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Kathleen P. Utgoff,

Executive Director, Pension Benefit Guaranty Corporation.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

Kentucky Permanent Regulatory Program; Approval in Part and Disapproval in Part of Amendment

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule.

SUMMARY: OSMRE is announcing the approval in part and disapproval in part of a proposed amendment submitted by the Commonwealth of Kentucky as a modification to its permanent regulatory program [hereinafter referred to as the Kentucky program] under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment restructures Kentucky's preliminary hearing process to eliminate the requirement that hearings automatically be scheduled for all violations, orders and proposed penalties.

EFFECTIVE DATE: October 6, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. W. Hord Tipton, Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504; Telephone: (606) 233-7327.

SUPPLEMENTARY INFORMATION:

- I. Background on the Kentucky Program
- II. Submission of Amendment
- III. Director's Findings
- IV. Public and Agency Comments
- V. Director's Decision
- VI. Procedural Determinations

I. Background on the Kentucky Program

The Kentucky program was conditionally approved by the Secretary of the Interior effective upon publication of the approval notice in the May 18, 1982 Federal Register (47 FR 21404-21435). Information pertinent to the general background, revisions, modifications and amendments to the proposed permanent program submission, as well as the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Kentucky program, can be found in the May 18,

1982 Federal Register. Other actions concerning program approval, subsequent program amendments and required amendments are identified at 30 CFR 917.13, 917.15, 917.16 and 917.17.

II. Submission of Amendment

By letter dated April 27, 1988 (Administrative Record No. KY-799), Kentucky submitted a proposed amendment specifying that a preliminary hearing on any notice or order of the Natural Resources and Environmental Protection Cabinet ("the Cabinet") need be scheduled only if requested in writing by the permittee or operator. This proposed amendment also contains numerous editorial revisions and clarifications of other related provisions of the Kentucky Administrative Regulations (KAR) at 405 KAR 7:090. OSMRE announced receipt of the proposed amendment in the July 1, 1988 Federal Register (53 FR 24957), and invited public comments on its adequacy.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment to the Kentucky program.

1. Preliminary Hearings

(a) *General.* Prior to the amendment now under consideration, 405 KAR 7:090 section 4 required the Cabinet to schedule a preliminary hearing for every violation notice, order or proposed penalty issued. These preliminary hearings are analogous to the informal public hearings and assessment conferences required by the Federal regulations at 30 CFR 843.15 and 845.18, respectively. However, the Federal regulations only require that informal public hearings and assessment conferences be held if requested by the operator. As revised by the proposed amendment, sections 3 and 4 of the Kentucky rule likewise will require the recipient of a notice or order to request a preliminary hearing before one will be scheduled. Therefore, except as discussed in paragraph (b) below, the Director finds that Kentucky's revised preliminary hearing procedures are similar to and no less effective than the corresponding Federal requirements.

(b) *Final assessment orders.* Kentucky also has revised section 3(4)(a) to provide that a person who chooses not to contest the fact of the *abated* violation or the assessment shall pay the assessment in full within 30 days of the date of mailing of the final assessment order. The previous version of this rule did not require that the violation be

abated before its provision took effect, nor does the corresponding Federal rule at 30 CFR 845.20(a) contain a similar restriction. The question of whether a violation is abated should not be a consideration in determining when an assessment becomes payable. Therefore, the Director finds that addition of the word "abated" to 405 KAR 7:090 section 3(4)(a) renders the State rule less effective than its Federal counterpart, and he is not approving this addition.

(c) *Ex parte communications.* Kentucky also has added paragraph (12) to 405 KAR 7:090 section 4 to prohibit and *ex parte* communications between the hearing officer and the parties to a preliminary hearing or their representatives. The corresponding Federal regulations at 30 CFR 843.15 and 845.18 concerning informal public hearings and assessment conferences lack a similar provision. However, since this addition provides an added safeguard for the integrity of the hearing process, the Director finds that it is not inconsistent with the corresponding Federal requirements.

2. Miscellaneous Revisions

As submitted, 405 KAR 7:090 contains numerous editorial and organizational revisions to improve clarity and consistency. References to surface coal mining operations have been revised to include reclamation and coal exploration operations. Similarly, references to violations of the State statute and regulations have been revised to include violations of permit conditions. Also, section 5 has been revised to specifically address formal hearings concerning blaster certification suspension and revocation. Although Kentucky has always interpreted 405 KAR 7:090 as applying to these types of operations and violations, the revisions remove potential ambiguities. For this reason and since these revisions do not alter the meaning or intent of the regulations, the Director finds that they are not inconsistent with any requirements of SMCRA or the Federal regulations concerning hearing rights and procedures.

IV. Public and Agency Comments

Public Comments

The public comment period and opportunity to request a public hearing announced in the July 1, 1988 Federal Register ended July 31, 1988. No one requested an opportunity to testify at the scheduled public hearing; therefore, no hearing was held. The Kentucky Resources Council submitted comments

supporting the amendment. The nature and disposition of other comments received are summarized below:

1. The Kentucky Coal Association recommended numerous editorial clarifications and suggested that the Cabinet provide a pre-addressed postcard for operator use in requesting a hearing. While the Director recognizes that some of these suggestions have merit, none would alter the meaning or effectiveness of the State rules. Therefore, he is not requiring that these changes be made.

2. The Kentucky Coal Association stated that the operator should be allowed 30 days from the date of receipt of the notice, order or penalty assessment to request a hearing, as in the Federal rules, rather than 30 days from the date of mailing as currently provided in paragraphs (1) and (6) of section 4 of the amendment. Sections 518(i) and 521(d) of SMCRA require that State programs include enforcement and penalty assessment procedures that are the same as or similar to the corresponding procedures contained in these sections of SMCRA. Nothing in these sections specifies the timeframe within which a hearing must be requested. States may deviate from the timeframes established in the Federal regulations provided such deviations are not unreasonable or an effective deprivation of rights.

3. The Kentucky Coal Association and Coal Operators and Associates, Inc. stated that section 4(6) of the amendment should be revised to clarify that prepayment of the penalty is not a condition of obtaining a formal hearing when only the fact of violation is being appealed. In response, the Director notes that section 518(c) of SMCRA provides that a person charged with a penalty who wishes to contest either the amount of the penalty or the fact of violation must place the penalty amount into escrow pending the outcome of the formal hearing. The Kentucky amendment is thus in accordance with the requirements of SMCRA.

4. The Kentucky Coal Association recommended that section 5(2)(a)(1) of the amendment, which allows the Cabinet to seek a formal hearing for permit suspension or revocation and bond forfeiture if it has reason to believe that a violation has occurred or is occurring, be deleted since there is no corresponding Federal provision. Since section 521(d) of SMCRA authorizes States to retain and develop additional enforcement rights and procedures not specifically enumerated within SMCRA, the Director does not agree that deletion is necessary.

5. The Kentucky Coal Association objected to the revisions to paragraphs (5) and (8) of section 5 of the amendment, which provide that a final order of the Cabinet shall be conclusive between all parties to the preliminary hearing and all persons in privity with such parties, and that the issues so resolved shall not be readjudicated at any subsequent formal hearing. Under section 3(4)(c) and paragraphs (8) and (10) of section 5, the Cabinet may issue such a final order only as part of a settlement agreement or when there is no timely request for a hearing. These provisions are similar to the corresponding Federal rules at 30 CFR 845.18(d)(1) and 845.20(a). Also the Federal rules use the term "person" rather than "parties" as in the Kentucky rule. As defined in 30 CFR 700.5, "person" would include all persons in privity with the parties, as specified in the Kentucky amendment. Therefore, the Director finds that the Kentucky amendment is consistent with Federal requirements.

6. The Kentucky Coal Association objected to removal of the sentence previously contained in section 5(8) which stated that the hearing officer shall permit any party to represent himself. The Association contended that this eliminated a party's right to self-representation.

The Director finds that the Association's concern is unfounded in that deletion of this sentence merely removes a redundancy; it does not translate into the alleged prohibition. Section 5(8) continues to state that "any party to a hearing may be represented by counsel" (emphasis added), not that all parties shall be represented by counsel.

Agency Comments

Pursuant to section 503(b) of SMCRA and the implementing regulations at 30 CFR 732.17(h)(11)(i), comments were solicited from various Federal agencies with an actual or potential interest in the Kentucky program. Only one agency provided substantive comments.

The Bureau of Land Management suggested that the owners of surface and mineral rights be given direct written notice of an impending permit revocation hearing. The Bureau stated that the public notice required under 405 KAR 7:090 section 4(2) did not seem to afford proper or sufficient notice to interested third parties such as the Bureau.

In response, the Director notes that since neither SMCRA nor the Federal regulations require that surface and mineral owners be given direct notice of enforcement actions and procedures

such as permit revocation, Kentucky cannot be required to do so. Furthermore, 405 KAR 7:090 Section 4 does not apply to permit revocation hearings. The Bureau's concern appears to relate principally to lands where it owns the surface or mineral rights. Under SMCRA, all such lands are considered Federal lands. Since Kentucky has not entered into a cooperative agreement allowing it to regulate mining on Federal lands, all such operations are regulated by OSMRE. Therefore, Federal enforcement and hearing procedures (30 CFR 843.13 and 43 CFR Part 4) would apply in place of those at 405 KAR 7:090.

V. Director's Decision

Based on the above findings, the Director is approving the amendment as submitted on April 27, 1988, with the exception of the provision noted in Finding 1(b). Approval of this amendment will enable the Cabinet to reduce its workload while fully maintaining its ability to implement its program in a manner no less stringent than SMCRA and no less effective than the Federal regulations. The Federal rules at 30 CFR Part 917 concerning the Kentucky program are being amended to implement the Director's decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to conform their programs with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

Compliance With the National Environmental Policy Act

The Secretary has determined that, pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

Compliance With Executive Order No. 12291

On July 12, 1984, the Office of Management and Budget (OMB) granted OSMRE an exemption from sections 3, 4, 7 and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

Compliance With the Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a

significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 917

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Robert E. Boldt,

Deputy Director, Office of Surface Mining Reclamation and Enforcement.

Date: September 29, 1988.

Therefore, for the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 917—KENTUCKY

1. The authority citation for Part 917 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. In § 917.15, a new paragraph (aa) is added to read as follows:

§ 917.15 Approval of regulatory program amendments.

(aa) The following amendment submitted to OSMRE on April 29, 1988, is approved in the form submitted on that date effective October 6, 1988: Revisions to the hearing procedures and requirements of the Kentucky Administrative Regulations at 405 KAR 7:090, except that portion of section 3(4)(a) disapproved in paragraph (d) of § 917.17 of this chapter.

3. In § 917.17, the language of the heading is revised and a new paragraph (d) is added to read as follows:

§ 917.17 State regulatory program amendments disapproved.

(d) The addition of the word "abated" to modify the term "violation" in paragraph (4)(a) of section 3 of Chapter 7:090 of Title 405 of the Kentucky Administrative Regulations, as submitted to OSMRE by letter dated April 27, 1988, is hereby disapproved. The effect of the disapproval is to continue the requirement that any person who chooses not to contest the fact of violation (whether abated or not) or the assessment shall pay the

assessment in full within 30 days of the date the final assessment order was mailed.

[FR Doc. 88-23026 Filed 10-5-88; 8:45 am]

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30 CFR Part 934

North Dakota Permanent Regulatory Program; Correction

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule; correction.

SUMMARY: OSMRE is correcting the preamble and codified portions of a final rule (53 FR 2837, February 2, 1988) concerning an amendment submitted by the State of North Dakota as a modification to its permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The corrections pertain to those provisions of the amendment involving performance bonds.

EFFECTIVE DATE: October 6, 1988.

FOR FURTHER INFORMATION CONTACT:

Mr. Jerry R. Ennis, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building, 100 E. "B" Street, Room 2128, Casper, Wyoming 82601-1918; Telephone: (307) 261-5776.

SUPPLEMENTARY INFORMATION: On February 2, 1988, the Director published a final rule deferring action on North Dakota's proposed revisions to NDAC 69-05.2-12-01 (4), (5), (6), and (7) (53 FR 2837). The Director stated in the notice that with one exception concerning incremental bonding North Dakota addressed all of OSMRE's concerns. The Director declined to approve the proposed revisions at that time since the amended provisions continued to authorize the use of incremental bonding, a practice which the U.S. District Court for the District of Columbia had found to be inconsistent with section 509 of SMCRA (*In re: Permanent Surface Mining Regulation Litigation II*, Civil Action No. 79-1144). However, on January 29, 1988, the U.S. Court of Appeals for the District of Columbia Circuit reversed the finding of the District Court on this issue (*National Wildlife Federation, et al. v. Hodel*, Case No. 84-5743). Because processing of the Federal Register notice concerning the North Dakota amendment had already been completed by the time OSMRE received a copy of the decision, the Director was unable to correct the notice prior to publication to reflect this decision. Therefore, as discussed below, the Director, by this

notice, is correcting the February 2, 1988 Federal Register notice to reflect the January 29, 1988 decision of the U.S. Court of Appeals and approve the State's revisions to its regulations, a decision which OSMRE had previously deferred.

1. On page 2838, second column, first line, delete the phrase "below and."

2. On page 2838, second column, delete the first full paragraph in its entirety.

3. On page 2840, first column, delete the last sentence of the first paragraph of the section entitled "Director's Decision."

In addition, the Director is amending paragraph (j) of 30 CFR 934.15 to remove the deferral and reflect his approval of the proposed editorial revisions to subsections 4, 5, 6, and 7 of NDAC 69-05.2-12-01. No comments were received on any of these proposed revisions. Public comment was invited in the April 14, 1987 Federal Register (52 FR 12002) and on August 18, 1987 (52 FR 35735) and again on December 14, 1987 (52 FR 4903).

List of Subjects in 30 CFR Part 934

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: September 26, 1988.

Raymond L. Lowrie,

Assistant Director, Western Field Operations, Office of Surface Mining Reclamation and Enforcement.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 934—NORTH DAKOTA

1. The authority citation for Part 934 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Paragraph (j) of § 934.15, is amended by revising the sentence which follows the colon to read as follows:

§ 934.15 Approval of regulatory program amendments.

(j) * * *: Modifications to North Dakota Administrative Code (NDAC) Article 69-05.2-12, addressing performance bonds; NDAC 69-05.2-13-04, addressing signs and markers; and NDAC 69-05.2-23, addressing postmining land use.

[FR Doc. 88-22919 Filed 10-5-88; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Parts 276 and 277

[DoD Directive 5505.5]

Implementation of the Program Fraud Civil Remedies Act

AGENCY: General Counsel, DoD.

ACTION: Final rule.

SUMMARY: The implementation of the DoD Program Fraud Civil Remedies Act is required by the Program Fraud Civil Remedies Act of 1986 (PFCRA), Pub. L. 99-509, (October 21, 1986), to be codified at 31 U.S.C. 3801 through 3812. This part implements PFCRA by establishing an administrative process within the Department of Defense and Departments of the Army, Navy, and Air Force (hereinafter referred to as the "authorities" for the adjudication of fraudulent claims of less change \$150,000 or false statements. It establishes a process for imposing liability of up to \$5,000 per claim or statement and double damages on anyone who, with knowledge or reason to know submits a false, fictitious or fraudulent claim or statement to an authority. Procedurally, this Part provides for the referral of matters, involving possible violation of PFCRA, from the Inspector General, DoD (the "investigating official") to a reviewing official in each authority for evaluation and transmission of written notice, to the Attorney General, Department of Justice, of intent to refer presiding officer for adjudication. The Attorney General will provide written approval or disapproval for the referral of the allegations to a presiding officer for a formal hearing on the record. This Part establishes procedures for an appeal of the presiding officer's decision to the authority head. On Thursday, July 16, 1987, the Department of Defense published proposed rule 32 CFR Parts 276 and 277. Numerous comments were received from the public. Those comments were carefully considered and, where appropriate, adopted in whole or in part in this final rule. This Part has incorporated the material of Parts 276 and 277, therefore Part 276 is no longer necessary.

EFFECTIVE DATE: August 30, 1988.

ADDRESSES: Assistant General Counsel (Legal Counsel), Room 3E988, the Pentagon, Washington, DC 20301-1600.

FOR FURTHER INFORMATION CONTACT: Michael A. Sterlacci, telephone (202) 697-2714.

SUPPLEMENTARY INFORMATION:

A. Executive Order 12291

Executive Order 12291 requires the Department to prepare and publish an initial regulatory impact analysis for any proposed major rule. A major rule is defined as any regulation that is likely to: (1) Have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for customers, individual industries, Government Agencies, or geographic regions; or (3) result in significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

We have determined that these final regulations do not meet the criteria for a major rule as defined by section 1(b) of Executive Order 12291. In general, the proposed rule would establish procedures governing the scope and conduct of administrative adjudications to impose civil penalties and assessments upon persons who submit false claims or statements to the Department. As such, this final rule would have no direct effect on the economy on Federal or State expenditures. Consequently, we have concluded that an initial regulatory impact analysis is not required.

B. Regulatory Flexibility Analysis

Consistent with Regulatory Flexibility Act of 1980 (Pub. L. 96-453, 5 U.S.C. 604(a)), DoD prepares and publishes an initial regulatory flexibility analysis for proposed regulations unless the Secretary certifies that the regulation would not have a significant economic impact on a substantial number of small business entities. The analysis is intended to explain what effect the regulatory action by the agency would have on small business and other small entities and to develop lower cost or burden alternatives. As indicated above, these final regulations would not have a significant economic impact. While some of the penalties and assessments the Department could impose as a result of these regulations might have an impact on small entities, we do not anticipate that a substantial number of these small entities would be significantly affected by this rulemaking. Therefore, the Secretary certifies that these final regulations would not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1980 (Pub. L. 96-511), all Departments

are required to submit to the Office of Management and Budget for review and approval any reporting or recordkeeping requirements contained in both proposed and final rules. It has been determined that this rulemaking does not contain specific information collection requirements and would not increase the Federal paperwork burden on the public and private sector.

List of Subjects in 32 CFR Parts 276 and 277

Fraud.

Accordingly, Title 32, Chapter I is amended as follows:

PART 276—[REMOVED]

1. Part 276 is removed.
2. Part 277 is added to read as follows:

PART 277—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

- 277.1 Purpose.
 - 277.2 Applicability.
 - 277.3 Policy.
 - 277.4 Responsibilities.
- Appendix—Program Fraud Civil Remedies
Authority: 31 U.S.C. 3807.

§ 277.1 Purpose.

This part establishes uniform policies, assigns responsibilities, and prescribes procedures for implementation of Pub. L. 99-509.

§ 277.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD); the Military Departments; the Office of the Inspector General, Department of Defense (OIG, DoD); the Defense Agencies; and the DoD Field Activities (hereinafter referred to collectively as "DoD Components").

§ 277.3 Policy.

It is DoD policy to redress fraud in DoD programs and operations through the nonexclusive use of Pub. L. 99-509. All DoD Components shall comply with the requirements of this part in using this new remedy. Changes or modifications to this part by implementing organizations are prohibited. Implementing regulations are authorized only to the extent necessary to effectively carry out the requirements of this part.

§ 277.4 Responsibilities.

(a) The Inspector General, Department of Defense (IG, DoD), shall establish procedures for carrying out the duties and responsibilities of the "investigating official" as outlined in the Appendix of this part.

(b) The *General Counsel, Department of Defense* (GC, DoD), shall:

(1) Establish procedures for carrying out the duties and responsibilities of the authority head, Department of Defense, which have been delegated to the GC, DoD, as set forth in Appendix of this part.

(2) Establish procedures for carrying out the duties and responsibilities for appointment and support of presiding officers, as set forth in Appendix of this part; and

(3) Review and approve the regulations and instructions required by this section to be submitted for approval by the GC, DoD.

(c) The *Secretaries of the Military Departments* shall:

(1) Establish procedures for carrying out the duties and responsibilities of the "authority head" and of the "reviewing officials" for their respective Departments, and for obtaining and supporting presiding officers from other Agencies as specified in Office of Personnel Management (OPM) regulations; (see Appendix of this part).

(2) Make all regulations or instructions promulgated subject to the approval of the GC, DoD; and

(3) Delegate duties as appropriate.

(d) The *General Counsel of the National Security Agency* (GC, NSA) and the *General Counsel of the Defense Logistics Agency* (GC, DLA) shall be responsible for establishing procedures for carrying out the duties and responsibilities of the reviewing officials that have been delegated to them, as stated in Appendix of this part. All Regulations or Instructions promulgated pursuant to this part shall be submitted to the GC, DoD.

Appendix—Program Fraud Civil Remedies

A. Scope and Purpose

1. The Department of Defense has the authority to impose 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.

2. This Appendix:

a. Establishes administrative policies and 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;

b. Specifies the hearing and appeal rights of persons subject to allegations

of liability for such penalties and assessments.

3. The uniform policies and procedures established by this enclosure are binding on the authorities and authority heads in the Department of Defense and Military Departments. Additional administrative regulations necessary to carry out the requirements of the PFCRA and this part may be written by the authority heads. Any such regulations shall be consistent with the provisions of this Appendix.

B. Definitions

1. Adequate Evidence

Information sufficient to support the reasonable belief that a particular act or omission has occurred.

2. Authority

a. The Department of Defense, which includes OSD, Organization of the Joint Chiefs of Staff (OJCS), Unified and Specified Commands, Defense Agencies, and DoD Field Activities.

b. The Department of the Army.

c. The Department of the Navy.

d. The Department of the Air Force.

3. Authority Head

a. For the Department of Defense, the Deputy Secretary of the Department of Defense or an official or employee of the Department of Defense or the Military Departments designated in writing by the Deputy Secretary of Defense.

b. For the respective Military Departments, the Secretary of the Military Department or an official or employee of the Military Department designated in regulations promulgated by the Secretary to act on behalf of the Secretary.

4. Benefit

In the context of statements, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling status, or loan guarantee.

5. Claim

Any request, demand, or submission made as follows:

a. To the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

b. 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:

(a) Provided such property or services;

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

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

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

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

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

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

6. Complaint

The administrative complaint served by the reviewing official on the defendant under section G., below.

7. Defendant

Any person alleged in a complaint under section G., below, to be liable for a civil penalty or assessment under Section C., below.

8. DoD Criminal Investigative Organizations

The U.S. Army Criminal Investigative Command, Naval Security and Investigative Command, U.S. Air Force Office of Special Investigations, and the Defense Criminal Investigative Service.

9. Government

The U.S. Government.

10. Individual

A natural person.

11. Initial Decision

The Written decision of the presiding officer required by section J. or KK., below. This includes a revised initial decision issued following a remand or a motion of reconsideration.

12. Investigating Official

a. The IG, DoD; or

b. An officer or employee of the OIG designated by the IG;

c. Who, if a member of the Armed Forces of the United States on active duty, is serving in Grade 0-7 or above or, if a civilian employee, 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.

13. Knows or Has Reason to Know

A person who, 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.

14. Makes

Includes 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.

15. Person

Any individual, partnership, corporation, association or private organization, and includes the plural of that term.

16. Preponderance of the Evidence

The evidence necessary to support a presiding officer's decision that a violation of the PFCRA has occurred. Evidence that leads to the belief that what is sought to be proved is more likely true than not true.

17. Presiding Officer

An officer or employee of the Department of Defense or an employee detailed to the Department of Defense from another agency who:

a. Is selected under 5 U.S.C., Chapter 33, pursuant to the competitive examination process applicable to administrative law judges;

b. Is appointed by the authority head of DoD to conduct hearings under this Part for cases arising in the Department of Defense or the Military Departments;

c. Is assigned to cases in rotation so far as practicable;

d. May not perform duties inconsistent with the duties and responsibilities of a presiding officer;

e. Is entitled to pay prescribed by the Office of Personnel Management (OPM) independently of ratings and recommendations made by the authority and in accordance with 5 U.S.C., Chapters 51 and 53, Subchapter III;

f. Is not subject to a performance appraisal pursuant to 5 U.S.C., Chapter 43; and

g. May be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing by such Board.

18. Representative

An Attorney-at-law duly licensed in any State, commonwealth, territory, the District of Columbia, or foreign country, who enters his or her appearance in writing to represent a party in a proceeding under this part, or an officer,

director, or employee of a defendant or of its affiliate.

19. Reviewing Official

a. In all cases arising in the Department of Defense and any of the Military Departments, the reviewing official shall be an officer or employee of an authority as follows:

(1) Who is designated by the authority head to make the determination required under section E., below, of this enclosure;

(2) Who, if a member of the Armed Forces of the United States on active duty, is serving in Grade O-7 or above or, if a civilian employee, 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; and

(3) Who is as follows:

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(c) Not an official designated to make suspension or debarment decisions.

b. The General Counsel, Defense Logistics Agency (GC, DLA), shall be the reviewing official for all cases involving a claim or statement made to the DLA or any other part of the Department of Defense other than a Military Department or the National Security Agency (NSA). The General Counsel, National Security Agency (GC, NSA), shall be the reviewing official for all cases involving claims or statements made to that Agency. The General Counsel, Defense Logistics Agency (GC, DLA), and GC, NSA, may redelegate their authority to act as reviewing officials to any individual(s) meeting the criteria set out in subparagraph (1) of this section.

c. The authority head of each Military Department shall select a reviewing official, who shall review all cases involving a claim or statement that was made to their Department.

20. Statement

Any written representation, certification, affirmation, document, record, 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 U.S. Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the U.S. 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.

C. Basis for Civil Penalties and Assessments

1. Claims

a. Any person who makes a claim that the person knows or has reason to know:

(1) Is false, fictitious, or fraudulent;

(2) Includes or is supported by a written statement that asserts a material fact that is false, fictitious, or fraudulent;

(3) Includes or is supported by any written statement that:

(a) Omits a material fact;

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

(c) Is a statement in which the person making such statement has a duty to include such material fact; or

(4) Is for payment for the provision of property or services that the person had not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$5,000 for each such claim.

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 an authority, recipient, or party when such claim is received by an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

d. Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, service, 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 subparagraph 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 subparagraph a.(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

2. Statements

a. Any person who makes a written statement that:

(1) The person knows or has reason to know the following:

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

(b) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(2) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$5,000 for each statement.

b. Each written representation, certification, or affirmation constitutes a separate statement.

c. A statement shall be considered made to an authority when such statement is received by an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

3. No proof of specific intent to defraud is required to establish liability under this section.

4. 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 jointly and severally liable for a civil penalty with respect to such claims or statements.

5. 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.

D. Investigation

1. If the investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted, then:

a. 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;

b. The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

c. The person receiving such subpoena shall be required to tender to the investigating official, or to the person designated to receive the documents, a

certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

2. If the investigating official concludes that an action under the PFCRA may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the appropriate reviewing official(s). In instances where the false claim or false statement involves more than one authority within the Department of Defense, or where the investigating official finds that more than one case has arisen from the same set of facts, the investigating official may, at his or her sole discretion, refer the case(s) to the reviewing official of one of the affected authorities. That reviewing official shall consolidate the claims and statements and act for all. Nothing in this subsection confers any right in any party to the consolidation or severance of any case(s), although presiding officers may, at their sole discretion, entertain motions to consolidate or sever.

3. Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under 18 U.S.C. 287 or 31 U.S.C. 3729 and 3730, False Claims Act, or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

4. Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

5. Nothing in this section shall preclude or limit the investigating official's authority to obtain the assistance of any investigative units of the Department of Defense, including those of the Military Departments. In this regard, appropriate investigation may be conducted by the Defense criminal investigative organizations and other investigative elements of the Military Departments and Defense Agencies.

E. Review by the Reviewing Official

1. If, based on the report of the investigating official under subsection D.2., above, the reviewing official determines that there is adequate evidence to believe that a person is liable under section C., above, the reviewing official shall transmit to the Attorney General or his or her

designated point of coordination within the Department of Justice a written notice of the reviewing official's intention to issue a complaint under section G., below.

2. Such notice shall include the following:

a. A statement of the reviewing official's reasons for issuing a complaint;

b. A statement specifying the evidence that supports the allegations of liability;

c. A description of the claims or statements upon which the allegations of liability are based;

d. An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of section C., above.

e. 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

f. A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

F. Prerequisites for Issuing a Complaint

1. The reviewing official may issue a complaint under section G., below, only if:

a. The Attorney General or an Assistant Attorney General designated by the Attorney General approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

b. In the case of allegations of liability under subsection C.1., above, 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 subsection 2. of this section), the amount of money or the value of property or services demanded or requested in violation of subsection C.1., above, does not exceed \$150,000.00;

2. 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.

3. Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person's claims that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

4. In any case that involves claims or statements made to more than one entity within the Department of Defense or the Military Departments, or the reviewing officials having responsibility for each such entity, as stated in subsection D.2., above, shall have concurrent jurisdiction to make the required determinations under this section. In any such case, the responsible reviewing officials shall coordinate with each other prior to making any determination under this section. Where more than one case arises from the same set of facts, such cases shall be consolidated to the degree practicable, although the reviewing official shall have absolute discretion to make such determination. The requirements of this paragraph do not confer any procedural or substantive rights upon individuals, associations, corporations, or other persons or entities who might become defendants under the PFCRA.

G. Complaint

1. On or after the date the Attorney General or an Assistant Attorney General designated by the Attorney General 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 section H., below.

2. The complaint shall state the following:

a. 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;

b. The maximum amount of penalties and assessments for which the defendant may be held liable;

c. Instructions for filing an answer to a request 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

d. That failure to file an answer within 30 days of service of the complaint shall result in the imposition of penalties and assessments without right to appeal, consistent with the provisions of section J., below.

3. At the same time the reviewing official serves the complaint, he or she shall notify the defendant with a copy of this Part and any applicable implementing regulations.

H. Service of Complaint

1. 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.

2. 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 the following:

a. Affidavit of the individual serving the complaint by delivery;

b. A United States Postal Service return receipt card acknowledging receipt; or

c. Written acknowledgement of receipt by the defendant or his or her representative.

I. Answer

1. 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.

2. In the answer, the defendant:

a. Shall admit or deny each of the allegations of liability made in the complaint;

b. Shall state any defense on which the defendant intends to rely;

c. May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

d. Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

3. If the defendant is unable to file an answer meeting the requirements of paragraph 2.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 subsection 2. of this section. The reviewing official shall, in such event, file promptly with the presiding officer the complaint, the general answer denying liability, and the request for an extension of time as provided in section K., below. For good cause shown, the presiding officer may grant the defendant additional time within which to file an answer meeting the requirements of subsection 2. of this section.

4. The 30-day limitation for filing an answer may be tolled for a reasonable period of time by written agreement of the parties and approval of the authority head to allow time for settlement.

J. Default Upon Failure to File an Answer

1. If the defendant does not file an answer within the time prescribed in

subsection I.1., above, and there is no approved written agreement as in subsection I.4., above, tolling the time prescribed, the reviewing official may then refer the complaint to the presiding officer.

2. Upon referral of the complaint pursuant to this section, the presiding officer shall promptly serve on defendant, in the manner prescribed in section H., above, a notice that an initial decision will be issued under this section.

3. Upon referral of the complaint pursuant to this section, the presiding officer shall assume the facts alleged in the complaint to be true and, if such facts establish liability under section C., above, the presiding officer shall issue an initial decision imposing penalties and assessments under the statute.

4. 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 subsection 3. of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

5. If, before such an initial decision becomes final, the defendant files a motion with the presiding officer seeking to reopen on the grounds that good cause prevented the defendant from filing an answer, the initial decision shall be stayed pending the presiding officer's decision on the motion.

6. If, on a motion brought under subsection J.5., above, the defendant can demonstrate good cause excusing the failure to file a timely answer, the presiding officer shall withdraw the initial decision in subsection 3. of this section if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

7. A decision of the presiding officer denying a defendant's motion under subsections 5. and 6. of this section is not subject to reconsideration under section LL., below.

8. 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 presiding officer denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

9. If the defendant files a timely notice of appeal with the authority head, the presiding officer shall forward the record of the proceeding to the authority head.

10. The authority head shall decide expeditiously whether good cause excused the defendant's failure to file a

timely answer based solely on the record before the presiding officer.

11. If the authority head decides that good cause excused the defendant's failure to file a timely answer, the authority head shall remand the case to the presiding officer with instructions to grant the defendant an opportunity to answer.

12. If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall approve the initial decision of the presiding officer, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

K. Referral of Complaint and Answer to the Presiding Officer

1. Upon receipt of an answer, the reviewing official shall file the complaint and answer with the presiding officer.

2. To allow time for settlement, referral of complaint and answer to the presiding officer may be delayed for a reasonable period of time if there is a written agreement of the parties, approved by the authority head, in favor of such delay.

L. Notice of Hearing

1. When the presiding officer receives the complaint and answer, the presiding officer shall promptly serve a notice of hearing upon the defendant in the manner prescribed by section H., above. At the same time, the presiding officer shall send a copy of such notice to the representative for the Government.

2. Such notice shall include:

- The tentative time and place, and the nature of the hearing;
- The legal authority and jurisdiction under which the hearing is to be held;
- The matters of fact and law to be asserted;
- A description of the procedures for the conduct of the hearing;
- The name, address, and telephone number of the representative of the Government, the defendant, and other parties, if any; and
- Such other matters as the presiding officer deems appropriate.

M. Parties to the Hearing

The parties to the hearing shall be the defendant and the authority. The reviewing official of each authority shall, with the concurrence of the DoD Component head, designate attorneys within that authority to represent the authority in hearings conducted under this part. Attorneys appointed as authority representatives shall remain under the supervision of their DoD Component.

N. Separation of Functions

1. The investigating official and the reviewing official, for any particular case or factually related case, may not do the following:

- Participate in the hearing as the presiding officer;
- 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 a public proceeding; or
- Make the collecting of penalties and assessments under 31 U.S.C. 3806.

2. The presiding officer shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

3. Except as provided in subsection 1. of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

O. Ex parte Contacts

No party or person (except employees of the presiding officer's office) shall communicate in any way with the presiding officer on any matter at issue in a case unless on notice and there is an 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.

P. Disqualification of Presiding Officer and Reviewing Official

1. A reviewing official or presiding officer in a particular case may disqualify himself or herself at any time.

2. A party may file a motion for disqualification of the presiding officer or the reviewing official. Such motion, to be filed with the presiding officer, shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

3. Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification or such objections shall be deemed waived.

4. 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.

5. Upon the filing of such a motion and affidavit, the presiding officer shall proceed no further in the case until he or she resolves the matter of

disqualification by taking one of the following actions:

- If the presiding officer determines that a reviewing official is disqualified, the presiding officer shall dismiss the complaint without prejudice;
- If the presiding officer disqualifies himself or herself, the case shall be reassigned promptly to another presiding officer;
- The presiding officer may deny a motion to disqualify. In such event, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

Q. Rights of Parties

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

- Be accompanied, represented, and advised by a representative;
- Participate in any conference held by the presiding officer;
- Conduct discovery;
- Agree to stipulations of fact or law, which shall be made part of the record;
- Present evidence relevant to the issues at the hearing;
- Present and cross-examine witnesses;
- Present oral arguments at the hearing, as permitted by the presiding officer; and
- Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

R. Authority of the Presiding Officer

1. The presiding officer shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

2. The presiding officer has the authority to do the following:

- Set and change the date, time, and place of the hearing upon reasonable notice to the parties;
- Continue or recess the hearing in whole or in part for a reasonable period of time;
- Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;
- Administer oaths and affirmations;
- Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;
- Rule on motions and other procedural matters;
- Regulate the scope and timing of discovery;
- Regulate the course of the hearing and the conduct of representatives and parties;
- Examine witnesses;

j. Receive, rule on, exclude, or limit evidence;

k. Upon motion of a party, take official notice of facts;

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

m. Conduct any conference, argument, or hearing on motions in person or by telephone; and

n. Exercise such other authority as is necessary to carry out the responsibilities of the presiding officer under this Directive.

3. The presiding officer does not have the authority to find Federal statutes or regulations invalid.

S. Prehearing Conferences

1. The presiding officer may schedule prehearing conferences as appropriate.

2. Upon the motion of any party, the presiding officer shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

3. The presiding officer may use prehearing conferences to discuss the following:

a. Simplification of the issues;
b. The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;
c. Stipulations and admissions of fact or as to the contents and authenticity of documents;

d. Whether the parties can agree to submission of the case on a stipulated record;

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

f. Limitation of the number of witnesses;

g. Scheduling dates for the exchange of witness lists and of proposed exhibits;

h. Discovery;

i. The time and place for the hearing; and

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

4. The presiding officer may issue an order containing all matters agreed upon by the parties or ordered by the presiding officer at a prehearing conference.

T. Disclosure of Documents

1. 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 subsection D.2., above, 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.

2. 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, except if disclosure would violate Rule 6(e) of the Federal Rules of Criminal Procedure.

3. The notice sent to the Attorney General from the reviewing official as described in section E., above, is not discoverable under any circumstances.

4. The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section at any time after service of the complaint.

U. Discovery

1. The following types of discovery are authorized:

a. Requests for production of documents for inspection and copying;
b. Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;
c. Written interrogatories; and
d. Depositions.

2. For the purpose of this section and sections V. and W., below, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence contained in a form contemplated by the definition of "document" set forth in the Federal Rules of Civil Procedure, Rule 34. Nothing contained herein shall be interpreted to require the creation of a document.

3. Unless mutually agreed to by the parties, discovery is available only as ordered by the presiding officer. The presiding officer shall regulate the timing of discovery.

4. Motions for discovery may be filed with the presiding officer by the party seeking discovery.

a. 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.

b. Within 10 days of service, a party may file an opposition to the motion

and/or a motion for protective order as provided in section X., below.

c. The presiding officer may grant a motion of discovery only if he finds that the discovery sought:

(1) Is necessary for the expeditious, fair, and reasonable consideration of the issue;

(2) Is not unduly costly or burdensome;

(3) Will not unduly delay the proceeding; and

(4) Does not seek privileged information.

d. The burden of showing that discovery should be allowed is on the party seeking discovery.

e. The presiding officer may grant discovery subject to a protective order under section X., below.

5. Depositions

a. If a motion for deposition is granted, the presiding officer 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. The presiding officer may order that parties produce deponents and/or documents without the need for subpoena.

b. The party seeking to depose shall serve the subpoena in the manner prescribed in section H., above.

c. The deponent may file with the presiding officer a motion to quash the subpoena or a motion for a protective order within 10 days of service.

d. The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all parties for inspection and copying.

6. Each party shall bear its own costs of discovery.

V. Exchange of Witness Lists, Statements, and Exhibits

1. At least 15 days before the hearing or at such other time as may be ordered by the presiding officer, 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 subsection GG.2., below. At the time the above documents are exchanged, any party that intends to rely upon the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the presiding officer, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

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

3. Unless another party objects within the time set by the presiding officer, documents exchanged in accordance with subsection 1. of this section shall be admitted into evidence at the hearing. Later challenges to admissibility at the hearing shall be permitted only upon a showing of good cause for the lateness.

W. Subpoenas for Attendance at Hearing

1. A party wishing to procure the appearance and testimony of any individual at the hearing may request that the presiding officer issue a subpoena.

2. A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

3. 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 presiding officer for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

4. The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

5. The party seeking the subpoena shall serve it in the manner prescribed in section H., above. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

6. A party or a representative of the individual to whom the subpoena is directed may file with the presiding officer a motion to quash the subpoena with 10 days after service or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

X. Protective Order

1. 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.

2. In issuing a protective order, the presiding officer may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following:

a. That the discovery not be had;

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

c. That the discovery may be had only through a method of discovery other than that requested;

d. That classified information not be released unless prior notice and arrangements reasonably acceptable to the representative of the authority are made in coordination with the Defense Investigative Service, and the presiding officer agrees to the use;

e. That certain matters not be inquired into or that the scope of discovery be limited to certain matters;

f. That discovery be conducted with no person except persons designated by the presiding officer;

g. That the contents of discovery or evidence be sealed;

h. That the defendant comply with 32 CFR Part 97 concerning official witnesses;

i. That a deposition after being sealed be opened only upon order of the presiding officer;

j. 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

k. That the parties simultaneously file specified documents of information enclosed in sealed envelopes to be opened as directed by the presiding officer.

Y. Fees

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

Z. Form, Filing, and Service of Papers

1. Form

a. Documents filed with the presiding officer shall include an original and two copies.

b. 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 presiding officer, and a designation of the paper (e.g., motion to quash subpoena).

c. 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.

d. 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.

2. *Service.* A party filing a document with the presiding officer 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 section H., above, 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.

3. *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.

AA. Computation of Time

1. 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.

2. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government shall be excluded from the computation.

3. Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response.

BB. Motions

1. Any application to the presiding officer for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, the facts alleged, and shall be filed with the presiding officer and served on all other parties.

2. Except for motions made during a prehearing conference or at the hearing,

all motions shall be in writing. The presiding officer may require the oral motions be put in writing.

3. Within 15 days after a written motion is served, or such other time as may be fixed by the presiding officer, any party may file a response to such motion.

4. The presiding officer 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.

5. The presiding officer shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

6. Failure by a party to raise defenses or objections or to make requests that must be made prior to the beginning of the hearing shall constitute waiver thereof, but the presiding officer may grant relief from the waiver for good cause shown.

CC. Sanctions

1. The presiding officer may sanction a person, including any party or representative, for the following:

- a. Failing to comply with an order, rule, or procedure governing the proceeding;
- b. Failing to prosecute or defend an action; or
- c. Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

2. Any such sanction, including but not limited to those listed in subsections 3., 4., and 5. of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

3. 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 presiding officer may:

- a. Draw an inference in favor of the requesting party with regard to the information sought;
- b. In the case of requests for admission, deem each matter of which an admission is requested to be admitted;
- c. Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and
- d. Strike any part of the pleadings or other submission of the party failing to comply with such request.

4. If a party fails to prosecute or defend an action under this Part commenced by service of a notice of hearing, the presiding officer may dismiss the action or may issue an

initial decision imposing penalties and assessments.

5. The presiding officer may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

DD. The Hearing and Burden of Proof

1. The presiding officer shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under section C., above, and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

2. The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

3. The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

4. The hearing shall be open to the public unless otherwise ordered by the presiding officer for good cause shown.

EE. Determining the Amount of Penalties and Assessments

In determining an appropriate amount of civil penalties and assessments, the presiding officer 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.

FF. Location of Hearing

1. The hearing may be held as follows:

- a. In any judicial district of the United States in which the defendant resides or transacts business;
- b. In any judicial district of the United States in which the claim or statement at issue was made; or
- c. In such other place, including foreign countries, as may be agreed upon by the defendant and the presiding officer.

2. Each party shall have the opportunity to petition the presiding officer with respect to the location of the hearing.

3. The hearing shall be held at the place and at the time ordered by the presiding officer.

GG. Witnesses

1. Except as provided in subsection 2. of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

2. At the discretion of the presiding officer, testimony may be admitted in the form of a written or videotaped statement or deposition. Any such

written or videotaped 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 deposition or cross-examination at the hearing. Prior written or videotaped statements of witnesses proposed to testify at the hearings and deposition transcripts shall be exchanged as provided in subsection V.1., above.

3. The presiding officer shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- a. Make the interrogation and presentation effective for the ascertainment of the truth;
- b. Avoid needless consumption of time; and
- c. Protect witnesses from harassment or undue embarrassment.

4. The presiding officer shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5. At the discretion of the presiding officer, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination.

6. Upon motion of any party, the presiding officer shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of the following:

- a. A party who is an individual;
- b. In the case of a party that is not an individual, an officer or employee of the party appearing for the party as its representative, or designated by the party's representative; or
- c. 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.

HH. Evidence

1. The presiding officer shall determine the admissibility of evidence.

2. Except as provided herein, the presiding officer shall not be bound by the Federal Rules of Evidence. However, the presiding officer may apply the Federal Rules of Evidence where appropriate; e.g., to exclude unreliable evidence.

3. The presiding officer shall exclude irrelevant and immaterial evidence.

4. 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 consideration of undue

delay or needless presentation of cumulative evidence.

5. Evidence shall be excluded if it is privileged under Federal law and the holder of the privilege asserts it.

6. Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

7. The presiding officer shall permit the parties to introduce rebuttal witnesses and evidence.

8. All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the presiding officer pursuant to section X., above.

II. The Record and Finding

1. The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the presiding officer at a cost not to exceed the actual cost of duplication.

2. 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 presiding officer and the authority head.

3. The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the presiding officer.

4. Funding for the hearing and record, except for the cost of the presiding officer, shall be the responsibility of the authority in which the case arose.

JJ. Post-hearing Briefs

The presiding officer may require or permit the parties to file post-hearing briefs. The presiding officer shall fix the time for filing any 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 presiding officer may permit the parties to file reply briefs.

KK. Initial Decision

1. The presiding officer shall issue an initial decision based only on the record that shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

2. The findings of fact shall include a finding on each of the following issues:

a. Whether the claims or statements identified in the complaint, or any portions thereof, violate section C., above; and

b. If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments.

3. The presiding officer 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 presiding officer 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 presiding officer or a notice of appeal with the authority head. If the presiding officer fails to meet the deadline contained in this subsection, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

4. Unless the initial decision of the presiding officer is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision of the presiding officer shall be final and binding on the parties 30 days after it is issued by the presiding officer.

LL. Reconsideration of Initial Decision

1. Except as provided in subsection 4. of this section, any party may file a motion for reconsideration of the initial decision within 20 days of service of the initial decision in the manner set forth in section H., above, for service of the complaint. Service shall be proved in the manner provided in subsection H.2., above.

2. 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.

3. Responses to such motions shall be allowed only upon request of the presiding officer; however, the presiding officer shall not issue a revised initial determination without affording both parties an opportunity to be heard on the motion for reconsideration.

4. No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

5. The presiding officer may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

6. If the presiding officer denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the presiding officer denies the motion, unless the initial decision is timely appealed to the authority head in accordance with section MM., below.

7. If the presiding officer 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 section MM., below.

MM. Appeal to Authority Head

1. 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.

2. A notice of appeal:

a. May be filed at any time within 30 days after the presiding officer issues an initial or a revised initial decision. If another party files a motion for reconsideration under section LL., above, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration, until the time period for filing a motion for reconsideration under section LL., above, has expired or the motion is resolved;

b. If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the presiding officer denies the motion or issues a revised initial decision, whichever applies;

c. 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.

3. If the defendant files a timely notice of appeal with the authority head, the presiding officer shall forward the record of the proceeding to the authority head when:

a. The time for filing a motion for reconsideration expires without the filing of such a motion, or

b. The motion for reconsideration is denied. Issuance of a revised initial decision upon motion for reconsideration shall require filing of a new notice of appeal.

4. A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

5. The representative for the Government may file a brief in opposition to the exceptions within 30 days of receiving the notice of appeal and accompanying brief.

6. There is no right to appear personally before the authority head, although the authority head may at his or her discretion require the parties to appear for an oral hearing on appeal.

7. There is no right to appeal any interlocutory ruling by the presiding officer.

8. In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the presiding officer, unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

9. If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the presiding officer for consideration of such additional evidence.

10. The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the presiding officer in any initial decision.

11. 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.

12. Unless a petition for review is filed as provided in 32 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 section C., above, is final and is not subject to judicial review.

13. The authority heads (or their designees) may designate an officer or employee of the authority, who is serving in the grade of GS-17 or above under the General Schedule, or in the Senior Executive Service, to carry out these appellate responsibilities; however, the authority to compromise, settle, or otherwise discretionarily dispose of the case on appeal provided pursuant to subsection MM.10, hereof, may not be so redelegated pursuant to this subsection.

NN. Stays Ordered by the Department of Justice

If at any time, the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this Directive with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed

only upon receipt of the written authorization of the Attorney General.

OO. Stay Pending Appeal

1. An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

2. No administrative stay is available following a final decision of the authority head.

PP. Judicial Review.

31 U.S.C. 3805 authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessment under this Part and specifies the procedures for such review.

QQ. Collection of Civil Penalties and Assessments

31 U.S.C. 3806 and 3808(b) authorize actions for collection of civil penalties and assessments imposed under this Part and specify the procedures for such actions.

RR. Right to Administrative Offset

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under section QQ., above, or any amount agreed upon in a compromise or settlement under section TT., below, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this section against a refund of an overpayment of Federal taxes then or later owing by the United States to the defendant.

SS. Deposit in Treasury of United States

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

TT. Compromise or Settlement

1. Parties may make offers of compromise or settlement at any time.

2. 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 presiding officer issues an initial decision.

3. The authority head has exclusive authority to compromise or settle a case under this Directive at any time after the date on which the presiding officer issues an initial decision, except during the pendency of any review under section PP., above, or during the pendency of any action to collect

penalties as assessments under section QQ., above.

4. The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under section PP., above, of any action to recover penalties and assessments under 31 U.S.C. 3806.

5. The investigating official may recommend settlement terms to the reviewing official or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Attorney General, as appropriate.

6. Any compromise or settlement must be in writing.

UU. Limitations

1. The notice of hearing with respect to a claim or settlement must be served in the manner specified in section H., above, within 6 years after the date on which such claim or statement is made.

2. If the defendant fails to file a timely answer, service of a notice under subsection J.2., above, shall be deemed a notice of hearing for purposes of this section.

3. If at any time during the course of proceedings brought pursuant to this section, the authority head receives or discovers any specific information concerning bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General and to the Inspector General, Department of Defense.

VV. Delegations

The General Counsel for the Department of Defense is designated to carry out the responsibilities of the authority head of the Department of Defense for the issuance of additional implementing regulations that are necessary to implement PFCRA and this Part to decide cases upon appeal, and to hire or designate employees of the Department of Defense to decide cases on appeal. The General Counsel, Department of Defense, is also designated to appoint presiding officers for the Department of Defense, and may assist in the appointment of presiding officers on detail from other Agencies for all authorities within the Department of Defense.

September 30, 1988.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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