserved]	

PART 1100—TRAFFICKING IN PERSONS

Subpart A [Reserved]

Subpart B—Victims of Severe Forms of Trafficking in Persons

Sec.
1100.25 Definitions.
1100.27 Purpose and scope.
1100.29 The roles and responsibilities of federal law enforcement, immigration, and Department of State officials under the Trafficking Victims Protection Act (TVPA).
1100.31 Procedures for protecting and providing services to victims of severe forms of trafficking in persons in federal custody.
1100.33 Access to information and translation services for victims of severe forms of trafficking in persons.
1100.35 Authority to permit continued presence in the United States for victims of severe forms of trafficking in persons.
1100.37 Requirements to train appropriate personnel in identifying and protecting victims of severe forms of trafficking in persons.

AUTHORITY: 5 U.S.C. 552, 552a; 8 U.S.C. 1101, 1103, 1104, 1252; 22 U.S.C. 7101, 7105; 42 U.S.C. 10606 and 10607; and section 107(c) of Public Law 106–386 (114 Stat. 1464, 1477).

SOURCE: 66 FR 38518, July 24, 2001, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Victims of Severe Forms of Trafficking in Persons

§ 1100.25 Definitions.

In this subpart, the following definitions apply:

Admission and *Admitted* mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer (8 U.S.C. 1101).

Alien means any person not a citizen or national of the United States (8 U.S.C. 1101).

Attorney General Guidelines means the *Attorney General Guidelines for Victim and Witness Assistance 2000*, which contain a policy guidance on how to treat crime victims and witnesses; these guidelines are available through the Internet on the Department of Justice's website.

Coercion means threats of serious harm to or physical restraint against any person; or any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of law or the legal process (22 U.S.C. 7102).

Commercial sex act means any sex act on account of which anything of value is given to or received by any person (22 U.S.C. 7102).

Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined (22 U.S.C. 7102).

Family members of victims of severe forms of trafficking in persons means spouses, children, parents, or siblings whom traffickers have targeted or are likely to target and for whom protections from harm may reasonably be provided. At the discretion of the responsible official, this classification may be extended to include other family members. This definition is only applicable to the protections from harm referred to in this subpart.

Federal custody means that statutory detention and custodial authority exercised by personnel of federal agencies, bureaus, boards, divisions, programs, and offices.

Federal victims' rights legislation means the following statutes, as amended: the Victim and Witness Protection Act of 1982 (VWPA), Public Law 97–291, 96 Stat. 1248; the Victims of Crime Act of 1984, Public Law 98–473, 98 Stat. 2170; the Victims Rights and Restitution Act of 1990, Public Law 101–647, 104 Stat. 4820; the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103–322, 108 Stat. 1796; the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104–132, 110 Stat. 1214; the Victim Rights Clarification Act of 1997, Public Law 105–6, 111 Stat. 12; and the Victims of Trafficking and Violence Protection Act of

2000 (VTVPA), Public Law 106–386, 114 Stat. 1464.

INA means the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

Involuntary servitude includes a condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process (22 U.S.C. 7102).

Responsible official refers to the agency official designated to provide the services described in 42 U.S.C. 10607(a).

Section 107(c) means section 107(c) of TVPA, Division A of Public Law 106–386.

Services to victims refer to those services to be provided pursuant to 42 U.S.C. 10607(c), unless otherwise specified in the TVPA or this subpart.

Severe forms of trafficking in persons means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery (22 U.S.C. 7102).

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act (22 U.S.C. 7102).

TVPA means the Trafficking Victims Protection Act of 2000, Public Law 106–386, Division A, October 28, 2000, 114 Stat. 1464, as amended, 22 U.S.C. 7105, *et seq.*

United States means the fifty States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States (22 U.S.C. 7102).

Victims' rights refer to crime victims' rights under 42 U.S.C. 10606(b), as well as in other federal victims' rights legislation.

§ 1100.27 Purpose and scope.

(a) Under section 107(c) of the TVPA, both the Department of Justice (DOJ) and the Department of State (DOS) have been directed to promulgate regulations to implement the following:

(1) Procedures for appropriate federal employees to ensure, to the extent practicable, that victims of severe forms of trafficking in persons are housed in a manner appropriate to their status as crime victims, afforded proper medical care and other assistance, and protected while in federal custody, in accordance with their status as victims of severe forms of trafficking in persons;

(2) Procedures to provide victims of severe forms of trafficking in persons with access to information about their rights and with translation services;

(3) Procedures for federal law enforcement officials to request that certain victims of severe forms of trafficking in persons, who are aliens and are also potential witnesses, be permitted to remain in the United States to effectuate the prosecution of those responsible, and procedures to protect their safety, including taking measures to protect victims of severe forms of trafficking in persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates (these procedures should be appropriate to their status as victims of severe forms of trafficking in persons); and

(4) Training of appropriate DOJ and DOS personnel in identifying victims of severe forms of trafficking in persons, in understanding the particular needs common to victims of severe forms of trafficking in persons, and in providing for the protection of such victims.

(b) The regulations in this subpart apply to all federal law enforcement personnel, immigration officials and DOS officials, insofar as their duties involve investigating or prosecuting traffickers in persons, or may involve identifying, encountering or detaining victims of severe forms of trafficking in persons.

(c) The rights and protections made available to victims of severe forms of trafficking in persons under section

107(c) supplement those rights and protections provided to victims and witnesses in federal victims' rights legislation as defined in this subpart. The intent of this subpart is to ensure that the protections available under the provisions of federal victims' rights legislation as well as the TVPA are fully provided to victims of severe forms of trafficking in persons, in keeping with their status as victims of severe forms of trafficking in persons. This subpart will ensure that these victims are identified as early as possible in the investigation and prosecution process, so that services and protections available to them under the laws of the United States are provided.

(d) The regulations under this subpart set forth the general procedures to ensure these rights are protected in cases involving victims of severe forms of trafficking in persons. All agencies, bureaus, boards, divisions, programs, and offices in the DOJ and the DOS with specific responsibilities under this subpart shall adopt such regulations and/or operating procedures as may be necessary to ensure compliance with section 107(c) and the requirements of this subpart.

§ 1100.29 The roles and responsibilities of federal law enforcement, immigration, and Department of State officials under the Trafficking Victims Protection Act (TVPA).

(a) *Department of Justice officials.* The various agencies, bureaus, boards, divisions, programs, and offices of the DOJ have most of the responsibilities assigned by section 107(c). The goals of section 107(c) are to identify victims of severe forms of trafficking in persons as early as possible in the investigation and prosecution process, to ensure efforts are made to see that such victims are accorded the rights described in 42 U.S.C. 10606, and to provide the protections and services required under 42 U.S.C. 10607 and under the TVPA.

(b) *Department of State officials.* Department of State missions throughout the world are often the initial contact for aliens in foreign countries who wish to come to the United States. Appropriate DOS personnel should be trained in identifying victims of severe forms of trafficking in persons. Furthermore, considering the international nature of trafficking in persons, appropriate DOS personnel, upon encountering victims of severe forms of trafficking in persons in foreign countries, should consider referrals to local law enforcement or service providers in the host country, but only if the local host country conditions support such actions.

(c) *Federal law enforcement officials.* Federal law enforcement officials who, during the performance of their duties, encounter a person whom they believe may be a victim of a severe form of trafficking in persons as defined by this subpart, are responsible for bringing such an individual to the attention of those federal law enforcement officials primarily responsible for enforcing trafficking laws, specifically INS or FBI. In addition, DOS's Diplomatic Security Service has investigative authority in visa and passport fraud cases that may involve trafficking in persons. Federal law enforcement officials also include federal law enforcement personnel working cooperatively with law enforcement officials who have primary investigative jurisdiction in such trafficking cases. Each federal agency having law enforcement responsibilities should ensure that its officers are trained in identifying victims of severe forms of trafficking in persons, and are familiar with the rights, services, and protections such victims are to be accorded under the TVPA and 42 U.S.C. 10606 and 10607.

§ 1100.31 Procedures for protecting and providing services to victims of severe forms of trafficking in persons in federal custody.

(a) While in federal custody, all victims of severe forms of trafficking in persons must be provided, to the extent practicable, the protections and services outlined in this section in accordance with their status as victims of severe forms of trafficking in persons. Under 42 U.S.C. 10607(a), each agency must designate officials who are responsible for identifying victims of crime and providing services to them. The designations appear in the *Attorney General Guidelines.* This responsibility also extends to those who are responsible for victims of severe forms of trafficking in persons while they are in federal custody.

(b) To the extent practicable and allowed by law, alternatives to formal detention of victims of severe forms of trafficking in persons should be considered in every case. However, if detention is required, victims of severe forms of trafficking in persons in federal custody, to the extent practicable, shall not be detained in facilities inappropriate to their status as crime victims. The responsible official shall make all efforts, where appropriate and practicable, to house those victims separately from those areas in which criminals are detained. The responsible official must also provide protections and security to those victims as required by federal standards, policies, and procedures. Information on the federal prohibitions against intimidation and harassment, and the remedies available for such actions should routinely be made available to victims.

(c) Victims of severe forms of trafficking in persons in federal custody shall receive necessary medical care and other assistance. This care should include free optional testing for HIV and other sexually transmitted diseases in cases involving sexual assault or trafficking into the sex industry, as well as a counseling session by a medically-trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim. Other forms of mental health counseling or social services also may be appropriate to address the trauma associated with trafficking in persons.

(d) As mandated by 42 U.S.C. 10607, federal officials are responsible for arranging for victims to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender. Federal law enforcement agencies also should protect victims of a severe form of trafficking in persons from harm and intimidation pursuant to section 6 of the Victim and Witness Protection Act of 1982 and 18 U.S.C. 1512 note. It may also be appropriate to discuss with the victims the available remedies described in 18 U.S.C. 1512 and 1513. Federal officials also should employ civil procedures for protecting victims and witnesses, including application for temporary restraining orders and protective orders, as set out in 18 U.S.C. 1514, if practicable. If the victim's safety is at risk or if there is danger of the victim's recapture by the trafficker, the responsible official should take the following steps under the TVPA:

(1) Use available practical and legal measures to protect the trafficked victim and family members from intimidation, harm, and threats of harm; and

(2) Ensure that the names and identifying information pertaining to trafficked victims and family members are not disclosed to the public.

§ 1100.33 Access to information and translation services for victims of severe forms of trafficking in persons.

(a) All federal investigative, prosecutorial, and correctional agencies engaged in the detection, investigation, or prosecution of crime shall use their best efforts to see that victims of severe forms of trafficking in persons are accorded all rights under federal victims' rights legislation. In cases involving severe forms of trafficking in persons, federal officials should provide victims within the United States, as defined by this subpart, information about their rights and applicable services, including:

(1) Pro bono and low-cost legal services, including immigration services;

(2) Federal and state benefits and services (victims who are minors and adult victims who are certified by the United States Department of Health and Human Services (HHS) are eligible for assistance that is administered or funded by federal agencies to the same extent as refugees; others may be eligible for certain, more limited, benefits);

(3) Victim service organizations, including domestic violence and rape crisis centers;

(4) Protections available, especially against threats and intimidation, and the remedies available as appropriate for the particular individual's circumstances;

(5) Rights of individual privacy and confidentiality issues;

(6) Victim compensation and assistance programs;

(7) Immigration benefits or programs that may be relevant to victims of severe forms of trafficking in persons, including those available under the VTVPA;

(8) The right to restitution;

(9) The right to notification of case status; and

(10) The availability of medical services.

(b) The federal agencies as defined in paragraph (a) of this section must ensure reasonable access to translation services and/or oral interpreter services in the event the victim is not able to communicate in English.

§ 1100.35 Authority to permit continued presence in the United States for victims of severe forms of trafficking in persons.

(a) Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the Immigration and Naturalization Service (INS) grant the continued presence of such aliens in the United States. All law enforcement requests for continued presence must be submitted to the INS, Headquarters Office of Field Operations, in accordance with INS procedures. Each federal law enforcement agency will designate a headquarters office to administer submissions and coordinate with the INS on all requests for continued presence. The designated headquarters office will be responsible for meeting all reporting requirements contained in INS procedures for the processing and administering of the requests for continued presence in the United States of eligible aliens.

(b) Upon receiving a request, the INS will determine the victim's immigration status. When applicable and appropriate, the INS may then use a variety of statutory and administrative mechanisms to ensure the alien's continued presence in the United States. The specific mechanism used will depend on the alien's current status under the immigration laws and other relevant facts. These mechanisms may include parole, voluntary departure, stay of final order, section 107(c)(3)-based deferred action, or any other authorized form of continued presence, including applicable nonimmigrant visas.

(1) The alien's continued presence in the United States under this subpart does not convey any immigration status or benefit apart from that already encompassed by the particular form of authorized continued presence granted. In most circumstances, victims granted continued presence will be eligible for temporary employment authorization.

(2) The continued presence granted through any of the mechanisms described in this paragraph (b) will contain the terms normally associated with the particular type of authorized continued presence granted, including, but not limited to, duration of benefit, terms and procedures for receiving an extension, travel limitations, and employment authorization unless expressly waived in an individual approval. Aliens granted deferred action based upon section 107(c)(3) are considered to be present in the United States pursuant to a period of stay authorized by the Attorney General for purposes of INA sections 212(a)(9)(B)(I) and (C).

(c)(1) In cases where it is determined that the granting to an alien of continued presence in the United States poses a threat to national security or to the safety and welfare of the public, the INS may require the requesting agency to meet special conditions or requirements prior to approval. The INS will promptly convey any such condition or requirement to the requesting agency in writing. Upon agreement by the requesting agency to comply with the conditions and accept the costs associated with the implementation of those conditions, the INS will grant the continued presence of the alien in the United States.

(2) Although the INS and the requesting law enforcement agency will make every effort to reach a satisfactory agreement for the granting of continued presence, the INS may deny a request for continued presence in the following instances:

(i) Failure, on the part of the requesting agency, to provide necessary documentation or to adhere to established INS procedures;

(ii) Refusal to agree or comply with conditions or requirements instituted

in accordance with paragraph (c)(1) of this section;

(iii) Failure, on the part of the requesting agency, to comply with past supervision or reporting requirements established as a condition of continued presence; or

(iv) When the INS determines that granting continued presence for the particular alien would create a significant risk to national security or public safety and that the risk cannot be eliminated or acceptably minimized by the establishment of agreeable conditions.

(3) In the case of a denial, the INS shall promptly notify the designated office within the requesting agency. The INS and the requesting agency will take all available steps to reach an acceptable resolution. In the event such resolution is not possible, the INS shall promptly forward the matter to the Deputy Attorney General, or his designee, for resolution.

(d) In addition to meeting any conditions placed upon the granting of continued presence in accordance with paragraph (c) of this section, the responsible official at the law enforcement agency requesting the victim's continued presence in the United States as described in paragraph (a) of this section shall arrange for reasonable protection to any alien allowed to remain in the United States by the INS. This protection shall be in accordance with 42 U.S.C. 10606 and shall include taking measures to protect trafficked persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates in accordance with section 107(c)(3). Such protection shall take into account their status as victims of severe forms of trafficking in persons.

§ 1100.37 Requirements to train appropriate personnel in identifying and protecting victims of severe forms of trafficking in persons.

(a) The TVPA requires that appropriate DOJ and DOS personnel be trained in identifying victims of severe forms of trafficking in persons and providing for the protection of such victims. These federal personnel will be trained to recognize victims and provide services and protections, as appropriate, in accordance with the TVPA, 42 U.S.C. 10606 and 10607, and other applicable victim-assistance laws. Specifically, the training will include, as applicable:

(1) Procedures and techniques for identifying victims of severe forms of trafficking in persons;

(2) Rights of crime victims, including confidentiality requirements;

(3) Description of the services available to victims of severe forms of trafficking in persons at the investigation, prosecution, and, where applicable, correction stages of the law enforcement process;

(4) Referral services to be provided to victims of severe forms of trafficking in persons;

(5) Benefits and services available to alien victims of severe forms of trafficking in persons regardless of their immigration status;

(6) Particular needs of victims of severe forms of trafficking in persons;

(7) Procedures and techniques for dealing with specialized needs of victims who may face cultural, language, and/or other obstacles that impede their ability to request and obtain available services for themselves; and

(8) Protection obligations of responsible officials under federal law and policies, as these apply to victims of severe forms of trafficking in persons.

(b) Each component of the DOJ and the DOS with program responsibility for victim witness services must provide initial training in the particular needs of victims of severe forms of trafficking in persons, and appropriate federal agencies' responses to such victims; initial training of appropriate agency personnel should be conducted as soon as possible. Thereafter, training must be held on a recurring basis to ensure that victims of severe forms of trafficking in persons receive the rights, protections, and services accorded them under the TVPA and federal victims' rights laws, and the federal policies, procedures, and guidelines implementing the TVPA and other federal victims' rights laws.

PARTS 1101–1199 [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 July 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 July 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

28 CFR

74 FR Page

Chapter V

545 Authority citation revised.....1897
545.25 (d) revised.....1897
550 Authority citation revised.....1897
550.50—550.57 (Subpart F) Revised.....1897

2010

28 CFR

75 FR Page

Chapter I

43.3 (a)(2), (3) and (b) revised.....9103
72.3 *Example 2* revised.....81853
79.74 (b) revised.....48275

Chapter V

540 Authority citation revised.....21164
Technical correction.....25110
540.20 (b) revised; interim.....21164
540.62 (d) revised; interim.....21164
541 Authority citation revised.....76267
541.1—541.8 (Subpart A) Revised.....76267
541.3 Table corrected.....81854
541.7 (a)(4) and (g) corrected.....81854
541.20—541.33 (Subpart B) Revised.....76273
541.23 (c)(3) corrected.....81854
542.14 (d)(5) added; interim.....34626
571.41 (c)(1) amended; interim.....13681

2011

28 CFR

76 FR Page

Chapter I

50 Authority citation revised.....76042
50.25 Added.....76042
51 Authority citation revised.....21243
51.1 (a)(1) revised.....21243
51.2 Amended.....21243
51.3 Revised.....21243
51.5 Revised.....21243
51.6 Revised.....21243
51.9 Revised.....21243
51.10 (a) revised.....21243
51.11 Revised.....21243
51.12 Revised.....21244
51.13 (e), (i) and (k) revised; (l) added.....21244
51.18 Revised.....21244
51.19 Revised.....21244
51.20 (b) through (e) revised; (f) added.....21244
51.21 Revised.....21244
51.22 Revised.....21244
51.23 Revised.....21245
51.24 Revised.....21245
51.25 (a) revised.....21245
51.27 (a) through (d) revised.....21245
51.28 (a)(5) and (c) revised; (a)(6) added.....21245
51.29 (b) and (d) revised.....21246
51.35 Revised.....21246
51.37 Revised.....21246
51.39 Revised.....21247
51.40 Revised.....21247
51.42 Revised.....21247

28 CFR—Continued

76 FR Page

Chapter I—Continued

51.43 Revised 21247
51.44 (c) revised 21247
51.46 (a) revised 21247
51.48 (a) through (d) revised 21248
51.50 Revised 21248
51.52 Revised 21248
51.54 Revised 21248
51.55 (a) revised 21249
51.57 Revised 21249
51.58 (b) revised 21249
51.59 Revised 21249
51.61 (a) and (b) revised 21249
51 Appendix revised 21250
55.1 Amended 54111
55.4 (a) revised 54111
55.7 Revised 54111
55.8 (b) revised 54112
55.11 Amended 54112
55.23 (b) revised 54112
55 Appendix A revised 54112
58.11 Added 31228
94.32 Revised; interim 19910
104 Revised 54120
Technical correction 65112

Chapter V

541 Regulation at 75 FR 76267 eff. date delayed to 6–20–11 11078
541.1—541.8 (Subpart A) Regulation at 75 FR 76267 eff. date delayed to 6–20–11 11078
541.3 Regulation at 75 FR 81854 eff. date delayed to 6–20–11 11078
541.7 Regulation at 75 FR 81854 eff. date delayed to 6–20–11 11078
541.20—541.33 (Subpart B) Regulation at 75 FR 76273 eff. date delayed to 6–20–11 11078
541.23 Regulation at 75 FR 81854 eff. date delayed to 6–20–11 11078
544.70—544.75 (Subpart H) Regulation at 62 FR 50793 confirmed 72623
549 Authority citation revised 40231
549.40—549.46 (Subpart C) Revised 40231
552.25 Revised 6056
570.30—570.38 (Subpart C) Revised 1517

2012

28 CFR

77 FR Page

Chapter I

115 Added; eff. 8-20-12 37197

28 CFR—Continued

77 FR Page

Chapter V

540 Regulation at 75 FR 21164 confirmed 19933
540.20 Regulation at 75 FR 21164 confirmed 19933
540.62 Regulation at 75 FR 21164 confirmed 19933

Chapter VIII

803 Authority citation revised 59082
803.1 (b) revised 59082
803.2 Revised 59082
803.3 (a) revised 59082

2013

28 CFR

78 FR Page

Chapter I

58.12 Added 16150
58.13 Added 16150
58.14 Added 16150
58.15 Revised 16152
58.16 Revised 16152
58.17 Revised 16152
58.18 Added 16153
58.19 Added 16153
58.20 Added 16153
58.21 Added 16153
58.22 Added 16153
58.23 Added 16153
58.24 Added 16153
58.25 Revised 16170
58.26 Revised 16170
58.27 Revised 16170
58.28 Added 16172
58.29 Added 16172
58.30 Added 16172
58.31 Added 16172
58.32 Added 16172
58.33 Added 16172
58.34 Added 16172
58.35 Added 16172
58.36 Added 16172
90.50—90.59 (Subpart C) Removed 40960
90.100—90.106 (Subpart E) Removed 40960

Chapter V

524.41 (d) and (e) removed; new (e) added; (f) redesignated as new (e) 63877
571 Authority citation revised; interim 73084
571 Authority citation revised 13479
571.61 (b) amended 13479
571.62 (a) revised 13479
(a)(2) amended; interim 73084

28 CFR—Continued

78 FR
Page

Chapter V—Continued
571.63 (a) revised 13479

Chapter VIII
811 Authority citation revised 23836
811.9 (c) revised; (e) added 23836

2014

(Regulations published from January 1, 2014, through July 1, 2014)

28 CFR

79 FR
Page

Chapter I
50 Authority citation revised 10990
50.10 Revised 10990
59.3 (d) amended 10994
85.3 Introductory text and (b) revised 17436