Sunshine Act Meetings

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This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 11:00 a.m., Monday, August 1, 1994.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Federal Reserve Bank and Branch director appointments.
2. Proposed acquisition of computer equipment within the Federal Reserve System.
3. Proposals regarding two Federal Reserve Bank renovation projects.
4. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
5. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: July 22, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–18328 Filed 7–22–94; 4:58 pm]

BILLING CODE 6210–01–P

LEGAL SERVICES CORPORATION

Board of Directors Audit and Appropriations Committee Meeting Notice

TIME AND DATE: The Legal Services Corporation Board of Directors Audit and Appropriations Committee will meet on August 5–6, 1994. The meeting will commence at 1:00 p.m. on August 5, 1994, and at 9:00 a.m. on August 6, 1994.

PLACE: The Fairmont Hotel, 123 Baronne, BAYOU III Room, New Orleans, LA 70140, (504) 529–7111.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

Open Session

1. Approval of Agenda.
2. Approval of Minutes of July 15, 1994 Meeting.
   a. Open Session.
   b. Closed Session.
3. Presentation of June 30, 1994 Expenses with Administrative Expenses Allocated to each Cost Center.
4. Consideration and Review of Expense Projections for the period of July 1, 1994 through September 30, 1994.
   a. Consideration of Recommended COB Modifications.
   b. Consideration of Recommended COB Internal Budgetary Adjustments.
5. Discussion of the Management and Administration Budget for Fiscal Year 1995.
6. Consideration of and Possible Action on the Fiscal Year 1996 Budget Mark.
7. Report on the Revenue Audit Conducted By the Office of the Inspector General.

CONTACT PERSON FOR INFORMATION: Patricia Batie (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Date issued: July 25, 1994.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 94–18471 Filed 7–25–94; 3:58 pm]

BILLING CODE 7050–01–M

NATIONAL LABOR RELATIONS BOARD

TIME AND DATE: 10:00 a.m., Thursday, August 4, 1994.

PLACE: Board Conference Room, Eleventh Floor, 1099 Fourteenth St., N.W., Washington, D.C. 20570.

STATUS: Open to public observation.

MATTERS TO BE CONSIDERED: Mail Ballots.

CONTACT PERSON FOR MORE INFORMATION: John C. Truesdale, Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, Telephone: (202) 273–1940.

Dated, Washington, D.C., July 25, 1994.

By direction of the Board:

John C. Truesdale,

Executive Secretary, National Labor Relations Board.

[FR Doc. 94–18394 Filed 7–25–94; 11:19 am]

BILLING CODE 7445–01–M

federal register

Wednesday
July 27, 1994

Part II

Department of Defense

Department of the Army

32 CFR Part 516
Litigation; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 516

Litigation

AGENCY: Office of the Judge Advocate General, Litigation Division, DOD.

ACTION: Final rule.

SUMMARY: This final rule revises 32 CFR Part 516, Litigation, Army Regulation 27–40, Litigation, previously published in the **Federal Register** as a proposed rule (57 FR 31852). This rule devotes a separate subpart to service of process (subpart B). The former "investigative report" is replaced by "litigation report" reflecting current usage (subpart C). A separate subpart is devoted to individual liability (subpart D). This rule also treats environmental litigation (subpart F), deletes coverage of criminal prosecutions in U.S. Magistrate and District Courts, delegates more authority to the installation level to determine release of information and appearance of witnesses (subpart G); and updates procedures to obtain release from local or state jury duty (subpart J).

EFFECTIVE DATE: This final rule is effective July 27, 1994.

ADDRESS: Office of the Judge Advocate General, ATTN: Litigation Division (DAJA-LT), 901 North Stuart Street, Arlington, VA 22203–1837.

FOR FURTHER INFORMATION CONTACT: MAJ Kelly Wheaton, (703) 696–1638.

SUPPLEMENTARY INFORMATION: This part prescribes policy and procedures for litigation in civilian court proceedings, including the following: providing representation of the Army and its personnel in Federal and state court proceedings; remedies for procurement fraud; environmental litigation; bankruptcy; prosecution in Federal court of offenses in which the Army has an interest; release of information and appearance of witnesses in criminal and civil court actions; procedures to follow when soldiers are summoned for jury duty; and, procedures for cooperation with the Office of Special Counsel. This part does not apply to DA or DOD proceedings such as courts-martial or administrative boards.

Executive Order 12291

This final rule has been classified as nonmajor. The effect of the this rule on the economy will be less than $100 million.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980. This final rule does not have a significant impact on small entities.

Paperwork Reduction Act

This final rule does not contain new reporting or recordkeeping requirements subject to the approval by the Office of Management and Budget under the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Kenneth L. Denton,

Army Federal Register Liaison Officer.

Accordingly, 32 CFR Part 516 is revised as follows:

PART 516—LITIGATION

Subpart A—General

Sec.

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§ 516.3 Explanation of abbreviations and terms.
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§ 516.17 SJA or legal adviser responsibilities.
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§ 516.28 Policy.
§ 516.29 Federal statutes and regulations.
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§ 516.31 Private counsel at government expense.
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Subpart E—Legal Proceedings Initiated by the United States Medical Care and Property Claims

§ 516.33 General.
§ 516.34 Referral of medical care and property claims for litigation.
§ 516.35 Preparation of claims for litigation.

Assertion of Other Claims

§ 516.36 Referral to Litigation Division.
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§ 516.38 Scope.
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§ 516.43 Release of Army and other agency records.
§ 516.44 Determination of release authorization.
§ 516.45 Records determined to be releasable.
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DA Personnel as Witnesses in Private Litigation

§ 516.47 Response to subpoenas, orders, or requests for witnesses.
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§ 516.51 Response to subpoenas, orders, or requests for witnesses.
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§ 516.54 Witnesses for the United States.
§ 516.55 Witnesses for a state or private litigant.
§ 516.56 Witnesses before foreign tribunals.

Subpart H—Remedies in Procurement Fraud and Corruption

§ 516.57 Purpose.
§ 516.58 Policies.
§ 516.59 Duties and procedures.
§ 516.60 Procurement fraud and irregularities programs at MACOMs.
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§ 516.62 PFD and HQ USACIDC coordination.
§ 516.63 Coordination with DOJ.
§ 516.64 Comprehensive remedies plan.
§ 516.65 Litigation reports in civil recovery cases.
§ 516.66 Administrative and contractual actions.
§ 516.67 Overseas cases of fraud or corruption.

§ 516.68 Program Fraud Civil Remedies Act (PFCRA).

Subpart I—Cooperation With the Office of Special Counsel

§ 516.69 Introduction.
§ 516.70 Policy.
§ 516.71 Duties.
§ 516.72 Procedures.
§ 516.73 Assistance from HQDA.

Subpart J—Soldiers Summoned to serve on State and Local Juries

§ 516.74 General.
§ 516.75 Policy.
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§ 516.77 Procedures for exemption.
§ 516.78 Status, fees, and expenses.
Appendix A to Part 516—References.
Appendix B to Part 516—Mailing Addresses.
Appendix C to Part 516—Department of Defense Directive 5405.2, Release of Official Information in Litigation and Testimony by DOD Personnel as Witnesses.
Appendix D to Part 516—Department of Defense Directive 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities.
Appendix E to Part 516—Department of Defense Directive 5505.5, Implementation of the Program Fraud Civil Remedies Act.
Appendix F to part 516—Glossary.
Appendix G to Part 516—Figures.

Authority: 5 U.S.C. 552; 10 U.S.C. 218, 1037, 1089, 1552, 1553, 2036; 18 U.S.C. 219, 3401; 28 U.S.C. 50, 513, 515, 543; 31 U.S.C. 3729 and 41 U.S.C. 51; 42 U.S.C. 290, 2651; 43 U.S.C. 666

Subpart A—General

§ 516.1 Purpose.

(a) This part prescribes policies and procedures for the following:

(1) Defensive and affirmative litigation in Federal and state civilian courts where the Army or DOD has an interest in the matter.

(2) Proceedings before Federal or state administrative bodies, such as utility rate commissions.

(3) Release of official information and testimony by DA personnel with regard to litigation.

(4) Remedies for procurement fraud and corruption.

(5) Environmental civil litigation and administrative proceedings.

(6) Proceedings before the Office of Special Counsel.

(b) This regulation does not apply to DA or DOD proceedings such as courts-martial or administrative boards.

§ 516.2 References.

Applicable publications and forms are listed in Appendix A to this part.

§ 516.4 Explanation of abbreviations and terms.

(a) The Glossary contains explanations of abbreviations and terms.

(b) The masculine gender has been used throughout this regulation for simplicity and consistency. Any reference to the masculine gender is intended to include women.

§ 516.4 Responsibilities.

(a) United States Department of Justice (DOJ). DOJ will defend litigation in domestic and foreign courts, against the United States, its agencies and instrumentalities, and employees whose official conduct is involved. The various U.S. Attorney Offices, under the oversight of the Attorney General, will conduct much of the representation.

(b) The Judge Advocate General (TJAG). Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General Counsel, TJAG is responsible for litigation in which the Army has an interest. Only TJAG (or Chief, Litigation Division) will communicate to DOJ the Army's position with regard to settlement of a case.

(c) Assistant Judge Advocate General For Civil Law and Litigation (AJAG–CL). Responsible to TJAG for litigation issues; supervises Chief, Litigation Division.

(d) Chief, Litigation Division. Reports to AJAG–CL and is responsible for the following:

(1) Supervising litigation in which the Army has an interest.

(2) Acting for TJAG and Secretary of the Army on litigation issues, including the authority to settle or compromise cases, subject to the supervision of TJAG and AJAG–CL.

(3) Delegating cases if appropriate.

(4) Serving as primary contact with DOJ on litigation.

(5) Accepting service of process for DA and for the Secretary of the Army in his official capacity. See 32 CFR § 257.5).

(e) Special Assistant U.S. Attorneys (SAUSAs) and DOJ Special Attorneys. Army judge advocates and civilian attorneys, when appointed as SAUSAs under 28 U.S.C. 543, will represent the Army's interests in either criminal or civil matters in Federal court under the following circumstances:

(1) Felony and misdemeanor prosecutions in Federal court. Army attorneys, at the installation level, after being duly appointed (See AR 27–10), will prosecute cases, in which the Army has an interest, in Federal court. Army attorneys who prosecute criminal cases will not represent the United States in civil litigation without authorization from Chief, Litigation Division.

(2) SAUSAs for civil litigation. By assignment of TJAG and upon the approval of the U.S. Attorney, Judge Advocates will serve within a U.S. Attorney's office to represent the government in litigation in which the Army or DOD has an interest. These Judge Advocates have the same general authority and responsibility as an Assistant U.S. Attorney.

(3) Special Attorneys assigned to DOJ. By assignment of TJAG and with the concurrence of the appropriate DOJ official, Judge Advocates will work as Special Attorneys for DOJ. Special Attorneys are authorized to represent the United States in civil litigation in which the Army or DOD has an interest.

(f) Attorneys at Army activities or commands. SJAs or legal advisers, or attorneys assigned to them, will represent the United States in litigation only if authorized by this regulation or delegated authority in individual cases by the Chief, Litigation Division.

(g) Commander, U.S. Army Claims Service (USARCS). The Commander, USARCS, and USARCS attorneys, subject to AR 27–20, Chapter 4, will maintain direct liaison with DOJ in regard to administrative settlement of claims under the Federal Tort Claims Act.

(h) Chief, Contract Law Division, OTJAG. The Chief, Contract Law Division, attorneys assigned to the Contract Law Division, and other attorneys designated by the Chief, Contract Law Division, in litigation involving taxation, will represent DA in negotiation, administrative proceedings, and litigation, and maintain liaison with DOJ and other governmental authorities.

(i) Legal Representatives of the Chief of Engineers. The Office of Chief Counsel, attorneys assigned thereto, and other attorneys designated by the Chief Counsel will maintain direct liaison with DOJ in litigation and administrative proceedings arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, and real property functions of the U.S. Army Corps of Engineers.

(j) Chief Trial Attorney, Contract Appeals Division, USALSA. The Chief Trial Attorney, attorneys assigned to the Contract Appeals Division, and attorneys designated by the Chief Trial Attorney will represent the government before the Armed Services Board of Contract Appeals and the General Services Board of Contract Appeals. They will maintain direct liaison with DOJ concerning appeals from ASBCA

and GSBCA decisions. The Chief Trial Attorney has designated COE attorneys to act as trial attorneys in connection with COE contract appeals.

(k) Chief, Regulatory Law Office, USALSA. The Chief, Regulatory Law Office, attorneys assigned to the Regulatory Law Office, and other attorneys designated by the Chief, will represent DA consumer interests in regulatory matters before state and Federal administrative agencies and commissions, including but not limited to proceedings involving rates and conditions for the purchase of services for communications (except long-distance telephone), transportation, and utilities (gas, electric, water and sewer). They will maintain direct liaison with DOJ for communications, transportation, and utilities litigation.

(l) Chief, Intellectual Property Law Division, USALSA. The Chief, Intellectual Property Law Division, and the attorneys assigned thereto will represent DA in matters pertaining to patents, copyrights, and trademarks. They will maintain direct liaison with DOJ concerning intellectual property issues.

(m) Chief, Labor and Employment Law Office, OTJAG. The Chief, Labor and Employment Law Office, attorneys assigned thereto, and attorneys identified as labor counselors will represent DA in matters pertaining to labor relations, civilian personnel, and Federal labor standards enforcement before the following: Federal Labor Relations Authority; Merit Systems Protection Board; Equal Employment Opportunity Commission; Department of Labor; National Labor Relations Board; and, state workmen's compensation commissions. In the event any individual mentioned in this subparagraph intends to make a recommendation to DOJ concerning an appeal of any case to a U.S. Court of Appeals, such recommendation will first be coordinated with Litigation Division.

(n) Chief, Procurement Fraud Division, USALSA. The Chief, Procurement Fraud Division, attorneys assigned thereto, and other attorneys designated by the Chief will represent DA in all procurement fraud and corruption matters before the Army suspension and debarment authority and before any civil fraud recovery administrative body. They will maintain liaison and coordinate remedies with DOJ and other agencies in matters of procurement fraud and corruption.

(o) Chief, Environmental Law Division, USALSA. The Chief, Environmental Law Division, attorneys assigned thereto, and other attorneys designated by the Chief, ELD, will maintain direct liaison with DOJ in all environmental and natural resources civil litigation and administrative proceedings involving missions and functions of DA, its major and subordinate commands, installations presently or previously managed by DA, and other sites or issues in which DA has a substantial interest, except as otherwise specifically provided in this regulation.

(p) Chief, Criminal Law Division, OTJAG. The Chief, Criminal Law Division, will have general oversight of felony and magistrate court prosecutions conducted by Army lawyers acting as Special Assistant U.S. Attorneys. (See subpart G of this part). The Chief will coordinate with DOJ and other governmental agencies concerning the overall conduct of these prosecutions.

§ 365.5 Restriction on contact with DOJ.

(a) General rule. Except as authorized by TJAG, the General Counsel, the Chief of Litigation Division, or this regulation, no Army personnel will confer or correspond with DOJ concerning legal proceedings in which the Army has an interest.

(b) Exceptions. This prohibition does not preclude contact with DOJ required by the Memorandum of Understanding between DOJ and DOD relating to the investigation and prosecution of certain crimes. (See AR 27–10, para 2–7). In addition, an installation SJA or legal adviser is expected to maintain a working relationship with the U.S. Attorney in each district within his geographical area. An SJA or legal adviser should request the U.S. Attorney to advise him immediately when litigation involving DA or its personnel is served on the U.S. Attorney.

§ 516.6 Appearance as counsel.

(a) General. Military personnel on active duty and DA civilian personnel will not appear as counsel before any civilian court or in any preliminary proceeding, for example, deposition, in litigation in which the Army has an interest without the prior written approval of TJAG, except under the following conditions:

(1) The appearance is authorized by this regulation.

(2) The individual is a party to the proceeding.

(3) The appearance is authorized under an expanded legal assistance program (See AR 27–3).

(4) The individual is a judge advocate assigned or detailed by TJAG to DOJ to represent the United States in civil or criminal cases, for example, a Special Assistant U.S. Attorney, or an attorney assigned to Litigation Division.

(b) Procedure. All requests for appearance as counsel will be made through Litigation Division to the Personnel, Plans and Training Office, OTJAG. Requests for DA military or civilian attorneys to appear in any civilian court or proceeding on behalf of a soldier who is also facing UCMJ action will be delivered to the SJA, legal adviser, or Regional Defense Counsel, as appropriate. The SJA or legal adviser will forward the request to Litigation Division with an evaluation of the case and recommendation. Regional Defense Counsel should send requests for USATDS counsel to Chief, USATDS, who will forward the request to Litigation Division. Privileged or otherwise sensitive client information should only be submitted through USATDS channels.

§ 516.7 Mailing addresses.

Mailing addresses for organizations referenced in this regulation are in Appendix B to this part.

Subpart B—Service of Process

§ 516.8 General.

(a) Defined. Process is a legal document that compels a defendant in an action to appear in court or to comply with the court's demands, for example, in a civil case a summons or subpoena, or in a criminal case, a warrant for arrest, indictment, contempt order, subpoena, or summons. Service of process is the delivery of the document to a defendant to notify him of a claim or charge against him.

(b) Policy. DA personnel will follow the guidance of this chapter when civil officials attempt to serve civil or criminal process on individuals on Federal property.

(c) Procedures. Provost marshals shall ensure that installation law enforcement personnel are adequately trained to respond to situations which arise with regard to service of civil and criminal process. SJAs or legal advisers shall provide guidance to law enforcement personnel in these matters.

§ 516.9 Service of criminal process within the United States.

(a) Surrender of personnel. Guidance for surrender of military personnel to civilian law enforcement officials is in Chapter 7 of AR 630–10 and AR 190–9. Army officials will cooperate with civilian law enforcement authorities who seek the surrender of a soldier in connection with criminal charges. Special rules apply when a bail bondsman or other surety seeks custody of a soldier.

(b) Requests for witnesses or evidence in criminal proceedings. See subpart H to this part.

§ 516.10 Service of civil process within the United States.

(a) Policy. DA officials will not prevent or evade the service or process in legal actions brought against the United States or against themselves in their official capacities. If acceptance of service of process would interfere with the performance of military duties, Army officials may designate a representative to accept service. DA personnel sued in their individual capacity should seek legal counsel concerning voluntary acceptance of process.

(b) Requests for witnesses or evidence in civil proceedings. See subpart H to this part.

(c) Process of Federal courts. Subject to reasonable restrictions imposed by the commander, civil officials will be permitted to serve Federal process. (See Fed. R. Civ. P. 4, 45).

(d) Process of state courts.

(1) In areas of exclusive Federal jurisdiction that are not subject to the right to serve state process, the commander or supervisor will determine whether the individual to be served wishes to accept service voluntarily. A JA or other DA attorney will inform the individual of the legal effect of voluntary acceptance. If the individual does not desire to accept service, the party requesting service will be notified that the nature of the exclusive Federal jurisdiction precludes service by state authorities on the military installation.

(2) On Federal property where the right to serve process is reserved by or granted to the state, in areas of concurrent jurisdiction, or where the United States has only a proprietary interest, Army officials asked to facilitate service of process will initially proceed as provided in the preceding subparagraph. If the individual declines to accept service, the requesting party will be allowed to serve the process in accordance with applicable state law, subject to reasonable restrictions imposed by the commander.

(e) Process of foreign courts. A U.S. District Court may order service upon a person who resides in the judicial district of any document issued in connection with a proceeding in a foreign or international tribunal. (28 U.S.C. 1696). In addition, the U.S. State Department has the power to receive a letter rogatory issued by a foreign or international tribunal, to transmit it to a tribunal, officer or agency in the United States, and to return it after execution. (28 U.S.C. 1781). Absent a treaty or agreement to the contrary, these provisions will govern.

(f) Seizure of personal property. State and Federal courts issue orders (for example, writ of attachment) authorizing a levy (seizure) of property to secure satisfaction of a judgment. DA personnel will comply with valid state or Federal court orders commanding or authorizing the seizure of private property to the same extent that state or Federal process is served.

§ 516.11 Service of criminal process outside the United States.

Army Regulation 630–10 and international treaties, such as status of forces agreements, govern the service of criminal process of foreign courts and the surrender of soldiers to foreign civilian law enforcement officials.

§ 516.12 Service of civil process outside the United States.

(a) Process of foreign courts. In foreign countries service of process issued by foreign courts will be made under the law of the place of service, as modified by status of forces agreements, treaties or other agreements. In foreign areas under exclusive U.S. jurisdiction, service of process issued by foreign courts will be made under the law specified by appropriate U.S. authority.

(b) Process of Federal courts. Service of process on U.S. citizens or residents may be accomplished under the following provisions: The Hague Convention, reprinted in 28 USCA Federal Rules of Civil Procedure, following Rule 4; Fed. R. Civ. P. 4(i); 28 USC 1781 and 1783; and, the rules of the Federal court concerned. If a DA official receives a request to serve Federal process on a person overseas, he will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned.

(c) Process of state courts. If a DA official receives a request to serve state court process on a person overseas, he will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned. (See, for example, The Hague Convention, reprinted in 28 USCA Federal Rules of Civil Procedure, following Rule 4).

(d) Suits against the United States. DA personnel served with foreign civil process will notify the appropriate SJA or legal adviser, who will return the document to the issuing authority explaining the lack of authority to accept service for the United States. Service on the United States must be made upon DOJ through established diplomatic channels.

§ 516.13 Assistance in serving process overseas.

(a) Europe. For information and assistance concerning service of process of persons assigned to or accompanying U.S. Forces in Europe, contact the Foreign Law Branch, International Law Division, Office of The Judge Advocate, Headquarters U.S. Army, Europe, and Seventh Army, Unit 29351, (Heidelberg, Germany) APO AE 09014.

(b) Korea. For information and assistance concerning service of process of persons assigned to or accompanying U.S. Forces in Korea, contact Staff Judge Advocate, US Forces Korea (Seoul, Republic of Korea), APO AP 96205.

(c) Panama, Central and South America. For information and assistance concerning service of process of persons assigned to or accompanying forces in the U.S. Army Southern Command, contact Staff Judge Advocate, HQ, US Army South, Fort Clayton, Panama, APO AA 34004–5000.

§ 516.14 Service of process on DA or Secretary of Army.

The Chief, Litigation Division, shall accept service of process for Department of the Army or for the Secretary of the Army in his official capacity.

Subpart C—Reporting Legal Proceedings to HQDA

§ 516.15 General.

(a) Legal proceedings requiring reporting. Actions must be taken upon commencement of litigation or administrative proceedings in which the United States has an interest. Typically, the Secretary of the Army, DA, the United States, or DA personnel are named as defendant in a lawsuit or as respondent in an administrative proceeding. A nonexclusive listing of cases in which the United States has an interest include the following:

(1) Suits for damages, injunctive relief, or other action filed against the government or against DA personnel in their official capacity.

(2) Suits alleging individual liability arising from performance of official duties by DA personnel.

(3) Actions affecting DA operations or activities or which might require official action by DA personnel.

(4) Actions arising out of DA contracts, subcontracts, or purchase orders wherein the government might be required to reimburse a contractor for litigation expenses.

(5) Bankruptcy proceedings in which the United States or its instrumentalities may have an interest, including bankruptcies involving government contractors.

(b) Command and agency responsibility. Commanders and supervisors of Army units, installations, or organizations will ensure reports required by this section are promptly submitted.

(c) Reports to HQDA. Reports required by this regulation will be made telephonically or mailed to the responsible organization at DA. Appendix B to this part contains mailing addresses for these offices. Except in the situations described below, reports required by this chapter will be made to Litigation Division:

(1) Actual or potential litigation (or administrative infringement claims) involving patents, copyrights, or trademarks will be made to Intellectual Property Law Division.

(2) Reports of pending or prospective litigation involving taxation will be made to Contract Law Division.

(3) Communications, transportation, and utility services reports will be made to Regulatory Law Office.

(4) Reports involving environmental and natural resource litigation and administrative proceedings will be made to Environmental Law Division.

(5) Potential civil recovery reports in cases of procurement fraud and corruption will be made to Procurement Fraud Division.

(6) Reports involving the felony prosecution program and magistrate court prosecutions will be made to Criminal Law Division, OTJAG.

(7) Cases before the Armed Services Board of Contract Appeals and the General Services Board of Contract Appeals will be made to Contract Appeals Division.

(d) Classified information. Information required by this regulation will be submitted in an unclassified form if possible. If downgrading or declassification is not feasible, the classified material should be separated from the report and forwarded under separate cover.

(e) Other reporting requirements. Reports required by this chapter are in addition to and do not satisfy any other reporting requirement, such as the following: notifying the FBI of offenses pursuant to AR 27–10; submitting serious incident reports pursuant to AR 190–40; reporting procurement fraud or other irregularities per Defense Federal Acquisition Regulation Supplement, section 209.406–3 (48 CFR 209.406–3); reporting the exercise of criminal jurisdiction by foreign tribunals over U.S. personnel pursuant to AR 27–50; or, reporting bankruptcies per AR 37–103.

(f) Reports control exemption. The reports required herein are exempt from reports control under AR 335–15, paragraphs 3–3a(5) and 5–2e(4).

§ 516.16 Individual and supervisory procedures upon commencement of legal proceedings.

(a) Individual procedures. DA personnel served with civil or criminal process concerning a proceeding in which the United States has an interest (§ 516.15) will immediately inform their supervisor and furnish copies of process and pleadings. There is no requirement to notify supervisors of purely private litigation.

(b) Supervisory procedures. When supervisors learn that legal proceedings in which the United States has an interest have commenced, the supervisor will forward a copy of all process and pleadings, along with other readily available information, to the SJA or legal adviser. If no legal officer is available locally, the documents will be forwarded to the SJA or legal adviser of the next higher headquarters.

§ 516.17 SJA or legal adviser procedures.

(a) Immediate notice to HQDA. When an SJA or legal adviser learns of litigation in which the United States has an interest, and it appears that HQDA is not aware of the action, the SJA or legal adviser will telephonically notify the responsible HQDA office. (See § 516.15(c)). Immediate notice is particularly important when litigation involves one of the following: a lawsuit against an employee in his individual capacity; a motion for a temporary restraining order or preliminary injunction; a habeas corpus proceeding; a judicial or administrative proceeding involving less than 60 days to file an answer; and, actions with possible Congressional, Secretarial, or Army Staff interest. For legal proceedings instituted in foreign tribunals, the SJA or legal adviser will also notify the major overseas commander concerned and the appropriate U.S. Embassy or Legation. A telephonic report to HQDA should include the following:

(1) Title or style of the proceeding.

(2) Full names and addresses of the parties.

(3) Tribunal in which the action is filed, date filed, docket number, when and on whom service of process was made, and date by which pleading or response is required.

(4) Nature of the action, amount claimed or relief sought.

(5) Reasons for immediate action.

(b) Transmission of process, pleadings, and related papers. Unless instructed otherwise by HQDA, the SJA or legal adviser will FAX or mail HQDA a copy of all process, pleadings, and related papers. Use of express mail or overnight delivery service is authorized.

(c) Notice to U.S. Attorney. If the legal proceeding is instituted in the United States, the SJA or legal adviser, unless instructed otherwise by HQDA, will notify the appropriate U.S. Attorney and render assistance as required.

§ 516.18 Litigation alleging individual liability.

See Subpart D for procedures to follow when DA personnel, as a result of performance of official duties, are either sued in their individual capacities or face criminal charges.

§ 516.19 Injunctive relief.

(a) General. Plaintiffs may attempt to force government action or restraint in important operational matters or pending personnel actions through motions for temporary restraining orders (TRO) or preliminary injunctions (PI). Because these actions can quickly impede military functions, immediate and decisive action must be taken.

(b) Notification to HQDA and U.S. Attorney. The SJA or legal adviser will immediately notify Litigation Division or other appropriate office at HQDA when a motion for TRO or PI has been, or is about to be, filed. The SJA or legal adviser will also notify the responsible U.S. Attorney.

(c) Actions by SJA or legal adviser. The SJA or legal adviser will assist the DOJ or DA attorney responsible for the litigation. Installation attorneys or support personnel should begin accumulating relevant documentary evidence and identifying witnesses. If requested, installation attorneys will prepare a legal memorandum concerning the motion, giving particular attention to the following issues relevant to a court granting injunctive relief:

(1) Plaintiff's likelihood of success on the merits.

(2) Whether plaintiff will be irreparably harmed if injunctive relief is not granted.

(3) Harm to defendant and other parties if injunctive relief is granted.

(4) The public interest.

§ 516.20 Habeas Corpus.

(a) General. A soldier may file a writ of habeas corpus to challenge his

continued custody (usually in a post court-martial situation) or retention in the Army. As is the case with injunctive relief in the preceding paragraph, installation SJAs and legal advisers must take immediate action.

(b) Notification to Litigation Division and U.S. Attorney. The SJA or legal adviser will notify Litigation Division and the responsible U.S. Attorney's Office immediately upon learning that a petition for writ of habeas corpus has been filed. All relevant documentary evidence supporting the challenged action should be assembled immediately.

(c) Procedures in habeas corpus. Upon the filing of a petition for a writ of habeas corpus, the court will dismiss the petition, issue the writ, or order the respondent to show cause why it should not be granted. If a writ or order to show cause is issued, the SJA or legal adviser should be prepared to assist the responsible Litigation Division or DOJ attorney in preparing a return and answer. If so directed, the SJA will also prepare a memorandum of points and authorities to accompany the return and answer. The government's response should cover the following: whether the Army has custody of petitioner; whether respondent and petitioner are within the judicial district; and, whether appellate or administrative remedies have been exhausted.

(d) Writs or orders issued by state courts. No state court, after being judicially informed that a petitioner is in custody under the authority of the United States, should interfere with that custody or require that petitioner be brought before the state court. A deserter, apprehended by any civil officer having authority to apprehend offenders under the laws of the United States or of any state, district, territory, or possession of the United States, is in custody by authority of the United States. If a writ of habeas corpus is issued by a state court, the SJA or legal adviser will seek guidance from Litigation Division.

(e) Foreign court orders. A foreign court should not inquire into the legality of restraint of a person held by U.S. military authority. If a foreign court issues any process in the nature of a writ of habeas corpus, the SJA or legal adviser will immediately report the matter to the appropriate U.S. forces commander and to Litigation Division.

§ 516.21 Litigation against government contractors.

(a) General. A contract might require that the government reimburse a contractor (or subcontractor) for adverse judgments or litigation expenses. Unless a contractor or subcontractor facing a lawsuit requests representation by DOJ, the Army presumes the contractor will obtain private counsel to defend the case. If the contract so allows, however, the contractor may request and HQDA may recommend that DOJ represent the contractor if it is in the best interests of the United States.

(b) Actions by SJA or legal adviser. If a contractor or subcontractor faces litigation and the underlying contract with the government requires reimbursement for adverse judgments or costs of the litigation, the SJA or legal adviser, through the contracting officer, should determine if the contractor desires representation by DOJ. If so, the contractor or authorized agent will sign a request for representation. (See Figure D–3, Appendix G, of this part.) The SJA or legal adviser will determine whether, in his opinion, representation by DOJ should be granted. He will prepare a memorandum to support his recommendation, especially concerning any issue regarding the government's obligation to reimburse the contractor under the contract. The SJA or legal adviser will forward his memorandum, along with the contractor's request, to Litigation Division.

(c) Actions by Litigation Division. The Chief, Litigation Division, will evaluate the submission and decide if it is in the Army's best interest that the request be granted. He will prepare a memorandum supporting his decision and send the packet to DOJ. The Chief's decision constitutes the final DA position on the matter. If DOJ grants the contractor's request, the Chief, Litigation Division, will ensure that the contractor is notified through the SJA or legal adviser and the contracting officer.

(d) Private Counsel. A contractor represented by DOJ may ask that private counsel assist the DOJ attorney in the litigation. The DOJ attorney will remain in control of the litigation, and the fees for private counsel will not be reimbursable except under unusual circumstances. The contractor must seek both DOJ and DA approval to employ private counsel when DOJ representation has been granted. Even if DOJ and DA grant authority to employ private counsel, the contracting officer will determine whether a contractor will be reimbursed under the contract for private counsel.

(e) Settlement. The contractor, unless the contract specifies otherwise, will ultimately decide whether to compromise a suit. Reimbursement under the contract is determined by the contracting officer, with the advice of his attorney.

§ 516.22 Miscellaneous reporting requirements.

SJAs or legal advisers will comply with the directives cited below concerning actual or prospective litigation involving the following types of cases:

(a) Taxation.

(1) Contractor transactions. (FAR and DFARS, 48 CFR parts 29 and 229).

(2) Army and Air Force Exchange Service (AAFES) activities. (AR 60–20).

(3) Purchase or sale of alcoholic beverages. (AR 215–2).

(4) Nonappropriated fund and related activities. (AR 215–1).

(b) Tort and contract claims, insurance and litigation involving nonappropriated fund activities. (AR 215–1).

(c) Annexation of Army lands. (AR 405–25).

(d) Communications, transportation, and utility services administrative proceedings. Any contracting officer or other Army official responsible for the acquisition of communications, transportation, utilities (gas, electric, water and sewer), or military mail services, who becomes aware of any action or proceeding of interest to the Army, will promptly refer the matter to the SJA or legal adviser, who will take the actions prescribed in § 516.17 of this part. Examples of actions requiring referral follow: new or amended rates, regulations, or conditions of service; applications for authority to discontinue or initiate service; changes in electromagnetic patterns causing adverse communications interference; or, zoning proposals affecting historic or aesthetic preservation. In addition, the SJA or legal adviser will transmit the following to Regulatory Law Office:

(1) The names and addresses of any parties intervening and the substance of their positions.

(2) Names of government users affected by any change.

(3) Copy of any proposed rates, rules, or regulations.

(4) A recommendation whether the Army should intervene in the action or proceeding. If intervention is recommended, provide a memorandum to support the recommendation.

(e) Legal proceedings overseas. Foreign communications, transportation, and utility service proceedings need not be reported. In other legal proceedings instituted in a foreign country, the SJA or legal adviser will take the actions prescribed in § 516.17 of this part.

(f) Maritime claims. Admiralty and maritime claims within the purview of Chapter 8, AR 27–20, which have been investigated and processed under AR

55–19 or other applicable regulations, will be referred to USARCS.

(g) Army and Air Force Exchange Service litigation. The SJA or legal adviser will send a copy of all documents relating to litigation against AAFES to General Counsel, AAFES, P.O. Box 660202, Dallas, TX 75266–0202.

(h) Bankruptcy. Reports of bankruptcy or insolvency proceedings shall be made in accordance with this regulation and AR 37–103.

§ 516.23 Litigation reports.

The SJA or legal adviser will prepare a litigation report when directed by HQDA. The report will contain the following sections: Statement of Facts; Setoff or Counterclaim; Responses to Pleadings; Memorandum of Law; Witness List; and, Exhibits.

(a) Statement of Facts. Include a complete statement of the facts upon which the action and any defense thereto are based. Where possible, support facts by reference to documents or witness statements. Include details of previous administrative actions, such as the filing and results of an administrative claim. If the action is predicated on the Federal Tort Claims Act, include a description of the plaintiff's relationship to the United States, its instrumentalities, or its contractors. Also include a statement whether an insurance company or other third party has an interest in the plaintiff's claim by subrogation or otherwise and whether there are additional claims related to the same incident.

(b) Setoff or Counterclaim. Discuss whether setoff or counterclaim exists. If so, highlight the supportive facts.

(c) Responses to Pleadings. Prepare a draft answer or other appropriate response to the pleadings. (See Figure C–1, to this part). Discuss whether allegations of fact are well-founded. Refer to evidence that refutes factual allegations.

(d) Memorandum of Law. Include a brief statement of the applicable law with citations to legal authority. Discussions of local law, if applicable, should cover relevant issues such as measure of damages, scope of employment, effect of contributory negligence, or limitations upon death and survival actions. Do not unduly delay submission of a litigation report to prepare a comprehensive memorandum of law.

(e) Potential witness information. List each person having information relevant to the case and provide an office address and telephone number. If there is no objection, provide the individual's social security account number, home address, and telephone number. This is "core information" required by Executive Order No. 12778 (Civil Justice Reform). Finally, summarize the information or potential testimony that each person listed could provide.

(f) Exhibits.

(1) Attach a copy of all relevant documents. This is "core information" required by Executive Order No. 12778 (Civil Justice Reform). Unless otherwise directed by HQDA, each exhibit should be tabbed and internally paginated. References to exhibits in the litigation report should be to page numbers of particular exhibits.

(2) Copies of relevant reports of claims officers, investigating officers, boards or similar data should be attached, although such reports will not obviate the requirement for preparation of a complete litigation report.

(3) Prepare an index of tabs and exhibits.

(4) Where a relevant document has been released pursuant to a FOIA request, provide a copy of the response, or otherwise identify the requestor and the records released.

(g) Distribution and number of copies. Unless HQDA directs otherwise, SJAs or legal advisers will mail (first class) an original and one copy of the litigation report to the responsible HQDA office (See § 516.15 of this part) and one copy to the U.S. Attorney's Office handling the case. If possible, record the litigation report onto a magnetic diskette, using either WordPerfect, Enable, or ACSII, and send it to Litigation Division.

§ 516.24 Preservation of evidence.

Because documents needed for litigation or administrative proceedings are subject to routine destruction, the SJA or legal adviser will ensure that all relevant documents are preserved.

§ 516.25 DA Form 4.

(a) General. The DA Form 4 (See Figure C–2, Appendix G, of this part) is used to authenticate Army records or documents. Documents attached to a properly prepared and sealed DA Form 4 are self-authenticating. (See Fed. R. Evid. 902).

(b) Preparation at the installation level. A DA Form 4 need not be prepared until the trial attorney presenting the government's case identifies documents maintained at the installation level which he will need at trial. Once documents are identified, the custodian of the documents will execute his portion of the DA Form 4. (See Figure C–2, Appendix G, of this part). The custodian certifies that the documents attached to the DA Form 4 are true copies of official documents. Documents attached to each form should be generally identified; each document need not be mentioned specifically. Only the upper portion of the form should be executed at the local level.

(c) Actions at HQDA. Upon receipt of the DA Form 4 with documents attached thereto, HQDA will affix a ribbon and seal and deliver it to the Office of the Administrative Assistant to the Secretary of the Army. That office will place the official Army seal on the packet.

§ 516.26 Unsworn declarations under penalty of perjury.

(a) General. Under the provisions of 28 U.S.C. 1746, whenever any matter is required or permitted to be established or proven by a sworn statement, oath or affidavit, such matter may also be established or proven by an unsworn written declaration under penalty of perjury. Because such declaration does not require a notary or other official to administer oaths, individuals preparing statements for use in litigation should consider using this format. (See Figure C–3, Appendix G, of this part).

(b) When executed within the United States. Place the following at the end of the witness statement:

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. 1746).
Executed on

(Date) (Signature)

(c) When executed outside the United States. Place the following at the end of the witness statement:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 U.S.C. 1746).
Executed on

(Date) (Signature)

Subpart D—Individual Liability

§ 516.27 Scope.

This subpart guidance when DA personnel, as a result of the performance of their official duties, are either sued in their personal capacity, or are charged in a criminal proceeding. Examples of civil actions alleging individual liability include the following: a medical malpractice lawsuit against health care providers; suits resulting from motor vehicle accidents; constitutional torts; or, common law torts such as assault, libel, or intentional infliction of emotional distress. Likewise, state or Federal criminal charges can arise from the performance of official duties, including environmental crimes or motor vehicle accidents.

§ 516.28 Policy.

(a) General. Commanders, supervisors, and SJAs or legal advisers will give highest priority to compliance with the requirements of this chapter with regard to current or former DA personnel who face criminal charges or civil litigation in their individual capacity as a result of performance of their official duties.

(b) DOJ policy on representation. If in the best interest of the United States, upon request of the individual concerned, and upon certification by his agency that he was acting within the scope of his employment, DOJ may represent present and former DA personnel sued individually as a result of actions taken within the scope of their employment. Representation can be declined for a variety of reasons, including but not limited to the following: the employee was not acting within the scope of his office; there is a conflict of interest; or, actions were not taken in a good faith effort to conform to law.

§ 516.29 Federal statutes and regulations.

(a) Federal Tort Claims Act (FTCA). (28 U.S.C. 1346(b), 2671–2680). A waiver of sovereign immunity which, with certain exceptions, makes the United States liable for tort claims in the same manner as a private individual.

(b) Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA or the Westfall Act, Pub. L. No. 100–694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. 2671, 2674, 2679). FELRTCA, by amending the Federal Tort Claims Act, makes the FTCA the exclusive remedy for common law tort claims arising from actions taken by Federal employees acting within the scope of employment. The law was passed to eliminate problems caused by *Westfall* v. *Erwin*, 484 U.S. 292 (1988).

(c) 10 U.S.C. 1089 (Defense of certain suits arising out of medical malpractice). This provision, commonly referred to as the Gonzales Act, makes the FTCA the exclusive remedy for suits alleging medical malpractice against a military health care provider.

(d) 28 CFR 50.15 (Representation of Federal officials and employees by Department of Justice attorneys [. . .] in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities). These DOJ regulations set out the policy and procedures for requesting representation in individual liability cases. See also 28 CFR part 15 (Defense of Certain Suits Against Federal Employees, etc.).

(e) 28 CFR 50.16 (Representation of Federal employees by private counsel at Federal expense).

§ 516.30 Procedures for obtaining certification and DOJ representation.

(a) SJA or legal adviser procedures. When an SJA or legal adviser learns of a criminal charge or of a lawsuit alleging individual liability against DA personnel as a result of performance of official duties, he will take the following actions:

(1) Immediately notify Litigation Division and the appropriate U.S. Attorney and FAX or express deliver copies of process and pleadings to each office. Where time for response is limited, request that the U.S. Attorney either petition the court for an extension of time, or provide temporary counsel and representation pending formal approval.

(2) Investigate whether the employee was acting within the scope of his office or employment. Obtain, if possible, statements from the defendant, supervisors, and witnesses.

(3) Advise the individual defendant of the rights and conditions set out in 28 CFR 50.15, which include the following:

(i) His right to request representation by a DOJ attorney and, in appropriate cases, certification that he was acting within the scope of employment. (See 28 U.S.C. 2679; 28 CFR 50.15).

(ii) The right to request private counsel at government expense, subject to the availability of funds. (See 28 CFR 50.16).

(iii) That the United States is not obligated to pay or indemnify defendant for any judgment rendered against him in his individual capacity.

(4) If the defendant desires certification or DOJ representation, have him sign a request. (See Figure D–1, Appendix G, of this part). Obtain a signed scope of employment statement from the defendant's supervisor. (Figure D–2, Appendix G, of this part).

(5) Prepare a report with, at a minimum, the following information: facts surrounding the incident for which defendant is being sued and those relating to scope of employment; the SJA's or legal adviser's conclusions concerning scope of employment; and, a recommendation whether certification by the Attorney General or representation by a DOJ attorney should be granted.

(6) In cases involving National Guard personnel, address also the following: whether defendant was acting in a state (Title 32 U.S.C.) or Federal (Title 10 U.S.C.) capacity during relevant periods (include orders); if defendant was acting under state authority, is it nevertheless in the interest of the United States to represent the individual; any impact on policies or practices of DA, the National Guard Bureau, or DOD; whether the relief requested can be granted only by a Federal officer or agency; and, whether Federal law or regulation required actions by state officials.

(7) Send the report, request for representation, and scope of employment statements to Chief, Litigation Division.

(b) Chief, Litigation Division, procedures. The Chief, Litigation Division, will review the report and evidence regarding representation and scope of employment and will determine whether certification and representation are appropriate. He will send his recommendation to the appropriate U.S. Attorney or office within DOJ. The Chief, Litigation Division, will notify the defendant of DOJ's decision.

§ 516.31 Private counsel at government expense.

(a) General. DA personnel, sued in their individual capacity or facing criminal charges as a result of performance of official duties, have no right to employ a private sector counsel at government expense or to expect reimbursement for the same. For proceedings in the United States, a request for employment of counsel at government expense may be approved by DOJ, contingent among other things upon availability of funds and a determination that employment of private counsel at government expense is in the best interests of the United States. (See 28 CFR 50.16). Special rules apply in overseas areas. (See paragraph (e) of this section).

(b) Individual request procedures. The individual will prepare a request that private counsel be employed for him at government expense. The request must also contain the following statement: "I understand that the United States is not required to employ private counsel on my behalf, and that I may be responsible for expenses incurred prior to proper authorization by the Department of the Army or the Department of Justice."

(c) Supervisory and legal adviser procedures. The request will be submitted through the individual's supervisors, who will make a recommendation and forward the packet to the local SJA or legal adviser. The SJA or legal adviser will prepare his own recommendation and forward the matter to Litigation Division.

(d) Chief, Litigation Division, procedures. If the Chief, Litigation Division, determines that the request for private counsel is meritorious, he will

prepare an appropriate recommendation and forward the packet to Civil Division, DOJ, for final approval.

(e) Special actions in foreign countries. Employment of private counsel in foreign proceedings is governed by AR 27–50 (Status of Forces Policies, Procedures, and Information). Under the authority of 10 U.S.C. 1037, soldiers, as well as employees or those accompanying the armed forces overseas, may be granted individual counsel in civil and criminal proceedings, under the criteria of AR 27–50.

§ 516.32 Requests for indemnification.

(a) Policy. An individual liable for a judgment rendered against him in his individual capacity has no right to reimbursement from DA. DA will consider, however, a request for indemnification from DA personnel where conduct within the scope of official duties has resulted in personal liability and indemnification is in the best interests of the United States. Indemnification is strictly contingent upon an appropriation to pay the judgment, as well as availability of such funds.

(b) Individual request procedures. An individual against whom an adverse judgment has been rendered may request indemnification. The request must include, at a minimum, the following: how the employee was acting within the scope of his employment; whether the requestor has insurance or any other source of indemnification; and, how reimbursement is in the best interests of the United States. The request must also contain the following statements: "I understand that acceptance of this request for indemnification for processing by DA does not constitute an acceptance of any obligation to make such a payment. I also understand that payment is contingent on availability of funds and that it will only be made if such is determined to be in the best interests of the United States." The individual should attach a copy of relevant documents, for example, court's opinion, judgment, and other allied papers.

(c) Supervisory and SJA procedures. The request for indemnification will be submitted through supervisory channels to the local SJA or legal adviser. Each supervisor will make a recommendation on the propriety of reimbursement.

(d) Chief, Litigation Division, procedures. Requests for indemnification will be forwarded to Chief, Litigation Division. The Chief, Litigation Division, will examine the submission and, after consultation with DOJ or other agencies, forward the packet with his recommendation to the Army General Counsel. The General Counsel will obtain a final decision by the Secretary of the Army or his designee on the matter. There is no administrative appeal of the Secretary's (or his designee's) decision.

Subpart E—Legal Proceedings Initiated by the United States Medical Care and Property Claims

§ 516.33 General.

(a) Authorities.

(1) Federal Medical Care Recovery Act (42 U.S.C. 2651). The act provides for the recovery of medical care expenses incurred because of a tortfeasor's actions.

(2) Federal Claims Collection Act (31 U.S.C. 3711). The act provides for the collection of claims for money or property arising from the activities of Federal agencies.

(3) Third-party Collection Program (10 U.S.C. 1095). The statute provides for collection of reasonable costs of health-care services, provided in facilities of the uniformed services to covered beneficiaries, from private insurers or third-party payers. In accordance with DOD Instruction 6010.15, "Third Party Collection (TPC) Program," 7 March 1991, the authority to settle or waive a DOD claim under the act is delegated to TJAG or to his designee.

(4) Executive Order No. 12778, (56 FR 55195; 3 CFR, 1991 Comp. p. 359), Civil Justice Reform. This order establishes several requirements on Federal agencies involved in litigation or contemplating filing an action on behalf of the United States.

(5) AR 27–20, Claims. Chapter l4 (Affirmative Claims) contains comprehensive guidance for Recovery Judge Advocates (RJAs) in the administrative determination, assertion, collection, settlement, and waiver of claims in favor of the U.S. for property damage and for medical care claims.

(b) Duties and Procedures. In accordance with Chapter 14, AR 27–20, Commander, USARCS, has supervisory responsibility over the administrative processing of property and medical care claims by RJAs. The Commander, U.S. Army Health Services Command (HSC), has supervisory responsibility over the Third Party Collection Program (TPCP). The HSC TPCP Implementation Plan effects DOD Instruction 6010.15 and establishes procedures for processing TPC claims. Litigation Division, in conjunction with DOJ and U.S. Attorneys, is responsible for pursuing, through litigation, claims not resolved administratively. DOJ is ultimately responsible for initiating litigation for the United States. (28 U.S.C. 515).

(c) Assertion of claims on behalf of the United States by private attorneys. The Army incurs potentially recoverable expenses when it provides medical care to soldiers or dependents injured by tortfeasors (for example, a soldier is hospitalized after an automobile accident). When injured personnel employ a private attorney to sue the tortfeasor, it may be in the Government's best interests to enter into an agreement with the private attorney to include the Army's medical care claim.

(d) Statute of limitations. There is a three year statute of limitations for actions in favor of the U.S. for money damages founded upon tort. (28 U.S.C. 2415(b)). Limitations periods can vary, however, depending upon the theory of liability and the jurisdiction involved. RJAs must be alert to the applicable period of limitations. A case referred for litigation should arrive at Litigation Division at least 6 months before the expiration of the limitations period.

(e) Reporting of recoveries. Amounts recovered through litigation will be reported to USARCS by Tort Branch, Litigation Division, or, where referred directly to a U.S. Attorney or the Nationwide Central Intake Facility (NCIF), by the responsible RJA.

§ 516.34 Referral of medical care and property claims for litigation.

(a) Criteria for referral. The RJA will forward the claims file and a litigation report (See § 516.35 of this part) through USARCS to Litigation Division when the claim has not been resolved administratively and any of the following conditions exist:

(1) The claim exceeds $5,000;

(2) It involves collection from the injured party or his attorney;

(3) The claim raises an important question of policy; or,

(4) There is potential for a significant precedent.

(b) Alternative methods. When none of the conditions cited in the preceding subparagraph are present, the RJA may refer the claim directly to the U.S. Attorney for the district in which the prospective defendant resides. Similar property claims may be referred through USARCS to DOJ's Nationwide Central Intake Facility (NCIF) rather than directly to the U.S. Attorney. Notice of all such referrals shall be provided through USARCS to Tort Branch, Litigation Division. The RJA should be ready to provide support to the U.S. Attorney if requested.

(c) Closing Files. A file referred directly to the U.S. Attorney will be

closed if the U.S. Attorney determines further action is unwarranted. If the RJA disagrees, the file should be forwarded with the RJA's recommendation through USARCS to Litigation Division.

§ 516.35 Preparation of claims for litigation.

(a) General. In preparing a referral for litigation the RJA will ensure the file contains at least the following:

(1) A litigation report (See § 516.23 of this part) that demonstrates a factual basis for the claim and a theory of recovery under applicable state law. (See Fed. R. Civ. P. 11)

(2) Copies of all medical records and bills reflecting the reasonable value of the medical care furnished to the injured party, including DA Form 2631–R (Medical Care-Third Party Liability Notification), and DA Form 3154 (MSA Invoice and Receipt). These documents should be authenticated as necessary on a DA Form 4.

(3) Copies of all documents necessary to establish the value of lost or damaged property.

(b) Transmittal letter. The letter of transmittal referring the claim for litigation should briefly summarize the facts giving rise to the claim and the collection actions previously taken by the Army and the injured party.

Assertion of Other Claims

§ 516.36 Referral to Litigation Division.

(a) General. The majority of cases filed on behalf of the United States will fall under this subpart E. All other civil cases which cannot be resolved administratively or by direct referral to DOJ will be forwarded through channels to Litigation Division with a litigation report. (See § 516.23 of this part).

(b) Government contractors. It may be in the Government's best interest to authorize a Government contractor, whose contract provides for the reimbursement of necessary legal expenses, to employ private counsel to initiate legal proceedings against a third party. To obtain authorization to employ private counsel in such instances the contractor should follow the procedures in § 516.21(c) of this part.

§ 516.37 Proceedings to repossess Government real property or quarters or to collect delinquent rent.

(a) General. U.S. Attorneys are authorized to accept a Federal agency's request for the following purposes: to initiate an action to recover possession of real property from tenants, trespassers, and others; to enjoin trespasses on Federal property; and, to collect delinquent rentals or damages for use and occupancy of real property for amounts less than $200,000.

(b) Procedures. When eviction or an action to collect delinquent rent is necessary, the SJA or legal adviser will notify General Litigation Branch, Litigation Division, of the situation. If approved by Litigation Division, the SJA or legal adviser may ask the U.S. Attorney to file suit. A copy of the complaint will be sent to Litigation Division. DOJ can take action to evict the occupants for violation of the terms of occupancy and collect delinquent rent or other charges. Once the matter has been referred to the U.S. Attorney, payments for rent should be sent to the U.S. Attorney. (See AR 210–50, chap 2.)

Subpart F—Environmental Litigation

§ 516.38 Scope.

This subpart contains guidance, policies, and procedures applicable to all environmental and natural resources civil litigation and administrative proceedings involving missions and functions of DA, its major and subordinate commands, all installations presently or previously managed by DA, and all other sites or issues in which DA has a substantial interest. In this chapter, "litigation" includes civil administrative proceedings.

§ 516.39 Duties and procedures.

(a) Water rights. Environmental Law Division will conduct direct liaison with DOJ and will represent DA in State and Federal litigation relating to availability and allocation of surface and ground water and the establishment and protection of water rights for Army military installations and activities. This will include litigation in State general adjudications of water rights under the McCarran Amendment, 43 U.S.C. 666, for Army military installations and activities. Such litigation relating solely to COE civil works projects or activities will be handled by attorneys under the technical supervision of the Chief Counsel, COE. With respect to any general adjudication which could affect the civil works or real property functions of COE, The Judge Advocate General, acting through the Chief, Environmental Law Division, and Chief Counsel, COE, will jointly determine which office should maintain primary direct liaison with DOJ and will scope and execute appropriate coordination with each other and with the General Counsel with respect to that litigation.

(b) Navigable waters. The Chief Counsel, COE, will conduct direct liaison with DOJ and represent DA in civil litigation involving activities in or across navigable waters of the United States or other activities regulated under the Rivers and Harbors Act of 1899, 33 U.S.C. 401 et seq.

(c) Waters of the United States. The Chief Counsel, COE, will conduct direct liaison with DOJ and represent DA in civil litigation involving The Clean Water Act section 404 (See 33 U.S.C. 1344) permit authority of COE over the discharge of dredged or fill material into waters of the United States.

(d) Enforcement. Environmental Law Division will conduct direct liaison with DOJ and represent DA in all civil litigation involving citizen or State enforcement of applicable State, Federal and local requirements respecting the control or abatement of pollution and involving the management of hazardous wastes, with respect to the missions and functions of, and Federal facilities owned or controlled by, DA, except for civil works facilities.

(e) Environmental response.

(1) Except as provided in (a)(2) of this section. Environmental Law Division will conduct direct liaison with DOJ and represent DA in all civil litigation seeking declaratory or injunctive relief or involving claims of Army liability for the costs of response at Federal facilities currently owned or controlled by DA and at other sites where the Army is a potentially responsible party.

(2) The Chief Counsel, COE, will conduct direct liaison with DOJ and represent DA in all civil litigation seeking declaratory or injunctive relief or involving claims of Army liability for the costs of response at civil works facilities, at former defense sites or at other sites where the Army is a potentially responsible party due to the response actions of the COE or its contractors.

(f) Fish and Wildlife, and Plants. Environmental Law Division will conduct direct liaison with DOJ and represent DA in civil litigation involving citizen or State enforcement of applicable State, Federal, and local laws governing conservation of plant, fish, and wildlife resources at Federal facilities owned or controlled by DA, except that such litigation relating solely to the real estate, civil works, navigation and Clean Water Act section 404 (See 33 U.S.C. 1344) permit functions and activities of the COE will be handled by attorneys under the technical supervision of the Chief Counsel, COE.

(g) Toxic torts.

(1) Except as otherwise provided in this part, Environmental Law Division will conduct direct liaison with DOJ and represent DA in all civil litigation involving claims of tort liability for exposure to environmental

contamination emanating from Federal facilities owned or controlled by DA.

(2) Litigation Division will conduct liaison with DOJ and represent DA in civil litigation involving claims of tort liability for singular and discrete incidents of exposure to environmental contamination emanating from any Federal facility owned or controlled by DA.

(3) The Chief Counsel, COE, will conduct direct liaison with DOJ and will represent DA in civil litigation involving claims of tort liability for exposure to environmental contamination (including singular and discrete incidents) emanating from any civil works activities under the jurisdiction of the Secretary of the Army.

(4) The Chief Counsel, COE, and Chief, Environmental Law Division, will confer and jointly determine which office will conduct direct liaison with DOJ and represent DA in civil litigation involving all other claims of toxic tort liability.

Subpart G—Release of Information and Appearance of Witnesses Scope

§ 516.40 General.

(a) Introduction. This subpart implements DOD Directive 5405.2 (See Appendix C to this part and 32 CFR part 97). It governs the release of official information and the appearance of present and former DA personnel as witnesses in response to requests for interviews, notices of depositions, subpoenas, and other requests or orders related to judicial or quasi-judicial proceedings. Requests for records, if not in the nature of legal process, should be processed under AR 25–55 (The Department of the Army Freedom of Information Act Program) or AR 340–21 (The Army Privacy Program). This subpart pertains to any request for witnesses, documents, or information for all types of litigation, including requests by private litigants, requests by State or U.S. attorneys, requests by foreign officials or tribunals, subpoenas for records or testimony, notices of depositions, interview requests, civil cases, criminal proceedings, private litigation, or litigation in which the United States has an interest.

(b) Definitions. (See Appendix F to this part).

§ 516.41 Policy.

(a) General Rule. Except as authorized by this subpart, present or former DA personnel will not disclose official information (See Appendix F—Glossary) in response to subpoenas, court orders, or requests.

(b) Exception. Present or former DA personnel may disclose official information if they obtain the written approval of the appropriate SJA, legal adviser, or Litigation Division.

(c) Referral to deciding official. If present or former DA personnel receive a subpoena, court order, request for attendance at a judicial or quasi-judicial proceeding, or request for an interview related to actual or potential litigation, and it appears the subpoena, order, or request seeks disclosures described in a above, the individual should immediately advise the appropriate SJA or legal adviser. If the SJA or legal adviser cannot informally satisfy the subpoena, order, or request in accordance with §§ 516.43 through 516.50 of this subpart, he should consult with Litigation Division.

(d) Requesters' responsibilities. Individuals seeking official information must submit, at least 14 days before the desired date of production, a specific written request setting forth the nature and relevance of the official information sought. (Requesters can be referred to this Subpart G). Subject to § 516.47(a), present and former DA personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in writing and properly approved by the SJA, legal adviser, or Litigation Division. (See United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

(e) Litigation in which the United States has an interest. If a subpoena, order, or request relates to litigation in which the United States has an interest and for which litigation responsibility has not been delegated, the SJA or legal adviser will coordinate with Litigation Division under § 516.42.

(f) Motions to stay or quash subpoenas. A subpoena should never be ignored, and an SJA or legal adviser should seek assistance from Litigation Division or the U.S. Attorney's office whenever necessary. If a response to a subpoena or order is required before a release determination can be made or before Litigation Division or the U.S. Attorney can be contacted, the SJA or legal adviser will do the following:

(1) Furnish the court or tribunal a copy of this regulation (32 CFR part 516, Subpart G) and applicable case law (See United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951));

(2) Inform the court or tribunal that the requesting individual has not complied with this Chapter, as set out in 32 CFR 97 & 516, or that the subpoena or order is being reviewed;

(3) Seek to stay the subpoena or order pending the requestor's compliance with this chapter or final determination by Litigation Division; and,

(4) If the court or other tribunal declines to quash or stay the subpoena or order, inform Litigation Division immediately so a decision can be made whether to challenge the subpoena or order. If Litigation Division decides not to challenge the subpoena or order, the affected personnel will comply with the subpoena or order. If Litigation Division decides to challenge the subpoena or order, it will direct the affected personnel to respectfully decline to comply with the subpoena or order. (See United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

(g) Classified or sensitive information. Only Litigation Division may authorize the release of official information or appearance of DA personnel as witnesses in litigation involving terrorism, espionage, nuclear weapons, or intelligence sources and methods.

(h) Requests for Inspector General records or testimony. IG records, and information obtained through performance of IG duties, are official information under the exclusive control of the Secretary of the Army. (See AR 20–1, Chapter 3.) IG records frequently contain sensitive official information that may be classified or obtained under guarantees of confidentiality. When justification exists, DA attorneys will seek court protection from disclosure of IG records and information. No DA personnel will release IG records or disclose information obtained through performance of IG duties without the approval of The Secretary of the Army, The Inspector General, TIG Legal Advisor, or Chief, Litigation Division. When IG personnel receive a subpoena, court order, request for attendance at a judicial or quasi-judicial proceeding, or a request for an interview which the IG reasonably believes is related to actual or potential litigation concerning IG records or related information, they should immediately notify the Inspector General Legal Adviser or the Chief, Litigation Division. IG personnel will follow the guidance of this subpart concerning actions to be taken regarding disclosure and testimony.

§ 516.42 Reference to HQDA.

(a) General. If the SJA or legal adviser is unable to resolve the matter, it will be referred for approval or action by Litigation Division under this chapter, by the most expeditious means, to General Litigation Branch, Litigation Division, with the following exceptions:

(1) Those involving a case assigned to another branch of Litigation Division will be submitted to that branch (Appendix B to this part).

(2) Those involving affirmative litigation (for example, medical care recovery or Army property damage or loss cases) under subpart E will be submitted to Tort Branch.

(3) Those involving patents, copyrights, privately developed technical information, or trademarks will be submitted to Intellectual Property Law Division.

(4) Those involving taxation will be submitted to Contract Law Division.

(5) Those involving communication, transportation, or utility service proceedings will be submitted to the Regulatory Law Office.

(6) Those involving environmental matters will be submitted to the Environmental Law Division.

(7) Those involving contract appeals cases before the ASBCA will be submitted to the Contract Appeals Division.

(8) Those involving procurement fraud, including Qui Tam cases, will be submitted to the Procurement Fraud Division.

(b) Information to be submitted. When referring matters pursuant to paragraph (a) of this section, the following data should be provided:

(1) Parties (named or prospective) to the proceeding, their attorneys, and case number, where appropriate.

(2) Party making the request (if a subpoena, indicate moving party) and his attorney.

(3) Name of tribunal in which the proceeding is pending.

(4) Nature of the proceeding.

(5) Date of receipt of request or date and place of service of subpoena.

(6) Name, grade, position, and organization of person receiving request or served with subpoena.

(7) Date, time, and place designated in request or subpoena for production of information or appearance of witness.

(8) Nature of information sought or document requested, and place where document is maintained.

(9) A copy of each document requested. Contact the appropriate office at HQDA if this would be burdensome and unnecessary to a decision whether to release, redact, or withhold a particular document.

(10) Name of requested witness, expected testimony, requested appearance time and date, and whether witness is reasonably available.

(11) Analysis of the problem with recommendations.

Release of Records in Connection With Litigation

§ 516.43 Release of Army and other agency records.

(a) Preservation of originals. To preserve the integrity of DA records, DA personnel will submit properly authenticated copies rather than originals of documents or records for use in legal proceedings, unless directed otherwise by Litigation Division. (See 28 U.S.C. 1733.)

(b) Authentication of copies. Copies of DA records approved for release can be authenticated for introduction in evidence by use of DA Form 4. (See § 516.25 for instructions.)

(1) Records maintained in U.S. Army Engineer Districts and Divisions will be forwarded to HQDA(CECC–K), WASH DC 20314–1000.

(2) All other records will be forwarded to the appropriate office at HQDA (See § 516.42).

(c) Fees and charges. AR 37–60 prescribes the schedule of fees and charges for searching, copying, and certifying Army records for release in response to litigation-related requests.

(d) Release of records of other agencies. Normally an individual requesting records originating in agencies outside DA (that is, FBI reports, local police reports, civilian hospital records) that are also included in Army records should be advised to direct his inquiry to the originating agency.

§ 516.44 Determination of release authorization.

(a) Policy. DA policy is to make official information reasonably available for use in Federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

(b) Releasability factors. In deciding whether to authorize release of official information, the deciding official should consider the following:

(1) Has the requester complied with DA policy governing the release of official documents in § 516.41(d) of this part.

(2) Is the request unduly burdensome or otherwise inappropriate under the applicable court rules?

(3) Is the disclosure appropriate under the rules of procedure governing the matter in which the request arose?

(4) Would the disclosure violate a statute, executive order, regulation, or directive?

(5) Is the disclosure appropriate under the relevant substantive law concerning privilege?

(6) Would the disclosure reveal information properly classified pursuant to the DOD Information Security Program under AR 380–5, unclassified technical data withheld from public release pursuant to 32 CFR § 250, or other matters exempt from unrestricted disclosure?

(7) Would disclosure interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or confidential commercial or financial information, or, otherwise be inappropriate under the circumstances?

(8) Would the disclosure violate any person's expectation of confidentiality or privacy?

§ 516.45 Records determined to be releasable.

If the deciding official, after considering the factors set forth in § 536.44, determines that all or part of requested official records are releasable, copies of the records should be furnished to the requester.

§ 516.46 Records determined not to be releasable.

(a) General. If the deciding official, after considering the factors in § 516.44, determines that all or part of requested official records should not be released, he will promptly communicate directly with the attorney or individual who caused the issuance of the subpoena, order, or request and seek to resolve the matter informally. If the subpoena or order is invalid, he should explain the basis of the invalidity. The deciding official should also explain why the records requested are privileged from release. The deciding official should attempt to obtain the agreement of the requester to withdraw the subpoena, order, or request or to modify the subpoena, order, or request so that it pertains only to records which may be released. (See Figure G–1, Appendix G, of this part.)

(b) Information protected by the Privacy Act.

(1) A subpoena duces tecum or other legal process signed by an attorney or clerk of court for records protected by the Privacy Act, 5 U.S.C. 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Privacy Act precludes disclosure of records in a system of records without the written consent of the subject of the records or "pursuant to the order of a court of competent jurisdiction." (See 5 U.S.C. 552a(b)(11)). An "order of the court" for the purpose of subsection 5 U.S.C. 552a(b)(11) is an order or writ requiring the production of the records, signed by a judge or magistrate.

(2) Unclassified records otherwise privileged from release under 5 U.S.C. 552a may be released to the court under either of the following conditions:

(i) The subpoena is accompanied by an order signed by a judge or magistrate,

or such order is separately served, that orders the person to whom the records pertain to release the specific records, or that orders copies of the records be delivered to the clerk of court, and indicates that the court has determined the materiality of the records and the nonavailability of a claim of privilege.

(ii) The clerk of the court is empowered by local statute or practice to receive the records under seal subject to request that they be withheld from the parties until the court determines whether the records are material to the issues and until any question of privilege is resolved.

(iii) Subpoenas for alcohol abuse or drug abuse treatment records must be processed under 42 U.S.C. 290dd-3 and 290ee-3, and Public Health Service regulations published at 42 CFR 2.1—2.67.

(iv) Upon request, SJAs and legal advisers may furnish to the attorney for the injured party or the tortfeasor's attorney or insurance company a copy of the narrative summary of medical care that relates to a claim under Subpart E of this part. If additional medical records are requested, only those that directly pertain to the pending action will be furnished. If furnishing copies of medical records would prejudice the cause of action, the matter will be reported to Litigation Division.

(c) Referral to Litigation Division. If the SJA or legal adviser is not able to resolve a request for Army records informally, he should contact Litigation Division.

(1) Litigation Division may respond to subpoenas or orders for records privileged from release by informing the local U.S. Attorney about the subpoena and requesting that office file a motion to quash the subpoena or a motion for a protective order. The records privileged from release should be retained by the custodian pending the court's ruling upon the government's motion.

(2) When a motion to quash or for a protective order is not filed, or the motion is unsuccessful, and the appropriate DA official has determined that no further efforts will be made to protect the records, copies of the records (authenticated if necessary) will be submitted to the court (or to the clerk of court) in response to the subpoena or order.

(d) Classified and privileged materials. Requests from DOJ, U.S. Attorneys, or attorneys for other governmental entities for records which are classified or otherwise privileged from release will be referred to Litigation Division. (See § 516.41(g).

DA Personnel as Witnesses in Private Litigation

§ 516.47 Response to subpoenas, orders, or requests for witnesses.

(a) Policy. The involvement of present or former DA personnel in private litigation is solely a personal matter between the witness and the requesting party, unless one or more of the following conditions apply:

(1) The testimony involves official information. (See Appendix F—Glossary to this part).

(2) The witness is to testify as an expert.

(3) The absence of the witness from duty will seriously interfere with the accomplishment of a military mission.

(b) Former DA personnel. Former DA personnel may freely respond to requests for interviews and subpoenas except in instances involving official information (paragraph (a)(1) of this section) or concerning expert testimony prohibited by § 516.49. In those instances, the subject of the request or subpoena should take the action specified in §§ 516.41(c) and 516.42.

(c) Present DA personnel. Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser.

(d) Discretion to testify. Any individual not wishing to grant an interview or to testify concerning private litigation may seek the advice of an Army attorney concerning the consequences, if any, of refusal. Any individual not authorized to consult with Army counsel should consult with private counsel, at no expense to the government.

§ 516.48 Official information.

(a) In instances involving § 516.47(a)(1), the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested, or to HQDA pursuant to § 516.47(a). The deciding official will determine whether to release the information sought under the principles established in § 516.44. If funding by the United States is requested, see § 516.55(d).

(b) If the deciding official determines that the information may be released, the individual will be permitted to be interviewed, deposed, or to appear as a witness in court provided such interview or appearance is consistent with the requirements of §§ 516.49 and 516.50. (See, for example, Figure G–2, Appendix G, to this part). A JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without HQDA approval. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

§ 516.49 Expert witnesses.

(a) General rule. Present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. Former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States. (See Figure G–3, Appendix G of this part). An SJA or legal adviser is authorized to deny a request for expert testimony, which decision may be appealed to Litigation Division.

(b) Exception to the general prohibition. If a requester can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, Litigation Division may grant special written authorization for present or former DA personnel to testify as expert or opinion witnesses at no expense to the United States. In no event may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

(c) Exception for AMEDD personnel. Members of the Army medical department or other qualified specialists may testify in private litigation with the following limitations (See Figure G–4, Appendix G, of this part):

(1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted, or other actions taken in the regular course of their duties.

(2) They limit their testimony to factual matters such as the following: their observations of the patient or other operative facts; the treatment prescribed

or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment.

(3) Their testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.

(d) Court-ordered expert or opinion testimony. If a court or other appropriate authority orders expert or opinion testimony, the witness will immediately notify Litigation Division. If Litigation Division determines it will not challenge the subpoena or order, the witness will comply with the subpoena or order. If directed by Litigation Division, however, the witness will respectfully decline to comply with the subpoena or order. (See *United States ex. rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951)).

(e) Expert witness fees. All fees tendered to present DA personnel as an expert or opinion witness, to the extent they exceed actual travel, meals, and lodging expenses of the witness, will be remitted to the Treasurer of the United States.

§ 516.50 Interference with mission.

If the absence of a witness from duty will seriously interfere with the accomplishment of a military mission, the SJA or legal adviser will advise the requesting party and attempt to make alternative arrangements. If these efforts fail, the SJA or legal adviser will refer the matter to Litigation Division.

Litigation in Which the United States Has an Interest

§ 516.51 Response to subpoenas, orders, or requests for witnesses.

(a) Referral to a deciding official. Requests, subpoenas, or orders for official information, interviews or testimony of present or former DA personnel in litigation or potential litigation in which the United States has an interest, including requests from DOJ, will be resolved by the SJA or legal adviser pursuant to the principles of this subpart. Litigation Division will be consulted on issues that cannot be resolved by the SJA or legal adviser.

(b) Reassignment of witnesses. When requested by the U.S. Attorney, the SJA or legal adviser will ensure that no witnesses are reassigned from the judicial district without advising the DOJ attorney. If a witness is vital to the government's case and trial is imminent, the SJA or legal adviser should make informal arrangements to retain the witness in the command until trial. If this is not feasible, or if a satisfactory arrangement cannot be reached with the DOJ attorney, the SJA or legal adviser should notify Litigation Division.

§ 516.52 Expert witnesses.

Requests for present or former DA personnel as expert or opinion witnesses from DOJ or other attorneys representing the United States will be referred to Litigation Division unless the request involves a matter that has been delegated by Litigation Division to an SJA or legal adviser. In no event, may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

§ 516.53 News media and other inquiries.

News media inquiries regarding litigation or potential litigation will be referred to the appropriate public affairs office. DA personnel will not comment on any matter presently or potentially in litigation without proper clearance. Local public affairs officers will refer press inquiries to HQDA (SAPA), WASH DC 20310–1500, with appropriate recommendations for review and approval by the Office of the Chief of Public Affairs. All releases of information regarding actual or potential litigation will be coordinated with Litigation Division prior to release.

Status, Travel, and Expenses of Witnesses

§ 516.54 Witnesses for the United States.

(a) Status of witness. A military member authorized to appear as a witness for the United States, including those authorized to appear under § 516.55(d), will be placed on temporary duty. If USAR or NG personnel are requested as witnesses for the United States, and if their testimony arises from their active duty service, they should be placed on active duty to testify. The status of a civilian employee will be determined under Federal Personnel Manual 630, subchapter 10. DA personnel who appear as necessary witnesses for a party asserting the government's claim for medical care expenses are witnesses for the United States.

(b) Travel arrangements. Travel arrangements for witnesses for the United States normally are made by DOJ through Litigation Division for other than local travel. Litigation Division will issue instructions for this travel, including fund citation, to the appropriate commander. A U.S. Attorney, or an attorney asserting the government's medical care claim under Subpart E, may make arrangements for local travel through the SJA or legal adviser for attendance of a witness who is stationed at an installation within the same judicial district, or not more than 100 miles from the place where testifying. Other requests, including those under § 516.55(d), will be referred to Litigation Division. The instructions from Litigation Division, or the request from the U.S. Attorney or the attorney asserting the government's claim, will serve as a basis for the issuance of appropriate travel orders by the local commander.

(c) Travel and per diem expenses. The witness' commander or supervisor should ensure the witness has sufficient funds to defray expenses. The SJA or legal adviser will provide assistance.

(1) Where local travel is performed at the request of a U.S. Attorney and the testimony does not involve information acquired in the performance of duties, transportation arrangements and any per diem expenses are the responsibility of the U.S. Attorney.

(2) An attorney asserting the government's medical care or property claim may be required to advance local travel expense money to the witness requested and to include these in recoverable costs where the government's claim is not large enough to justify expenditures of government travel funds.

(3) Other local travel and per diem expense for cases involving Army activities or claims are proper expenses of the command issuing the orders.

(4) Litigation Division will furnish travel expense and per diem funds for other than local travel and will receive reimbursement from DOJ or other government agencies as appropriate.

§ 516.55 Witnesses for a state or private litigant.

(a) Status of witness. If authorized to appear as a witness for a state or private litigant, and the testimony to be given relates to information obtained in the performance of official duties, a military member will attend in a permissive TDY status. If authorized to appear as a witness, but the testimony does not relate to information obtained in the performance of official duties, a military member may be granted a pass or permissive TDY under AR 630–5, or be required to take ordinary leave. The status of a civilian employee will be determined under 5 CFR Chapter I.

(b) Travel arrangements. The requesting party or state agency will make all travel arrangements for attendance of DA personnel authorized to appear as witnesses for a state or private litigant. The local commander may issue appropriate orders when necessary.

(c) Travel expenses. The United States may not pay travel, meals, and lodging expenses of the witness, other than normal allowances for subsistence pursuant to the DOD Military Pay and Allowances Entitlements Manual. These expenses are solely a matter between the witness and the party seeking his appearance. Witnesses ordinarily should be advised to require advance payment of such expenses. Military personnel authorized to appear in a pass or permissive TDY status are not entitled to receive witness attendance fees, but may accept travel, meals, and lodging expense money from the requesting litigant. All witness fees tendered the military member, to the extent they exceed such actual expenses of the member, will be remitted to the Treasurer of the United States. A civilian employee authorized to appear in his or her official capacity will accept the authorized witness fees, in addition to the allowance for travel and subsistence, and make disposition of the witness fees as instructed by his or her personnel office.

(d) Funding by the United States. Requests for DA personnel to appear at government expense as witnesses in state or local proceedings for a party other than the United States, including cases involving domestic violence or child abuse, will be referred to Litigation Division. Litigation Division may authorize travel and per diem expenses under § 516.54 when the case is one in which the United States has a significant interest.

§ 516.56 Witnesses before foreign tribunals.

(a) Referral to the SJA. Requests or subpoenas from a foreign government or tribunal for present DA personnel stationed or employed within that country to be interviewed or to appear as witnesses will be forwarded to the SJA of the command exercising general court-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The SJA will determine the following:

(1) Whether a consideration listed in § 516.47(a)(1) through (a)(3) applies.

(2) Whether the information requested is releasable under the principles established in § 516.43 through § 516.46.

(3) Whether the approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity may be involved.

(b) United States has an interest in the litigation. If the SJA determines that the United States has an interest in the litigation, the commander may authorize the interview or order the individual's attendance in a temporary duty status. The United States will be deemed to have an interest in the litigation if it is bound by treaty or other international agreement to ensure the attendance of such personnel.

(c) United States has no interest in the litigation. If the SJA determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness under the principles established in § 516.47 through § 516.50.

(d) Witnesses located outside the requester's country. If the requested witness is stationed in a country other than the requester's, the matter will be referred to Litigation Division.

Subpart H—Remedies in Procurement Fraud and Corruption

§ 516.57 Purpose

This subpart delineates the policies, procedures, and responsibilities for reporting and resolving allegations of procurement fraud or irregularities (PFI) within DA. It implements DOD Directive 7050.5. (See Appendix D to this part.)

§ 516.58 Policies

(a) Procurement fraud and irregularities will be promptly and thoroughly addressed whenever encountered. Reports will be initiated in a timely manner and will be supplemented as appropriate.

(b) Investigations will be monitored to see that interim corrective action is taken and that final action is taken as expeditiously as possible.

(c) This regulation establishes the Procurement Fraud Division (PFD), U.S. Army Legal Services Agency, as the single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement.

(d) The key elements of the Army's procurement fraud program follow: centralized policy making and program direction; fraud remedies coordination; decentralized responsibility for operational matters, such as reporting and remedial action; continuous case monitorship by PFD from the initial report until final disposition; and, command-wide fraud awareness training.

(e) Remedies for PFI will be pursued in a timely manner and properly coordinated with other agencies. Every effort will be made to support criminal investigation and prosecution of fraudulent activity.

(f) A specific remedies plan will be formulated for each significant case of fraud or corruption involving procurement.

(g) Coordination on the status and disposition of cases will be maintained between PFD, OTJAG, PFI Coordinators at MACOMs, and Procurement Fraud Advisers at subordinate commands. Coordination of procurement and personnel actions will be accomplished with investigative agencies as required by those agencies.

(h) Training which relates to fraud and corruption in the procurement process is a significant element of this program.

§ 516.59 Duties and procedures.

(a) TJAG has overall responsibility for the coordination of remedies in procurement fraud and corruption within the Army. This responsibility has been delegated to PFD. Functions of PFD will include the following:

(1) Serving as the single centralized organization in the Army to monitor the status of, and ensure the coordination of, criminal, civil, contractual, and administrative remedies for each significant case of fraud or corruption.

(2) Receiving reports of procurement fraud and corruption from any source including, but not limited to the following: DOD criminal investigative organizations; audit agencies; contracting officers; inspectors general of the executive branch; correspondence from the public; and, commanders. This provision does not repeal any other reporting requirement but establishes PFD as a recipient of PFI information at the earliest possible time.

(3) Establishing a monitoring system within OTJAG for all cases of fraud and corruption that relate to Army procurement.

(4) Discussing regularly with the U.S. Army Criminal Investigation Command (USACIDC) or the assigned DOD criminal investigative organization the current status of significant fraud or corruption cases and their coordination with prosecutive authorities.

(5) Ensuring that all criminal, civil, contractual, and administrative remedies are considered in each significant fraud or corruption case and that timely and applicable remedies are undertaken by commanders, contracting officers, and suspension and debarment authorities. For example, consideration of suspension or debarment of a contractor or individual should normally be initiated within 30 days of indictment or conviction.

(6) Coordinating, as appropriate, with other DOD components affected by a

significant fraud or corruption case being monitored by the Army.

(7) Developing, with the responsible DOD investigative organization, Procurement Fraud Coordinators and Advisers, and other involved agencies, a specific comprehensive remedies plan for each significant fraud or corruption case.

(8) Coordinating remedies with DOJ. In the case of ongoing criminal investigations, coordinate remedies through, or with the prior knowledge of, the DOD criminal investigative organization responsible for the case.

(9) In significant fraud or corruption cases, identifying and documenting any known adverse impact on a DOD mission, and including the information in any remedies plan.

(10) Providing the appropriate DOD criminal investigative organization with information concerning final remedies as a result of an investigation by that organization.

(11) Receiving notifications from criminal investigative agencies concerning substituted, defective, and counterfeit hardware in which a serious hazard to health, safety or operational readiness is indicated; ensuring that appropriate safety, procurement and program officials are informed in accordance with enclosure 3 of DOD Directive 7050.5. PFD will specifically ensure that contract reviews (DD 350 reports) and adverse impact statements (See § 516.64(c)(2) are prepared, and that such information is used to determine if further inquiry is warranted to prevent reoccurrence and to detect other possible fraud. Impact statements will not be released to prosecutive agencies until reviewed by PFD. When appropriate, PFD will coordinate with other DOD agencies to establish a lead agency for victim impact statements in multi-DOD agency cases.

(b) The Commanding General, USACIDC, will take the following actions:

(1) Notify PFD of any investigations involving fraud or corruption related to procurement activities.

(2) Notify other DOD component criminal investigative organizations when investigations involving fraud or corruption affect that component. This includes evidence of fraud by a contractor, subcontractor, or employee of either, on current or past contracts with, or affecting, that component.

(3) Notify the Defense Investigative Service of any investigations that develop evidence which affects DOD cleared industrial facilities or personnel.

(4) Determine the effect on any ongoing investigations or prosecutions of any criminal, civil, contractual, or administrative actions being considered by a centralized organization and advise of any adverse impact.

(5) Promptly provide commanders, contracting officers, Procurement Fraud Advisers, and suspension and debarment authorities, when needed to allow consideration of applicable remedies, any court records, documents, or other evidence of fraud or corruption from ongoing or completed criminal investigations. In cases of indictment or conviction of a contractor or individual, the information will be provided in time for initiation, if appropriate, of suspension or debarment action within 30 days of the indictment or conviction.

(6) Provide prosecutive authorities and centralized organizations with timely information on the adverse impact on a DOD mission of fraud or corruption that relates to DOD procurement activities. This information will be obtained from individuals such as the head of the contracting agency, appropriate commanders, and staff agencies. Some examples of adverse impact on a DOD mission are endangerment of personnel or property, monetary loss, compromise of the procurement process, or reduction or loss of mission readiness.

(7) Discuss regularly with Procurement Fraud Advisers the status of significant investigations of fraud or corruption and their coordination with prosecutive authorities and provide documents and reports resulting from the investigations.

(c) Commanders of service schools conducting procurement or procurement-related training (such as The Judge Advocate General's School, the U.S. Military Police School, and the U.S. Army Logistics Management Center) will ensure the following:

(1) All procurement and procurement-related training includes a period of instruction on fraud and corruption in the procurement process. The length of the period of instruction will be appropriate to the duration and nature of the training.

(2) Training materials are developed to support that training.

(3) Training materials developed will be sent to MACOM PFI Coordinators.

(d) MACOM commanders and heads of contracting activities will ensure the following:

(1) Substantial indications of fraud or corruption relating to Army contracts or Army administered contracts are reported promptly to the supporting USACIDC element and the Procurement Fraud Division.

(2) Information provided includes reports by contracting officers under DFARS 209.406–3.

§ 516.60 Procurement fraud and irregularities programs at MACOMs.

(a) Command counsel and SJAs at MACOMs will develop a program and appoint an attorney as PFI Coordinator for their command. Chief counsel and SJAs at commands with procurement advisory responsibility will appoint an attorney as a Procurement Fraud Adviser (PFA) to manage the PFI program at their installations as well.

(b) Provision may be made for activities not having sufficient attorney assets to obtain assistance from nearby installations that have a PFA.

(c) Reports and recommendations will be transmitted through command channels to the PFI coordinator for the affected MACOM.

(d) Command counsel, chief counsel, and SJAs will exercise supervisory authority to ensure effective operation of the fraud program and coordination of remedies within their organizations.

(e) The MACOM PFI Coordinator will have overall responsibility for the design and implementation of the MACOM's procurement fraud program.

(f) PFAs and PFI Coordinators will coordinate with the appropriate local CID or Defense Criminal Investigative Service (DCIS) activity to assure the prompt notification and coordination of all Procurement Fraud cases.

§ 516.61 Reporting requirements.

(a) Typical fraud indicators during the procurement cycle are listed in Figure D–1, Appendix G, to this part. The mere presence of one or more of these indicators does not, by itself, require reporting under paragraph b of this section. Reports should be submitted if there is a reasonable suspicion of procurement fraud or irregularity or the procuring agency refers the matter for investigation.

(b) "Procurement Flash Reports" will be transmitted by FAX directly to PFD whenever a PFI Coordinator or PFA receives notice of a PFI involving the Army. To facilitate filing, a separate sheet should be used for each case reported. These reports will provide a succinct summary of the following available information:

(1) Name and address of contractor.

(2) Known subsidiaries of parent firms.

(3) Contracts involved in potential fraud.

(4) Nature of potential fraud.

(5) Summary of pertinent facts.

(6) Possible damages.

(7) Investigative agencies involved.

(8) Local PFAs (name and phone numbers).

Any of the above categories that cannot be completed will be annotated as "unknown at present."

(c) When a report is required by DFARS or is requested by PFD, the provisions of DFARS 209.406–3 (48 CFR 209.406–3) will be followed. That paragraph provides the basic content and format for PFI reports.

(d) All personnel will cooperate to ensure that investigations and prosecutions of procurement fraud are completed in a timely and thorough manner. Requests for assistance from federal prosecutors should be processed through the local PFA whenever possible. Requests for federal investigators will be processed through the supporting USACIDC and the PFA will be notified. When the conduct of criminal investigations and prosecutions conflict with the progress of procurements, reasonable deference will be given to criminal investigators and prosecutors whenever possible. Any serious conflict that cannot be resolved at a local level will be immediately reported to the PFI Coordinator or PFD for action.

(e) PFI Coordinators and PFAs may request access to information obtained during criminal investigations that is not protected by Fed. R. Crim. P. 6(e) and use this information to assist them in taking appropriate administrative, contractual, and civil remedies. Requests for this information should be made directly to the appropriate federal investigative agency. The investigative organization may withhold requested information if release would compromise an investigation. Difficulties in obtaining information which cannot be resolved locally will be referred to PFD for appropriate action.

(f) USACIDC will notify, in writing, local PFAs as well as PFD within 30 days, of initiation of a significant investigation of fraud or corruption related to Army procurement activities. Such notification will include the following:

(1) Case title.

(2) USACIDC Report of Investigation number.

(3) Responsible investigative agency or agencies.

(4) Office of primary responsibility.

(5) Date opened.

(6) Summary of facts.

(7) Suspected offense.

(g) The transmission of the information in f above may be delayed if the Commanding General, USACIDC, or the head of another DOD criminal investigation organization determines the transmission would compromise the success of any case or its prosecution. The prosecutive authorities dealing with the case will be consulted, when appropriate, in making such determinations.

(h) USACIDC will obtain the following information at the earliest possible point in an investigation of fraud or corruption that relates to DOD procurement activities, whenever possible without reliance on grand jury subpoenas:

(1) The individuals suspected to be responsible.

(2) The suspected firm's organizational structure.

(3) The firm's financial and contract history.

(4) The firm's organizational documents and records.

(5) Statements of witnesses.

(6) Monetary loss to the government.

(7) Other relevant information.

This information will be provided to PFD or other cognizant DOD centralized organization.

(i) PFD will provide written notification to the Defense Investigative Service of all suspension or debarment actions taken by the Army.

§ 516.62 PFD and HQ USACIDC coordination.

PFD and HQ USACIDC will coordinate as follows:

(a) Discuss the status of significant procurement fraud or corruption investigations being conducted by USACIDC and possible remedies. These discussions should take place on a regular basis.

(b) Discuss the coordination of possible criminal, civil, contractual, or administrative remedies with prosecutive authorities.

(c) PFD will maintain liaison with other DOD centralized organizations and will coordinate remedies with those centralized organizations affected by a significant investigation of fraud or corruption that relates to DOD procurement activities.

(d) Ascertain the effect on any ongoing investigation of the initiation of civil, contractual, or administrative remedies as follows:

(1) PFD will maintain liaison with USACIDC and other DOD criminal investigative organizations in order to determine the advisability of initiating any civil, contractual, or administrative actions.

(2) USACIDC will advise PFD of any adverse effect on an investigation or prosecution by the initiation of civil, contractual, or administrative actions.

§ 516.63 Coordination with DOJ.

(a) PFD will establish and maintain liaison with DOJ and the Defense Procurement Fraud Unit on significant fraud and corruption cases to accomplish the following:

(1) Monitor criminal prosecutions.

(2) Initiate litigation for civil recovery.

(3) Coordinate administrative or contractual actions while criminal or civil proceedings are pending.

(4) Coordinate settlement agreements or proposed settlements of criminal, civil, and administrative actions.

(5) Respond to DOJ requests for information and assistance.

(b) In cases where there is an ongoing criminal investigation, coordination with DOJ by any member of the Army normally will be accomplished by or through USACIDC or the cognizant DOD criminal investigative organization, or with the investigative organization's advance knowledge. This does not apply to the routine exchange of information between government attorneys in the course of civil litigation or the routine referral of cases to DOJ for civil recovery.

(c) Initial contact by any attorney associated with the U.S. Army with a U.S. Attorney's office or DOJ, whether initiated by the Army attorney or not, will be reported to PFD. Activity after the initial contact will only be reported to PFD when the Army attorney feels there has been a significant event in the case. If the Army attorney is not a PFI Coordinator or a PFA, the matter should be referred to one of these two attorneys as soon as possible. Routine exchanges between Army attorneys and U.S. Attorney's offices or DOJ do not need to be brought to the attention of PFD.

§ 516.64 Comprehensive remedies plan.

(a) A specific, comprehensive remedies plan will be developed in each significant investigation involving fraud or corruption that relates to Army procurement activities. When possible, these plans should be forwarded with the DFARS 209.406–3 reports. In no case, however, should the report be delayed an appreciable time pending completion of the plan. The format for a remedies plan is at Figure H–2, Appendix G, to this part.

(b) The plan will be developed initially by the PFA with the participation of the appropriate criminal investigators and other relevant personnel such as the contracting officer. In significant cases the PFA should also coordinate a remedies plan early with PFD. Defective product/product substitution remedies plans must comply with the requirements of Appendix D to this part.

(c) A comprehensive remedies plan will include at a minimum the

following information and considerations:

(1) Summary of allegations and investigative results.

(2) Statement of any adverse impact on a DOD mission. DOD investigative organizations, commanders, or procurement officials will also provide this information to prosecutive authorities to enhance prosecution of offenses or to prepare a victim impact statement pursuant to Fed. R. Crim. P. 32(c)(2).

(3) The impact upon combat readiness and safety.

(4) Consideration of each criminal, civil, contractual, and administrative remedy available, and documentation of those remedies, either planned, in progress, or completed.

(5) Restrictions on the pursuit of any remedies such as grand jury information or possible compromise of the investigation.

(d) When remedies plans are received by PFD they will be coordinated with the headquarters of the appropriate DOD criminal investigative organization involved.

(e) Testing necessary to support the investigation and remedies plan should comply with Figure H–3, Appendix G, to this part.

§ 516.65 Litigation reports in civil recovery cases.

(a) All substantiated PFI cases will be evaluated by PFAs to determine whether it is appropriate to recommend civil recovery proceedings.

(b) Recovery should be considered under both statutory and common law theories, including but not limited to the following:

(1) False Claims Act, 31 USC 3729.

(2) Anti-Kickback Act, 41 USC 51.

(3) Sherman Act, 15 USC 1–7.

(4) Racketeer Influenced and Corrupt Organizations Act, 18 USC 1961–1968.

(5) Common law fraud.

(6) Unjust enrichment.

(7) Constructive trust.

(8) Cases where contracts have been procured in violation of the conflict of interest statute, 18 USC 218. See *K&R Engineering Co.* v. *United States*, 616 F.2d 469 (Ct. Cl., 1980).

(c) When civil recovery appears possible, PFD should be consulted to determine if a litigation report is necessary. If requested by PFD, the report should summarize the available evidence and applicable theories of recovery and be prepared under § 516.23 of this part. To avoid unnecessary duplication of effort, recovery reports may include and make liberal references to other reports previously prepared on a given case such as the DFARS 209.406–3 (48 CFR 209.406–3) report.

(d) The MACOM PFI coordinator and PFA will monitor all civil fraud recovery efforts throughout the command and will provide training and technical assistance as required. Status reports of all civil fraud recovery efforts will be provided through channels as required by PFD.

§ 516.66 Administrative and contractual actions.

(a) The following remedial options should be considered in response to confirmed fraudulent activity:

(1) Contractual.

(i) Termination of contract for default.

(ii) Nonaward of contract based upon a finding of contractor nonresponsibility. (If this appears to be a valid option, a DFARS 209.406–3 (48 CFR 209.406–3) report must be prepared where contractor nonresponsibility is based on lack of integrity).

(iii) Rescission of contract.

(iv) Revocation of acceptance.

(v) Use of contract warranties.

(vi) Withholding of payments to contractor. In the case of withholding pursuant to DFARS 2032.173, the Chief, PFD, is the Army Remedy Coordinating Official.

(vii) Offset of payments due to contractor from other contracts.

(viii) Revocation of facility security clearances.

(ix) Increased level of quality assurance.

(x) Refusal to accept nonconforming goods.

(xi) Denial of claims submitted by contractors.

(xii) Removal of contract from automated solicitation or payment system.

(2) Administrative.

(i) Change in contracting forms and procedures.

(ii) Removal or reassignment of government personnel.

(iii) Review of contract administration and payment controls.

(iv) Revocation of warrant of contracting officer.

(v) Suspension of contractor.

(vi) Debarment of contractor.

(b) In cases which are pending review or action by DOJ, PFAs should coordinate with the DOJ attorney handling the case prior to initiating any contractual or administrative remedy. In the case of ongoing criminal investigations, this coordination will be accomplished through the appropriate DOD criminal investigation organization.

§ 516.67 Overseas cases of fraud or corruption.

(a) Commanders of overseas major commands will establish procedures, similar to this regulation and consistent with the DFARS, and regulations and directives of their respective unified commands, for reporting and coordination of available remedies in overseas procurement fraud and corruption cases involving foreign firms and individuals. Overseas major commands will also maintain liaison with PFD and provide periodic reports of remedies coordination results.

(b) Overseas suspension and debarment actions are governed by DFARS 209.403 (48 CFR 209.403). The names of all firms and individuals suspended or debarred will be expeditiously forwarded to PFD for inclusion on the List of Parties Excluded From Federal Procurement or NonProcurement Programs.

(c) Overseas cases of fraud or corruption related to the procurement process that involve U.S. firms or U.S. citizens may be referred to PFD for coordination of remedies under this regulation.

§ 516.68 Program Fraud Civil Remedies Act (PFCRA).

(a) PFCRA was enacted on 21 October 1986 (Public Law 99–509) and implemented by DOD on 30 August 1988 (DOD Directive 5505.5). (See Appendix E to this part.)

(b) PFCRA expands the capability of the government to deter and recover losses from false, fictitious or fraudulent claims and statements. It is also applicable to program fraud and provides an administrative remedy in addition to those otherwise available to the Army in procurement fraud or pay and entitlements fraud cases.

(c) As part of the Army implementation, the Secretary of the Army's duties and responsibilities under PFCRA as Authority Head are delegated to the Army General Counsel. The Chief, Intellectual Property Law Division, is the Army's Reviewing Official within the meaning of PFCRA. Army implementation also requires DA to follow the policies and procedures prescribed in enclosure 2 of DOD Directive 5505.5. (See Appendix E to this part.)

(d) The DOD Inspector General (IG) is the Investigating Official within DOD. The duties of this position will be performed by the Assistant IG For Investigations. This individual is vested with the authority to investigate all allegations of liability under PFCRA. That authority includes the power to task subordinate investigative agencies

to review and report on allegations that are subject to PFCRA. If the Investigative Official concludes that an action under PFCRA is warranted in an Army case, the official will submit a report containing the findings and conclusions of such investigation through PFD to the Army Reviewing Official.

(e) Pursuant to DOD IG guidance, USACIDC will forward appropriate cases that appear to qualify for resolution under PFCRA to the Investigating Official in a timely manner. Additionally, USACIDC will forward current information regarding the status of remedies pending or concluded. USACIDC may obtain remedies information by coordinating with PFD and the cognizant command.

(f) In pay and entitlement or transportation operation fraud cases, USACIDC will coordinate with the Office of the Secretary of the Army, Financial Management, Review and Oversight Directorate (SAFM–RO), to determine the status of any pending or proposed action under the Debt Collection Act. This information, in addition to information obtained under § 517.68(e), will be forwarded with appropriate cases to the Investigating Official.

(g) In those cases where the Investigating Official has submitted a report to the Army Reviewing Official for action under PFCRA, PFD will, at the direction of the Reviewing Official, prepare all legal memoranda as necessary to transmit the Reviewing Official's intention to issue a complaint. As part of this responsibility PFD will do the following: coordinate with the affected command or agency to ensure that all appropriate remedies have been considered; evaluate the overall potential benefits to the Army; and, ensure that action under PFCRA is not duplicative of other remedies already taken. In order to fully supplement the Reviewing Official's file, PFD may request a litigation report.

(h) PFD will coordinate all cases involving transportation operations emanating from Military Traffic Management Command (MTMC) activity, under the military transportation exception to the FAR, and all cases involving pay and entitlements fraud with SAFM–RO, for comments and recommendations. These matters will be forwarded with the case file to the Reviewing Official.

(i) If the Attorney General approves the issuance of a complaint, PFD, at the direction of the Army Reviewing Official, shall prepare the complaint and all necessary memoranda as required. PFD shall also designate attorneys to represent the Authority in hearings under PFCRA.

Subpart I—Cooperation With the Office of Special Counsel

§ 516.69 Introduction.

This subpart prescribes procedures for cooperation with the Office of Special Counsel (OSC) when OSC is investigating alleged prohibited personnel practices or other allegations of improper or illegal conduct within DA activities.

§ 516.70 Policy.

(a) DA policy follows:

(1) Civilian personnel actions taken by management officials, civilian and military, will conform to laws and regulations implementing established merit system principles and will be free of any prohibited personnel practices.

(2) Management officials will take vigorous corrective action when prohibited personnel practices occur. Disciplinary measures under AR 690–700, Chapter 751, may be initiated after consultation and coordination with appropriate civilian personnel office and labor counselor.

(b) DA activities will cooperate with OSC in the following ways:

(1) Promoting merit system principles in civilian employment programs within DA.

(2) Investigating and reporting allegations of improper or illegal conduct forwarded to the activity by HQDA.

(3) Facilitating orderly investigations by the OSC of alleged prohibited personnel practices and other matters assigned for investigation to the OSC, such as violations of the Whistleblower Protection Act of 1989, the Freedom of Information Act, or the Hatch Act.

§ 516.71 Duties.

(a) DA General Counsel. The DA General Counsel is responsible for the following:

(1) Provide overall guidance on all issues concerning cooperation with OSC, including the investigation of alleged prohibited personnel practices and allegations of improper or illegal conduct.

(2) Review for adequacy and legal sufficiency each OSC report of investigation that must be personally reviewed by the Secretary of the Army.

(3) Ensure compliance with the Civil Service Reform Act of 1978 by obtaining a suitable investigation of allegations of improper or illegal conduct received from OSC. This includes compliance with time limits for reporting results of the investigation and personal review of the report by the Secretary of the Army when required.

(4) Forward to the DOD Inspector General (DODIG) copies of each allegation of improper or illegal conduct referred to DA by OSC.

(5) Delegate to The Judge Advocate General the authority to act on behalf of the DA General Counsel in all OSC investigations of prohibited personnel practices.

(6) Act upon requests for counsel from "accused" or "suspected" employees.

(b) Chief, Labor and Employment Law Office. The Chief, Labor and Employment Law Office, OTJAG (DAJA–LE) is responsible for the following:

(1) Act for TJAG as the Senior Management Official in cooperating with OSC. As Senior Management Official, the Chief, DAJA–LE, through TJAG, will be responsible to the DA General Counsel for administration of the policies and procedures contained in this chapter.

(2) Promptly inform the DA General Counsel of any OSC investigation and consult with the DA General Counsel on any legal or policy issue arising from an OSC investigation.

(3) Serve as the HQDA point of contact in providing assistance to OSC.

(4) Act as DA attorney-of-record in administrative matters initiated by OSC before the MSPB which arise from an OSC investigation. As DA attorney-of-record, the Chief, DAJA–LE, will file necessary pleadings and make necessary appearances before the MSPB to represent DA interests.

(5) Monitor ongoing OSC investigations within DA.

(6) Ensure that appropriate DA personnel are fully apprised of their rights, duties and the nature and basis for an OSC investigation.

(7) Review and prepare recommendations to the General Counsel concerning any OSC recommended corrective action referred to DA. Such review and recommendations will address whether disciplinary action should be taken against DA civilian employees or military members, and whether the information warrants referral to appropriate authorities for corrective and disciplinary action.

(8) Seek OSC approval of DA proposed disciplinary action against an employee for an alleged prohibited personnel practice or other misconduct which is the subject of or related to any OSC investigation.

(9) Review and prepare recommendations for DA General Counsel concerning requests for counsel, to include identifying available

DA attorneys to act as individual representatives. Upon approval of DA General Counsel, appoint DA civilian and military attorneys, to include attorneys from the U.S. Army Materiel Command and the Corps of Engineers, to represent individual military members or employees.

(10) Determine, to the extent practicable, whether an investigation is being or has been conducted which duplicates, in whole or in part, a proposed or incomplete OSC investigation, and convey that information to the OSC whenever it might avoid redundant investigative efforts.

(11) Provide guidance and assistance to activity Labor Counselors in fulfilling their duties as Liaison Officers.

(c) Activity Labor Counselor. The activity Labor Counselor will do the following:

(1) Act as Liaison Officer for OSC investigations arising within the command, activity or installation serviced by the Labor Counselor's client Employment Office.

(2) Promptly inform the MACOM labor counselor and the Chief, DAJA–LE, of any OSC inquiry or investigation.

(3) Act as the legal representative of the command, activity, or installation.

(4) Assist the OSC investigator with administrative matters related to the investigation, such as requests for witnesses and documents.

(5) Process all OSC requests for documents.

(6) Make appropriate arrangements for OSC requests to interview civilian employees and military members.

(7) Ensure that personnel involved are advised of the nature and basis for an OSC investigation, the authority of the OSC, and their rights and duties.

(8) Consult with the Chief, DAJA–LE, on policy and legal issues arising from the OSC investigation.

(9) Keep the Chief, DAJA–LE, informed of the status of the OSC investigation.

(10) Act as agency representative before the MSPB in actions initiated by employees (individual right of action appeals).

§ 516.72 Procedures.

(a) Witnesses and counsel for consultation.

(1) DA military and civilian managers, supervisors, and employees who are requested by OSC for an interview will be made available in accordance with arrangements the Labor Counselor will establish. Requests for the testimony of IGs will be coordinated with the Inspector General Legal Office, SAIG–ZXL, DSN 227–9734 or Commercial (703) 697–9734.

(2) The Labor Counselor will ensure that witnesses are aware of their obligation to answer OSC questions, their potential to be considered "suspects" in OSC investigations, and their right to the assistance of counsel during interviews with OSC representatives. If the requested witness is not an "accused" or "suspected" individual and the witness asks for assistance of counsel, a DA attorney will be made available for the limited purpose of consultation regarding the witness' rights and obligations. An attorney-client relationship will not be established. (See Appendix F to this part).

(3) The Labor Counselor will arrange for individual counsel for consultation from local assets. If local assets are not sufficient, assistance may be requested from other DOD activities in the area or from HQDA, DAJA–LE. DA attorneys tasked to consult with one or more witnesses individually will not be tasked to represent the DA activity concerned.

(4) The Labor Counselor, as the legal representative of the activity, is precluded from assisting or representing individual witnesses during OSC interviews.

(b) "Accused" or "suspected" DA personnel and counsel for representation.

(1) If the OSC identifies a DA civilian employee or a military member as an "accused" or "suspected" individual, or if the Labor Counselor concludes that an individual is a "suspect," the Labor Counselor will inform the individual. The Labor Counselor also will advise the individual of the availability of counsel for representation upon approval by DA General Counsel. (See Glossary, Counsel for Representation).

(2) If the "suspected" individual desires legal representation by DA, the individual must request counsel by submitting a written request through DAJA–LE to DA General Counsel. (See Figure I–1, Appendix G, to this part).

(3) During the investigation but prior to DA General Counsel approval of the request for counsel, an "accused" or "suspected" individual will be provided the assistance of counsel for consultation in the same manner as any other OSC requested witness. "Accused" or "suspected" individuals who do not request counsel for representation will be provided counsel for consultation in the same manner as any other OSC requested witness.

(4) If the DA General Counsel approves the request for counsel, the Chief, DAJA-LE, will appoint a DA attorney to represent the individual. This appointment may be made telephonically but will be confirmed in writing. The Chief, DAJA-LE, will make appropriate coordination with MACOM SJAs and command counsel to confirm availability of the attorney.

(5) An attorney appointed by DA may represent a civilian employee in any proceeding initiated by OSC before the MSPB. However, counsel provided by DA may not represent the employee in any proceeding initiated by DA, in any appeal from a final decision by the MSPB, or in any collateral proceeding before any forum other than the MSPB.

(6) OSC may not bring a disciplinary action before the MSPB against a military member. Accordingly, DA counsel will not be required to represent the military member in any MSPB disciplinary proceeding. However, counsel may represent the member during the OSC investigation with the understanding that the evidence obtained by OSC may be referred to the member's command for possible disciplinary action under the UCMJ or appropriate regulations. If DA initiates action against the military member for misconduct disclosed in the OSC investigation, the member will obtain counsel as provided under the UCMJ or relevant regulations.

(c) Records.

(1) OSC requests for records must be in writing. The Labor Counselor will assist OSC representatives in identifying the custodian of specific records sought during the inquiry.

(2) Generally, requested records should be furnished to OSC representatives if such records would be released under AR 25–55 or AR 340–21 to other government agencies in the normal course of official business. Records constituting attorney work product should not be released without approval of the Chief, DAJA-LE. IG records will not be released without the approval of the Inspector General. (AR 20–1). The Labor Counselor should seek guidance from the Chief, DAJA-LE, if there is any doubt concerning the release of records.

(3) If, after completion of the OSC investigation, the OSC files a complaint against DA or a DA employee, release of records and other information will be accomplished pursuant to MSPB rules of discovery (5 CFR part 1201, subpart B).

(d) Funding. The command, activity, or installation within which the allegations of misconduct arose will provide funding for travel, per diem and other necessary expenses related to the OSC investigation. These expenses may include appropriate funding for witnesses, counsel for consultation and

DA General Counsel approved counsel for representation.

§ 516.73 Assistance from HQDA.

Labor Counselors may seek guidance on questions arising from implementation of this chapter by calling the Chief, DAJA-LE, DSN 225–9476/9481 or Commercial (703) 695–9476/9481.

Subpart J—Soldiers Summoned to Serve on State and Local Juries

§ 516.74 General.

(a) This subpart implements 10 U.S.C. § 982 and DOD Directive 5525.8. It establishes Army policy concerning soldiers on active duty who are summoned to serve on state and local juries.

(b) This subpart does not apply to Army National Guard soldiers in an annual training or full-time AGR (Active Guard Reserve) status under Title 32, U.S. Code. Soldiers in a Title 32 status must refer to their respective state law for relief from state or local jury duty.

§ 516.75 Policy.

(a) Active duty soldiers should fulfill their civic responsibility by serving on state and local juries, so long as it does not interfere with military duties.

(b) The following active duty soldiers are exempt from complying with summons to serve on state and local juries:

(1) General officers.

(2) Commanders.

(3) Active duty soldiers stationed outside the United States, Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the Virgin Islands.

(4) Active duty soldiers in a training status.

(5) Active duty soldiers assigned to forces engaged in operations.

(c) Other active duty soldiers may be exempted from serving on local juries if compliance with such summons would have either of the following effects:

(1) It would unreasonably interfere with performance of the soldier's military duties; or,

(2) It would adversely affect the readiness of a summoned soldier's unit, command, or activity.

§ 516.76 Exemption determination authority.

(a) The commander exercising special court-martial convening authority (SPCMCA) over a unit has the authority to determine whether a soldier of that unit, who has been served with a summons, is exempt from serving on a state or local jury unless that authority has been limited or withheld in accordance with paragraph (b) or (c) of this section. This authority may not be delegated to a subordinate commander who does not exercise SPCMCA.

(b) A commander superior to the SPCMCA, who also exercises SPCMCA or general court-martial convening authority (GCMCA) over a unit, may limit or withhold the exemption determination authority of subordinate commanders.

(c) A GCMCA, who orders a unit or soldier assigned to one command to be attached or detailed to another command for disciplinary purposes (for example, "for administration" or "for administration of military justice"), may reserve exemption determination authority to the commander exercising SPCMCA in the chain of command to which the unit or soldier is assigned rather than the chain of command to which the unit or soldier is attached or detailed.

§ 516.77 Procedures for exemption.

(a) Active duty soldiers served with a summons to serve on a state or local jury will promptly advise their commander and provide copies of pertinent documents.

(b) Unit commanders will evaluate the summons considering both the individual soldier's duties and the unit mission. Coordination with the servicing judge advocate or legal adviser and with the appropriate state or local official may be necessary to determine any impact on the soldier's duties or on unit readiness.

(1) If the soldier is not exempt under § 516.75 (b) or (c), the commander will process the soldier for permissive TDY in accordance with AR 630–5, Leaves and Passes.

(2) If the soldier is exempt under § 516.75 (b) or (c), the commander will forward the summons and any related documentation, with recommendations, through the chain of command to the commander with exemption determination authority over the soldier concerned.

(c) The commander with exemption determination authority over the soldier concerned will determine whether the soldier is exempt. His determination is final.

(d) The exemption determination authority will notify responsible state or local officials whenever a soldier summoned for jury duty is exempt. The notification will cite 10 U.S.C. 982 as authority.

§ 516.78 Status, fees, and expenses.

(a) Soldiers who are required to comply with summons to serve on state or local juries will be placed on permissive TDY under the provisions of AR 630–5.

(b) Jury fees accruing to soldiers for complying with the summons to serve on state and local juries must be turned over to the appropriate finance office for deposit into the U.S. Treasury. Commands will establish procedures with local authorities and their servicing finance and accounting activity to ensure that such jury fees are so deposited. Soldiers, however, may keep any reimbursement from state or local authority for expenses incurred in the performance of jury duty, including transportation, meals, and parking.

Appendix A to Part 516—References

Publications referenced in this part can be obtained at the National Technical Information Services, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

Required Publications

AR 25–55, The Department of the Army Freedom of Information Act Program. (Cited in §§ 516.40, 516.72)

AR 27–10, Military Justice. (Cited in § 516.4)

AR 27–20, Claims. (Cited in §§ 516.4, 516.33, 516.22)

AR 27–60, Patents, Inventions, and Copyrights.

AR 37–60, Pricing for Material and Services. (Cited in § 516.43.)

AR 37–103, Finance and Accounting for Installations: Disbursing Operations. (Cited in § 516.22.)

AR 60–20, Operating Policies. (Cited in § 516.22.)

AR 190–9, Absentee Deserter Apprehension Program and Surrender of Military Personnel to Civilian Law Enforcement Agencies. (Cited in § 516.9)

AR 210–47, State and Local Taxation of Lessee's Interest in Wherry Act Housing (Title VIII of the National Housing Act).

AR 215–1, Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in § 516.22.)

AR 215–2, The Management and Operation of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in § 516.22.)

AR 310–1, Publications, Blank Forms, and Printing Management.

AR 340–21, The Army Privacy Program. (Cited in §§ 516.40, 516.72.)

AR 380–5, Department of the Army Information Security Program.

AR 405–25, Annexation. (Cited in § 516.22.)

AR 630–5, Leaves and Passes. (Cited in §§ 516.55, 516.77, 516.78.)

AR 630–10, Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings. (Cited in § 516.9)

Related Publications

A related publication is merely a source of additional information. The user does not have to read it to understand the regulation.

AR 20–1, Inspector General Activities and Procedures. (Cited in §§ 516.41, 516.72.)
AR 27–1, Judge Advocate Legal Service.
AR 27–3, Legal Assistance. (Cited in § 516.6.)
AR 27–10, Military Justice. (Cited in §§ 516.4, 516.5, 516.15.)
AR 27–50, Status of Forces Policies, Procedures, and Information. (Cited in § 516.15.)
AR 37–104–3, Military Pay and Allowances Procedures.
AR 37–105, Finance and Accounting for Installations: Civilian Pay Procedures.
AR 55–19, Marine Casualties. (Cited in § 516.22.)
AR 190–29, Misdemeanors and Uniform Violation Notices Referred to U.S. Magistrates or District Courts.
AR 190–40, Serious Incident Report. (Cited in § 516.15.)
AR 210–50, Family Housing Management. (Cited in § 516.37.)
AR 335–15, Management Information Control System. (Cited in § 516.15.)
AR 600–40, Apprehension, Restraint, and Release to Civil Authorities.
AR 600–50, Standards of Conduct for Department of the Army Personnel.
AR 690–700, Personnel Relations and Services. (Cited in § 516.70.)

Prescribed Form

DA Form 4, Department of the Army Certification for Authentication of Records. (Prescribed in § 516.25, 516.35.)

Referenced Forms

DA Form 2631–R, Medical Care-Third Party Liability Notification.
DA Form 3154, MSA Invoice and Receipt.

Appendix B to Part 516—Mailing Addresses

The following is a list of frequently referred to Department of the Army Services/Divisions/Offices and their mailing addresses:

COMMANDER (JACS–Z), U.S. ARMY CLAIMS SERVICE, OTJAG, BUILDING 4411, ROOM 206, LLEWELLYN AVENUE, FORT GEORGE G. MEADE, MD 20755–5360
(1) PERSONNEL CLAIMS AND RECOVERY DIVISION (JACS–PC), U.S. ARMY CLAIMS SERVICE, OTJAG, BUILDING 4411, ROOM 206, LLEWELLYN AVENUE, FORT GEORGE G. MEADE, MD 20755–5360
(2) TORT CLAIMS DIVISION (JACS–TC), U.S. ARMY CLAIMS SERVICE, OTJAG, BUILDING 4411, ROOM 206, LLEWELLYN AVENUE, FORT GEORGE G. MEADE, MD 20755–5360
CONTRACT APPEALS DIVISION, HQDA(DAJA–CA), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
CONTRACT LAW DIVISION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310–2200
CRIMINAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310–2200
ENVIRONMENTAL LAW DIVISION, HQDA(DAJA–EL), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
LABOR AND EMPLOYMENT LAW DIVISION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310–2200,
LITIGATION DIVISION, HQDA(DAJA–LT), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
(1) CIVILIAN PERSONNEL BRANCH, HQDA(DAJA–LTC), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
(2) GENERAL LITIGATION BRANCH, HQDA(DAJA–LTG), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
(3) MILITARY PERSONNEL BRANCH, HQDA(DAJA–LTM), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
(4) TORT BRANCH, HQDA(DAJA–LTT), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
PERSONNEL, PLANS, AND TRAINING OFFICE, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310–2200
PROCUREMENT FRAUD DIVISION, HQDA(DAJA–PF), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
INTELLECTUAL PROPERTY DIVISION, HQDA(JALS–IP), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
REGULATORY LAW OFFICE, HQDA(JALS–RL), 901 NORTH STUART STREET, ARLINGTON, VA 22203–1837
THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310–2200
THE AJAG FOR CIVIL LAW & LITIGATION, THE JUDGE ADVOCATE GENERAL, 2200 ARMY PENTAGON, WASHINGTON, DC 20310–2200
U.S. ARMY TRIAL DEFENSE SERVICE, HQDA(JALS–TD), NASSIF BUILDING, FALLS CHURCH, VA 22041–5013

Appendix C to Part 516—Department of Defense Directive 5405.2, Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses

Department of Defense Directive

July 23, 1985, Number 5405.2, GC, DOD

Subject: Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses

References:

(a) Title 5, United States Code, Sections 301, 552, and 552a
(b) Title 10, United States Code, Section 133
(c) DoD Directive 5220.6, "Industrial Personnel Security Clearance Program," December 20, 1976
(d) DoD Directive 5200.1–R, "Information Security Program Regulation," August 1982, authorized by DoD Directive 5200.1, June 7, 1982
(e) DoD Directive 5230.25, "Withholding of Unclassified Technical Data from Public Disclosure," November 6, 1984
(f) DoD Instruction 7230.7, "User Charges," January 29, 1985
(g) DoD Directive 5400.7–R, "DoD Freedom of Information Act Program," December 1980, authorized by DoD Directive 5400.7, March 24, 1980

A. Purpose

Under Section 301 reference (a) and reference (b), this Directive establishes policy, assigns responsibilities, and prescribes procedures for the release of official DoD information in litigation and for testimony by DoD personnel as witnesses during litigation.

B. Applicability and Scope

1. This Directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as "DoD Components"), and to all personnel of such DoD Components.

2. This Directive does not apply to the release of official information or testimony by DoD personnel in the following situations:

a. Before courts-martial convened by the authority of the Military Departments or in administrative proceedings conducted by or on behalf of a DoD Component;

b. Pursuant to administrative proceedings conducted by or on behalf of the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), or pursuant to a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

c. In response to requests by Federal Government counsel in litigation conducted on behalf of the United States;

d. As part of the assistance required in accordance with the Defense Industrial Personnel Security Clearance Program under DoD Directive 5220.6 (reference (c)); or

e. Pursuant to disclosure of information to Federal, State, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

3. This Directive does not supersede or modify existing laws or DoD programs governing the testimony of DoD personnel or the release of official DoD information during grand jury proceedings, the release of official information not involved in litigation, or the release of official information pursuant to the Freedom of Information Act, 5 U.S.C. Section 552 (reference (a)) or the Privacy Act, 5 U.S.C. Section 552a (reference (a)), nor does this Directive preclude treating any written request for agency records that is not in the nature of legal process as a request under the Freedom of Information or Privacy Acts.

4. This Directive is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States in appropriate cases.

5. This Directive does not preclude official comment on matters in litigation in appropriate cases.

6. This Directive is intended only to provide guidance for the internal operation of the Department of Defense and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law against the United States or the Department of Defense.

C. Definitions

1. Demand. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority for the production, disclosure, or release of official DoD information or for the appearance and testimony of DoD personnel as witnesses.

2. DoD Personnel. Present and former U.S. military personnel; Service Academy cadets and midshipmen; and present and former civilian employees of any Component of the Department of Defense, including nonappropriated fund activity employees; non-U.S. nationals who perform services overseas, under the provisions of status of forces agreements, for the United States Armed Forces; and other specific individuals hired through contractual agreements by or on behalf of the Department of Defense.

3. Litigation. All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

4. Official Information. All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces.

D. Policy

It is DoD policy that official information should generally be made reasonably available for use in Federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

E. Responsibilities

1. The General Counsel, Department of Defense (GC, DoD), shall provide general policy and procedural guidance by the issuance of supplemental instructions or specific orders concerning the release of official DoD information in litigation and the testimony of DoD personnel as witnesses during litigation.

2. The Heads of DoD Components shall issue appropriate regulations to implement this Directive and to identify official information that is involved in litigation.

F. Procedures

1. Authority to Act

a. In response to a litigation request or demand for official DoD information or the testimony of DoD personnel as witnesses, the General Counsels of DoD, Navy, and the Defense Agencies; the Judge Advocates General of the Military Departments; and the Chief Legal Advisors to the JCS and the Unified and Specified Commands, with regard to their respective Components, are authorized—after consulting and coordinating with the appropriate Department of Justice litigation attorneys, as required—to determine whether official information originated by the Component may be released in litigation; whether DoD personnel assigned to or affiliated with the Component may be interviewed, contacted, or used as witnesses concerning official DoD information or as expert witnesses; and what, if any, conditions will be imposed upon such release, interview, contact, or testimony. Delegation of this authority, to include the authority to invoke appropriate claims of privilege before any tribunal, is permitted.

b. In the event that a DoD Component receives a litigation request or demand for official information originated by another Component, the receiving Component shall forward the appropriate portions of the request or demand to the originating Component for action in accordance with this Directive. The receiving Component shall also notify the requestor, court, or other authority of its transfer of the request or demand.

c. Notwithstanding the provisions of paragraphs F.1.a. and b., the GC, DoD, in litigation involving terrorism, espionage, nuclear weapons, intelligence means or sources, or otherwise as deemed necessary, may notify Components that GC, DoD, will assume primary responsibility for coordinating all litigation requests and demands for official DoD information or the testimony of DoD personnel, or both; consulting with the Department of Justice, as required; and taking final action on such requests and demands.

2. Factors to Consider

In deciding whether to authorize the release of official DoD information or the testimony of DoD personnel concerning official information (hereinafter referred to as "the disclosure") pursuant to paragraph F.1., DoD officials should consider the following types of factors:

a. Whether the request or demand is unduly burdensome or otherwise inappropriate under the applicable court rules;

b. Whether the disclosure, including release in camera, is appropriate under the rules of procedure governing the case or matter in which the request or demand arose;

c. Whether the disclosure would violate a statute, executive order, regulation, or directive;

d. Whether the disclosure, including release in camera, is appropriate or necessary under the relevant substantive law concerning privilege;

e. Whether the disclosure, except when in camera and necessary to assert a claim of privilege, would reveal information properly classified pursuant to the DoD Information Security Program under DoD 5200.1–R (reference (d)), unclassified technical data withheld from public release pursuant to DoD Directive 5230.25 (reference (e)), or other matters exempt from unrestricted disclosure; and

f. Whether disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.

3. Decisions on Litigation Requests and Demands

a. Subject to paragraph F.3.e., DoD personnel shall not, in response to a litigation request or demand, produce, disclose, release, comment upon, or testify concerning any official DoD information without the prior written approval of the appropriate DoD official designated in paragraph F.1. Oral approval may be granted, but a record of such approval shall be made and retained in accordance with the applicable implementing regulations.

b. If official DoD information is sought, through testimony or otherwise, by a litigation request or demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph F.3.e., DoD personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the appropriate DoD official designated in paragraph F.1. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

c. Whenever a litigation request or demand is made upon DoD personnel for official DoD information or for testimony concerning such information, the personnel upon whom the request or demand was made shall immediately notify the DoD official designated in paragraph F.1. for the Component to which the individual contacted is or, for former personnel, was last assigned. In appropriate cases, the responsible DoD official shall thereupon notify the Department of Justice of the request or demands. After due consultation and coordination with the Department of Justice, as required, the DoD official shall determine whether the individual is required to comply with the request or demand and shall notify the requestor or the court or other authority of the determination reached.

d. If, after DoD personnel have received a litigation request or demand and have in turn notified the appropriate DoD official in accordance with paragraph F.3.c., a response to the request or demand is required before instructions from the responsible official are received, the responsible official designated in paragraph F.1. shall furnish the requestor or the court or other authority with a copy of this Directive and applicable implementing regulations, inform the requestor or the court or other authority that the request or demand is being reviewed, and seek a stay of the request or demand pending

a final determination by the Component concerned.

e. If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken pursuant to paragraph F.3.d., or if such court or other authority orders that the request or demand must be complied with notwithstanding the final decision of the appropriate DoD official, the DoD personnel upon whom the request or demand was made shall notify the responsible DoD official of such ruling or order. If the DoD official determines that no further legal review of or challenge to the court's ruling or order will be sought, the affected DoD personnel shall comply with the request, demand, or order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See United States ex rel. *Touhy* v. *Ragen*, 340 U.S. 462 (1951).

4. Fees

Consistent with the guidelines in DoD Instruction 7230.7 (reference (f)), the appropriate officials designated in paragraph F.1. are authorized to charge reasonable fees, as established by regulation and to the extent not prohibited by law, to parties seeking, by request or demand, official DoD information not otherwise available under the DoD Freedom of Information Act Program (reference (g)). Such fees, in amounts calculated to reimburse the Government for the expense of providing such information, may include the costs of time expended by DoD employees to process and respond to the request or demand; attorney time for reviewing the request or demand and any information located in response thereto and for related legal work in connection with the request or demand; and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

5. Expert or Opinion Testimony

DoD personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Defense or the United States, the appropriate DoD official designated in paragraph F.1. may, in writing, grant special authorization for DoD personnel to appear and testify at no expense to the United States. If, despite the final determination of the responsible DoD official, a court of competent jurisdiction, or other appropriate authority, orders the appearance and expert or opinion testimony of DoD personnel, the personnel shall notify the responsible DoD official of such order. If the DoD official determines that no further legal review of or challenge to the court's order will be sought, the affected DoD personnel shall comply with the order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

G. Effective Date and Implementation

This Directive is effective immediately. Forward two copies of implementing documents to the General Counsel, DoD, within 120 days.

Signed by William H. Taft, IV

Deputy Secretary of Defense.

Appendix D to Part 516—Department of Defense Directive 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

Department of Defense Directive

June 7, 1989, Number 7050.5, IG, DOD

Subject: Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

References:

(a) DoD Directive 7050.5, subject as above, June 28, 1985 (hereby canceled)

(b) Public Law 97–291, "The Victim and Witness Protection Act of 1982," October 12, 1982

(c) Defense FAR Supplement (DFARS), Subpart 4.6, "Contract Reporting"

(d) DoD Instruction 4105.61, "DoD Procurement Coding Manual," May 4, 1973

(e) DoD 4105.61–M, "Procurement Coding Manual" (Volume I), October 1988, authorized by DoD Instruction 4105.61 May 4, 1973

A. Reissuance and Purpose

This Directive reissues reference (a) to update policies, procedures, and responsibilities for the coordination of criminal, civil, administrative, and contractual remedies stemming from investigation of fraud or corruption related to procurement activities. More effective and timely communication of information developed during such investigations will enable the Department of Defense to take the most appropriate of the available measures.

B. Applicability

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

C. Definitions

1. *DoD Criminal Investigative Organizations.* Refers to the U.S. Army Criminal Investigation Command; the Naval Investigative Service Command; the U.S. Air Force Office of Special Investigations; and the Defense Criminal Investigative Service, Office of the IG, DoD (OIG, DoD).

2. *Significant.* Refers to all fraud cases involving an alleged loss of $100,000, or more; all corruption cases related to procurement that involved bribery, gratuities, or conflicts of interest; and any investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated, regardless of loss value.

D. Policy

It is DoD policy that:

1. Each of the DoD Components shall monitor, from its inception, all significant investigations of fraud or corruption related to procurement activities affecting its organizations, for the purpose of ensuring that all possible criminal, civil, administrative, and contractual remedies in such cases are identified to cognizant procurement and commend officials and that appropriate remedies are pursued expeditiously. This process shall include appropriate coordination with all other affected DoD Components.

2. All investigations of fraud or corruption related to procurement activities shall be reviewed to determine and implement the appropriate contractual and administrative actions that are necessary to recover funds lost through fraud or corruption and to ensure the integrity of DoD programs and operations.

3. Appropriate civil, contractual, and administrative actions, including those set forth in enclosure 1, shall be taken expeditiously. During an investigation and before prosecution or litigation, and when based in whole or in part on evidence developed during an investigation, such actions shall be taken with the advance knowledge of the responsible DoD criminal investigative organization and, when necessary, the appropriate legal counsel in the Department of Defense and the Department of Justice (DoJ). When appropriate, such actions shall be taken before final resolution of the criminal or civil case.

E. Responsibilities

1. The *Heads of DoD Components* shall:

a. Establish a centralized organization (hereafter referred to as "the centralized organization") to monitor and ensure the coordination of criminal, civil, administrative, and contractual remedies for each significant investigation of fraud or corruption related to procurement activities affecting the DoD Component.

b. Establish procedures requiring the centralized organization to discuss regularly with the assigned DoD criminal investigative organization(s) such issues as the current status of significant investigations and their coordination with prosecutive authorities.

c. Establish procedures requiring that all coordination involving the DoJ, during the pendency of a criminal investigation, is accomplished by or with the advance knowledge of the appropriate DoD criminal investigative organization(s).

d. Establish procedures to ensure appropriate coordination of actions between the centralized organizations of any DoD Components affected by a significant investigation of fraud or corruption related to procurement activities.

e. Establish procedures to ensure that all proper and effective civil, administrative, and contractual remedies available to the Department of Defense are, when found applicable and appropriate, considered and

undertaken promptly by the necessary DoD officials (e.g., commanders, programs officials, and contracting officers). This includes initiation of any suspension and debarment action within 30 days of an indictment or conviction. The centralized organization shall ensure that all proposed actions are coordinated with appropriate investigative organization.

f. Establish procedures to ensure that a specific comprehensive remedies plan is developed for each significant investigation involving fraud or corruption related to procurement activities. These procedures shall include the participation of the appropriate DoD criminal investigative organization in the development of the plan.

g. Establish procedures to ensure that in those significant investigations of fraud or corruption related to procurement activities when adverse impact on a DoD mission can be determined, such adverse impact is identified and documented by the centralized organization. This information is to be used by the centralized organization of the DoD Component concerned in development of the remedies plan required in paragraph E.1.f., above, and shall be furnished to prosecutors as stated in paragraph E.2.e., below. The information shall also be used by the centralized organizations in development and preparation of "Victim Impact Statements" for use in sentencing proceedings, as provided for P.L. 97–291 (reference (b)). Some examples of adverse impact on a DoD mission are as follows:

(1) Endangerment of personnel or property.

(2) Monetary loss.

(3) Denigration of program or personnel integrity.

(4) Compromise of the procurement process.

(5) Reduction or loss of mission readiness.

h. Ensure training materials are developed on fraud and corruption in the procurement process, and that all procurement and procurement-related training includes a period of such instruction appropriate to the duration and nature of the training.

i. Establish procedures enabling the centralized organization to ensure that safety and readiness issues are examined and appropriately dealt with for all cases in which a notice is required under paragraph E.2.i., below. The minimum procedures to be followed by the centralized organization are in enclosure 3.

j. Ensure that appropriate command, procurement, and investigative organizations are provided sufficient information to determine if further inquiry is warranted on their part to prevent reoccurrence and detect other possible fraud within their activity.

2. The *Secretaries of the Military Departments* and the *Inspector General, Department of Defense (IG, DoD)*, or their designees, shall establish procedures that ensure that their respective criminal investigative organizations will:

a. Notify, in writing, the centralized organization for the affected DoD Component of the start of all significant investigations involving fraud or corruption that are related to procurement activities. Initial notification shall include the following elements:

(1) Case title.

(2) Case control number.

(3) Investigative agency and office of primary responsibility.

(4) Date opened.

(5) Predication.

(6) Suspected offense(s).

b. Notify expeditiously the Defense Investigative Service (DIS) of any investigations that develop evidence that would impact on DoD-cleared industrial facilities or personnel.

c. Discuss regularly with the centralized organization such issues as the current status of significant investigations and their coordination with prosecutive authorities. If the DoD criminal investigative organization has prepared any documents summarizing the current status of the investigation, such documents shall be provided to the centralized organization. Completed reports of significant investigations also should be provided to the centralized organization.

d. Provide to the appropriate procurement officials, commanders, and suspension and debarment authorities, when needed to allow consideration of applicable remedies, any court records, documents, or other evitlence of fraud or corruption related to procurement activities. Such information shall be provided in a timely manner to enable the suspension and debarment authority to initiate suspension and debarment action within 30 days of an indictment or conviction.

e. Provide expeditiously to prosecutive authorities the information regarding any adverse impact on a DoD mission, that is gathered under paragraph E.1.g., above, for the purpose of enhancing the prosecutability of a case. Such information also should be used in preparing a victim impact statement for use in sentencing proceedings as provided for in Public Law 97–291.

f. Gather, at the earliest practical point in the investigation, without reliance on grand jury subpoenas whenever possible, relevant information concerning responsible individuals, the organizational structure, finances, and contract history of DoD contractors under investigation for fraud or corruption related to procurement activities, to facilitate the criminal investigation as well as any civil, administrative, or contractual actions or remedies that may be taken. Some available sources of such information are listed in enclosure 2.

g. Provide timely notice to other cognizant DoD criminal investigative organizations of evidence of fraud by a contractor, subcontractor, or employees of either, on current or past contracts with, or affecting, other DoD Components.

h. Ascertain the impact upon any ongoing investigation or prosecution of civil, contractual, and administrative actions being considered and advise the appropriate centralized organization of any adverse impact.

i. Obtain a DD 350 report in every investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

j. Obtain a DD 350 report in all significant fraud investigations, as defined in subsection C.2. above, whether or not the case involved defective products or product substitution. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

3. The *Inspector General, Department of Defense* (IG, DoD), shall:

a. Develop training materials relating to fraud and corruption in procurement related activities which shall be utilized in all procurement related training in conjunction with training materials developed by the DoD Components. (See paragraph E.1.h., above.)

b. Establish procedures for providing to the DoD criminal investigative organizations, through the Office of the Assistant Inspector General for Auditing (OAIG–AUD), reports of data contained in the Individual Procurement Action Report (DD Form 350) System.

F. Procedures

Transmissions of information by DoD criminal investigative organizations required by subsection E.2., above, shall be made as expeditiously as possible, consistent with efforts not to compromise any ongoing criminal investigation. The transmission of the information may be delayed when, in the judgment of the head of the DoD criminal investigative organization, failure to delay would compromise the success of any investigation or prosecution. The prosecutive authorities dealing with the investigation shall be consulted, when appropriate, in making such determinations.

G. Effective Date and Implementation

This Directive is effective immediately. Forward two copies of implementing documents to the Inspector General, Department of Defense, within 120 days.

Donald J. Atwood,

Deputy Secretary of Defense.

Enclosures—3

1. Civil Contractual and Administrative Actions That Can Be Taken in Response to Evidence of Procurement Fraud

2. Sources of Information Relating to Government Contractors

3. Actions to be Taken in Product Substitution Investigations

Civil, Contractual, and Administrative Actions That Can Be Taken In Response to Evidence of Procurement Fraud

A. Civil

1. *Statutory*

a. False Claims Act (31 USC 3729 et seq.).

b. Anti-Kickback Act (41 USC 51 et seq.).

c. Voiding Contracts (18 USC 218).

d. Truth in Negotiations Act (10 USC 2306(f)).

e. Fraudulent Claims-Contract Disputes Act (41 USC 604)

2. *Nonstatutory*

a. Breach of contract.

b. Breach of warranty.

c. Money paid under mistake of fact.

d. Unjust enrichment.

e. Fraud and/or Deceit.

f. Conversion.
g. Recision and/or Cancellation.
h. Reformation.
i. Enforcement of performance bond/guarantee agreement.

3. *Contractual*

a. Termination of contract for default.
b. Termination of contract for convenience of Government.
c. Termination for default and exemplary damages under the gratuities clause.
d. Recision of contract.
e. Contract warranties.
f. Withholding of payments to contractor.
g. Offset of payments due to contractor from other contracts.
h. Price reduction.
i. Correction of defects (or cost of correction).
j. Refusal to accept nonconforming goods.
k. Revocation of acceptance.
l. Denial of claims submitted by contractors.
m. Disallowance of contract costs.
n. Removal of the contractor from automated solicitation or payment system.

4. *Administrative*

a. Change in contracting forms and procedures.
b. Removal or reassignment of Government personnel.
c. Review of contract administration and payment controls.
d. Revocation of warrant contracting officer.
e. Suspension of contractor and contractor employees.
f. Debarment of contractor and contractor employees.
g. Revocation of facility security clearances.
h. Nonaward of contract based upon a finding of contractor nonresponsibility.
i. Voluntary refunds.

SOURCES OF INFORMATION RELATING TO GOVERNMENT CONTRACTORS

Type of information	Possible source
Location, dollar value, type, and number of current contracts with the Department of Defense.	a. DD Form 350 Report.[1] b. Defense Logistics Agency's (DLA) "Contract Administration Defense Logistics Agency's (DLA) Contract Administration Report (CAR Report) on contracts DLA administers.
2. Financial status of corporation, history of corporation, owners, and officers.	a. Dunn and Bradstreet Reports. b. Corporate filings with local secretaries of the State, or corporate recorders. c. Securities and Exchange Commission (public corporations). d. Small Business Administration (SBA) (small businesses). e. General Accounting Office (bid protests, and contractors indebted to the Government). f. Armed Services Board of Contract Appeals (ASBCA) or court litigation. g. List of Contractors Indebted to the United States (maintained, published and distributed by the U.S. Army Finance and Accounting Center, Indianapolis, Indiana 46249).
3. Security clearance background information on facility and officers	a. Defense Investigative Service.
4. Performance history of contractor	a. Local contracting officers. b. Defense Contract Administration Service preaward surveys. c. SBA Certificate of Competency records.
5. Name, location, offense alleged, and previous investigative efforts involving DLA-awarded or DLA-administered contracts.	DLA Automated Criminal Case Management System. (Available through field offices of the DLA Counsel's office.)
6. Bid protests, litigation, and bankruptcy involving DLA-awarded or DLA-administered contracts.	Field offices of the DLA Counsel's office.

[1] A determination as to the contract history of any DoD contractor with contracts in excess of $25,000 annually can be made through a review of the "Individual Procurement Action Report" (DD Form 350) system, as prescribed by Subpart 4.6 of the DoD FAR Supplement, DoD Instruction 4105.61, and DoD 4105.61–M (references (c), (d), and (e)).

Actions to be Taken in Product Substitution Investigations

A. The centralized organization, in all cases involving allegations of product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated shall:

1. Review the notice of the case immediately after receiving it from the Defense criminal investigative organization. Review the notice to determine any potential safety or readiness issues indicated by the suspected fraud.

2. Notify all appropriate safety, procurement, and program officials of the existence of the case.

3. Obtain a complete assessment from safety, procurement, and program officials of the adverse impact of the fraud on DoD programs and operations.

4. Ensure that the DoD Component provides the Defense criminal investigative organization with full testing support to completely identify the defective nature of the substituted products. Costs associated with the testing shall be assumed by the appropriate procurement program.

5. Prepare a comprehensive impact statement describing the adverse impact of the fraud on DoD programs for use in any criminal, civil, or contractual action related to the case.

B. In all cases involving allegations of product substitution that affect more than one DoD Component, that centralized organizations of the affected DoD Components shall identify a lead Agency. The lead centralized organization shall ensure that information on the fraud is provided to the centralized organization of all other affected DoD Components. The lead centralized organization shall ensure compliance with the requirements of section A., above. The lead centralized organization shall then be responsible for preparing a comprehensive "Victim Impact Statement" as required by paragraph E.1.g. of this Directive.

C. In all cases involving allegations of product substitution, the Defense Criminal Investigative Organization shall:

1. Immediately notify the appropriate centralized organization of the beginning of the case.

2. Continue to provide to the centralized organization any information developed during the course of the investigation that indicates substituted products have been, or might be, provided to the Department of Defense.

3. Ensure that any request for testing of substituted products is provided to the centralized organization.

Appendix E to Part 516—Department of Defense Directive 5505.5, Implementation of the Program Fraud Civil Remedies Act

DOD Directive 5505.5 is contained in 32 CFR Part 277.

Appendix F to Part 516—Glossary

Abbreviations

AAFES: Army and Air Force Exchange Service
AMEDD: Army Medical Department

AFARS: Army Federal Acquisition Regulation Supplement
ASBCA: Armed Services Board of Contract Appeals
AUSA: Assistant United States Attorney
CFR: Code of Federal Regulations
COE: United States Army Corps of Engineers
DA: Department of the Army
DFARS: Defense Federal Acquisition Regulation Supplement
DOD: Department of Defense
DOJ: Department of Justice. In this regulation, reference to DOJ means either United States Attorneys' Offices or The (main) Department of Justice in Washington, DC
DCIS: Defense Criminal Investigative Service
e.g.: An abbreviation for *exempli gratia*, meaning "for example"
et seq.: An abbreviation for *et sequentes*, meaning "and the following"
FAR: Federal Acquisition Regulation
FAX: Facsimile Transmission
FBI: Federal Bureau of Investigation
Fed. R. Civ. P.: Federal Rules of Civil Procedure
Fed. R. Crim. P.: Federal Rules of Criminal Procedure
FOIA: Freedom of Information Act
GAO: General Accounting Office
HQDA: Headquarters, Department of the Army
i.e.: An abbreviation for *id est*, meaning "that is"
IG: Inspector General
JA: Judge Advocate
MACOM: Major Command
MSPB: Merit Systems Protection Board
NAF: Nonappropriated Fund
OTJAG: Office of The Judge Advocate General
OSC: Office of Special Counsel
PFA: Procurement Fraud Advisor
PFCRA: Program Fraud Civil Remedies Act
PFD: Procurement Fraud Division
PFI: Procurement Fraud or Irregularities
RJA: Recovery Judge Advocate
SAUSA: Special Assistant U.S. Attorney
SJA: Staff Judge Advocate
TDY: temporary Duty
TJAG: The Judge Advocate General
UCMJ: Uniform Code of Military Justice
USACIDC: U.S. Army Criminal Investigation Command
USALSA: U.S. Army Legal Services Agency
USARCS: U.S. Army Claims Service
USATDS: U.S. Army Trial Defense Service
USMA: United States Military Academy
U.S.C.: United States Code

Terms

Active Duty

Full-time duty in the active military service of the United States. Includes: full-time training duty; annual training duty; active duty for training; attendance, while in the active military service, at a school designated as a Service School by law or by the Secretary of the military department concerned; and, attendance, while in the active military service, at advanced civil schooling and training with industry. It does not include full-time National Guard duty under Title 32, United States Code.

Army Activities

Activities of or under the control of the Army, one of its instrumentalities, or the Army National Guard, including activities for which the Army has been designated the administrative agency, and those designated activities located in an area in which the Army has been assigned single service claims responsibility by DOD directive.

Army Property

Real or personal property of the United States or its instrumentalities and, if the United States is responsible therefore, real or personal property of a foreign government which is in the possession or control of the Army, one of its instrumentalities, or the Army National Guard, including property of an activity for which the Army has been designated the administrative agency, and property located in an area in which the Army has been assigned single service claims responsibility.

Centralized Organization

That organization of a DOD component responsible for coordinating and monitoring of criminal, civil, contractual, and administrative remedies relating to contract fraud. For DOD components other than the Army, the Centralized organizations are as follows: the Office of General Counsel, Department of the Air Force; the Office of the Inspector General, Department of the Navy; and the Office of General Counsel, Defense Logistics Agency.

Claim

The Government's right to recover money or property from any individual, partnership, association, corporation, governmental body, or other legal entity (foreign and domestic) except an instrumentality of the United States. A claim against several joint debtors or tortfeasors arising from a single transaction or incident will be considered one claim.

Claims Officer

A commissioned officer, warrant officer, or qualified civilian employee designated by the responsible commander and trained or experienced in the conduct of investigations and the processing of claims.

Corruption

Practices that include, but are not limited to, solicitation, offer, payment, or acceptance of bribes or gratuities; kickbacks; conflicts of interest; or unauthorized disclosure of official information related to procurement matters.

Counsel for Consultation

An attorney, provided by DA at no expense to the military member or civilian employee, who will provide legal advice to the witness concerning the authority of OSC, the nature of an OSC interview and their individual rights and obligations. The counsel may accompany the witness to the interview and advise the witness during the interview. No attorney-client relationship is established in this procedure.

Counsel for Representation

An attorney, provided by DA at no expense to the military member or civilian employee, who will act as the individual's lawyer in all contacts with the MSPB and the OSC during the pendancy of the OSC investigation and any subsequent OSC initiated action before the MSPB. An attorney-client relationship will be established between the individual and counsel for representation.

DA Personnel

DA personnel includes the following:

a. Military and civilian personnel of the Active Army and The U.S. Army Reserve.

b. Soldiers of the Army National Guard of the United States (Title 10, U.S.C.) and, when specified by statute or where a Federal interest is involved, soldiers in the Army National Guard (Title 32, U.S.C.). It also includes technicians under 32 U.S.C. 709(a)(d).

c. USMA cadets.

d. Nonappropriated fund employees.

e. Foreign nationals who perform services for DA overseas.

f. Other individuals hired by or for the Army.

Debarment

Administrative action taken by a debarring authority to exclude a contractor from Government contracting and Government-approved subcontracting for a specified period.

Deciding Official (Chapter 7)

SJA, legal adviser, or Litigation Division attorney who makes the final determination concerning release of official information.

DOD Criminal Investigation Organizations

Refers to the USACIDC; the Naval Investigative Service; the U.S. Air Force Office of Special Investigations; and the Defense Criminal Investigative Service, Office of the Inspector General, DOD.

Fraud

Any intentional deception of DOD (including attempts and conspiracies to effect such deception) for the purpose of inducing DOD action or reliance on that deception. Such practices include, but are not limited to, the following: bid-rigging; making or submitting false statements; submission of false claims; use of false weights or measures; submission of false testing certificates; adulterating or substituting materials; or conspiring to use any of these devices.

Improper or Illegal Conduct

a. A violation of any law, rule, or regulation in connection with Government misconduct; or

b. Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Information Exempt From Release To The Public

Those categories of information which may be withheld from the public under one or more provisions of law.

Judge Advocate

An officer so designated (AR 27–1).

Legal Adviser

A civilian attorney who is the principal legal adviser to the commander or operating head of any Army command or agency.

Litigation

Legal action or process involving civil proceedings, i.e., noncriminal.

Litigation in Which The United States Has an Interest

a. A suit in which the United States or one of its agencies or instrumentalities has been, or probably will be, named as a party.

b. A suit against DA personnel and arises out of the individual's performance of official duties.

c. A suit concerning an Army contract, subcontract, or purchase order under the terms of which the United States may be required to reimburse the contractor for recoveries, fees, or costs of the litigation.

d. A suit involving administrative proceedings before Federal, state, municipal, or foreign tribunals or regulatory bodies that may have a financial impact upon the Army.

e. A suit affecting Army operations or which might require, limit, or interfere with official action.

f. A suit in which the United States has a financial interest in the plaintiff's recovery.

g. Foreign litigation in which the United States is bound by treaty or agreement to ensure attendance by military personnel or civilian employees.

Medical Care

Includes hospitalization, outpatient treatment, dental care, nursing service, drugs, and other adjuncts such as prostheses and medical appliances furnished by or at the expense of the United States.

Misdemeanor

An offense for which the maximum penalty does not exceed imprisonment for 1 year. Misdemeanors include those offenses categorized as petty offenses (18 USC § 3559).

Official Information

All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces.

Operating Forces

Those forces whose primary missions are to participate in combat and the integral supporting elements thereof. Within DA, the operating forces consist of tactical units organized to conform to tables of organization and equipment (TOE).

Personnel Action

These include—

a. Appointment.

b. Promotion.

c. Adverse action under 5 U.S.C. 7501 et seq. or other disciplinary or corrective action.

d. Detail, transfer, or reassignment.

e. Reinstatement.

f. Restoration.

g. Reemployment.

h. Performance evaluation under 5 U.S.C. 4301 et seq.

i. Decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.

j. Any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

Private Litigation

Litigation other than that in which the United States has an interest.

Process

The legal document that compels a defendant in an action to appear in court; e.g., in a civil case a summons or subpoena, or in a criminal case, a warrant for arrest, subpoena or summons.

Prohibited Personnel Practice

Action taken, or the failure to take action, by a person who has authority to take, direct others to take, recommend, or approve any personnel action—

a. That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation, as prohibited by certain specified laws.

b. To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual.

c. To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

d. To deceive or willfully obstruct any person with respect to such person's right to compete for employment.

e. To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

f. To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

g. To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. 3110) of the employee, if the position is in the agency in which the employee is serving as a public official or over which the employee exercises jurisdiction or control as an official.

h. To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower, as defined below.

i. To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule, or regulation.

j. To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.

k. To take or fail to take any other personnel action if the taking of, or failure to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

Prosecutive Authorities

These include—

a. A U.S. Attorney;

b. A prosecuting attorney of a State or other political subdivision when the U.S. Attorney has declined to exercise jurisdiction over a particular case or class of cases; and

c. An SJA of a general court-martial convening authority considering taking action against a person subject to the UCMJ.

Recovery JA

A JA or legal adviser responsible for assertion and collection of claims in favor of the United States for property claims and medical expenses.

Significant Case of Fraud and Corruption

A procurement fraud case involving an alleged loss of $100,000 or more; all corruption cases related to procurement that involve bribery, gratuities, or conflicts of interest; any defective products or product substitution in which a serious hazard to health, safety or operational readiness is indicated, regardless of loss value; and, any procurement fraud case that has received or is expected to receive significant media coverage.

Staff Judge Advocate

An officer so designated (AR 27–1). The SJA of an installation, a command or agency reporting directly to HQDA, or of a major subordinate command of the U.S. Army Materiel Command, and the senior Army JA assigned to a joint or unified command.

Subpoena

A process to cause a witness to appear and give testimony, e.g., at a trial, hearing, or deposition.

Suspension

Administrative action taken by a suspending authority to temporarily exclude a contractor from Government contracting and Government-approved subcontracting.

Suspension and Debarment Authorities

Officials designated in DFARS, section 9.403, as the authorized representative of the Secretary concerned.

Tortfeasor

A wrongdoer; one who commits a tort.

Appendix G to Part 516—Figures

This appendix contains figures cited or quoted throughout the text of this part.

Figure C–1. Sample Answer to Judicial Complaint, With Attached Certificate of Service

In the United States District Court for the Southern District of Texas Corpus Christi Division, No. C–90–100

John Doe, Plaintiff v. Togo D. West, Jr., Secretary of the Army, Department of the Army, Defendant.

First Affirmative Defense

The Complaint is barred by laches.

Figure C–3. Sample Answer to Judicial Complaint, with attached Certificate of Service. This is intended to be used as a guide in preparing a draft Answer as part of a Litigation Report.

Answer

For its answer to the complaint, defendant admits, denies and alleges as follows:

1. Admits.
2. Denies.
3. Denies.
4. The allegations contained in paragraph 4 are conclusions of law to which no response is required; to the extent they may be deemed allegations of fact, they are denied.
5. Denies the allegations contained in the first sentence of paragraph 5; admits the allegations contained in the second sentence of paragraph 5; denies the remainder of the allegations in paragraph 5.
6. Denies the allegations in paragraph 6 for lack of knowledge or information sufficient to form a belief as to their truth.
7. Denies each allegation in the complaint not specifically admitted or otherwise qualified.

Prayer for Relief

The remainder of plaintiff's Complaint contains his prayer for relief, to which no answer is required. Insofar as an answer is required, denies that plaintiff is entitled to any relief whatsoever.

Defendant respectfully prays that the Court dismiss plaintiff's Complaint and award to defendant costs and such further relief as the Court deems proper.

Respectfully submitted,

Ronald M. Ford,

United States Attorney.

Roy A. Andersen,

Assistant United States Attorney, 606 N. Carancua, Corpus Christi, Texas 78476, (512) 884–3454.

Captain Christopher N. Jones,

Department of the Army, Office of the Judge, Advocate General, 901 N. Stuart St., Suite 400, Arlington, Virginia 22203–1837, (703) 696–1666.

Certificate of Service

I hereby certify that a true and correct copy of Defendant's Answer has been placed in the mail, postage prepaid, this ____ day of _____, 1991, addressed to plaintiff's counsel as follows: Mr. Eugene Henderson, 777 Fourth Street, Corpus Christi, TX 78888.

Roy A. Andersen,

Assistant United States Attorney.

Sample DA Form 4

Figure C–3. Unsworn Declaration Under Penalty of Perjury Executed Within the United States

Declaration Under Penalty of Perjury

I am Private Paul Jones, currently assigned to Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina. I have personal knowledge of the following matters.

On the evening of 3 June 1970, I was present at the company party at Lake Popolopen when the accident occurred. I saw a bright, full moon that evening.

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on: _____

Paul Jones,

Private, U.S. Army.

Figure D–1. Format for a Request for a Representation Using an Unsworn Declaration Under Penalty of Perjury Executed Within the United States

Request for Representation

I request that the Attorney General of the United States, or his agent, designate counsel to defend me in my official and individual capacities in the case of *John Doe* v. *Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina. I have read the complaint filed in this case and I declare that all my actions were performed in my official capacity, within the scope of my official duties, and in a good faith belief that my actions conformed to the law. I am not aware of any pending related criminal investigation.

I understand the following: if my request for representation is approved, I will be represented by a U.S. Department of Justice attorney; that the United States is not required to pay any final adverse money judgment rendered against me personally, although I can request indemnification; that I am entitled to retain private counsel at my own expense; and, that the Army expresses no opinion whether I should or should not retain private counsel.

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on: _____

Paul Jones,

Private, U.S. Army.

Figure D–2. Format for Scope of Employment Statement Using an Unsworn Declaration Under Penalty of Perjury Executed Outside the United States

Declaration

I am currently the Commander of HHC, 6th Armored Division, Bad Vilbel, Germany. I have read the allegations concerning Private Paul Jones in the complaint of *John Doe* v. *Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina.

At all times relevant to the complaint, I was Private Jones' company commander. His actions relevant to this case were performed within the scope of his official duties as Assistant Charge of Quarters, Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on: _____

John Smith,

Captain, Infantry.

Figure D–3. Format for Contractor Request for Representantion

Request for Representation

I am the President of the XYZ Corporation. I request the Attorney General of the United States designate counsel to defend me and my company in *Doe* v. *XYZ, Inc.*, now pending in the U.S. District Court for the Eastern District of North Carolina.

I understand that the assumption by the Attorney General of the defense of this case does not alter or increase the obligations of the United States under United States Contract No. WP–70–660415.

I further agree that such representation will not be construed as waiver or estoppel to assert any rights which any interested party may have under said contract.

Executed on: _____

D.D. Tango,

President, XYZ, Inc.

Figure G–1. Sample "Touhy" Compliance Letter

Department of the Army, Office of the Staff Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,
Attorney At Law, 105 Hay Street, Whynot, ND 84167

Dear Mr. Taylor: We have learned that you subpoenaed Captain Roberta Selby to testify at a deposition in the case *Kramer* v. *Kramer*, currently filed in state court, and that you directed her to bring her legal assistance file concerning her client, SSG Kramer.

Under 32 CFR §§ 97.6(c), 516.35, and 516.40, the Army must authorize the appearance of its personnel or the production of official documents in private litigation. In this case, the Army cannot authorize Captain Selby to appear or produce the requested file absent the following:

You must request in writing her appearance and the production of the file in accordance with Department of Defense directives, 32 CFR § 97.6(c), and Army regulations, 32 CFR §§ 516–34—516.40. The request must include the nature of the proceeding, 32 CFR § 516.34(b), and the nature and relevance of the official information sought. *Id.* § 516.35(d). We cannot act on your request until we receive the required information. *See, for example, United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951); *Boron Oil Co.* v. *Downie*, 873 F.2d 67 (4th Cir. 1989); *United States* v. *Bizzard*, 674 F.2d 1382 (11th Cir. 1982); *United States* v. *Marino*, 658 F.2d 1120 (6th Cir. 1981); *United States* v. *Allen*, 554 F.2d 398 (10th Cir. 1977).

To overcome Federal statutory restrictions on the disclosure of the requested file imposed by the Privacy Act, 5 U.S.C. § 552a, you must provide either a written release authorization signed by the individual to whom the file pertains (that is, SSG Kramer)

or a court ordered release signed by a judge of a court of competent jurisdiction. A subpoena signed by a clerk of court, notary, or other official is insufficient. *See, for example, Doe* v. *DiGenova*, 779 F.2d 74 (DC Cir. 1985).

In this case, because of the attorney-client relationship between Captain Selby and SSG Kramer, you must produce a written waiver of the attorney-client privilege from SSG Kramer. Because the privilege may protect both documents and testimony, Captain Selby may not divulge such information without SSG Kramer's consent. *See, for example,* Rule of Professional Conduct for Army Lawyers 1.6(a).

In addition to the above requirements, Captain Selby's supervisor must approve her absence from duty. *See* 32 CFR § 516.43. In this regard, we suggest you take the deposition at Fort Smith. In any event, however, you or your client must pay all travel expenses, as this is purely private litigation and witness' appearance must be at no expense to the United States. *See id.* § 516.48(c).

Finally, if Captain Selby does appear as a witness, she may only give factual testimony. She may not testify as an opinion or expert witness. This limitation is based on Department of Defense and Army policy that generally prohibits Government employees from appearing as expert witnesses in private litigation. *See id.* §§ 97.6(e), 516.42.

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. So that the Army can adequately protect its interests in this matter, I request that you respond to this letter by 27 April 1993. If you have any questions, please call CPT Taylor at 919–882–4500.

Sincerely,

Robert V. Jackansi,

Major, JA, Chief, Administrative Law.

Figure G–2. Sample Fact Witness Approval Letter

Department of the Army, Office of the Staff Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,
Attorney At Law, 105 Hay Street, Whynot, ND 84167

Dear Mr. Taylor: This letter responds to your request to interview and depose Captain Buzz Sawyer as a witness in *Morgan* v. *Jones*. Subject to the following conditions, your request is approved.

This grant of authority is limited to factual testimony only. Captain Sawyer may not testify as an expert witness. This limitation is based on Army policy prohibiting Government employees from appearing as expert witnesses in private litigation. *See* 32 CFR § 516.42. Captain Sawyer may not provide official information that is classified, privileged, or otherwise protected from public disclosure.

The decision whether to testify in private litigation is within the discretion of the prospective witness. This authorization is also subject to the approval of the witness' supervisors to be absent during the period involved. Finally, because this is private litigation, the witness' participation must be at no expense to the United States. *See* 32 CFR § 516.48.

If you have any questions, please call CPT Taylor at 919–882–4500.

Sincerely,

Robert V. Jackansi,

Major, JA, Chief, Administrative Law

Figure G–3. Sample Expert Witness Denial Letter

Department of the Army, Office of the Staff Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,
Attorney At Law, 105 Hay Street, Whynot, ND 84167

Dear Mr. Taylor: This responds to your request for Mr. Charles Montrose to appear as an expert witness in private litigation: *Smithers* v. *ABC Video*. For the following reasons, the request is denied.

Army Regulation 27–40 forbids Army personnel from providing expert testimony in private litigation, with or without compensation, except under the most extraordinary circumstances. See 32 CFR §§ 97.6(e), 516.42. Several reasons support the exercise of strict control over such witness appearances.

The Army policy is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have a significant interest. When a witness with an official connection with the Army testifies, a natural tendency exists to assume that the testimony represents the official view of the Army, despite express disclaimers to the contrary.

The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. If Army personnel testify as expert witnesses in private litigation, their official duties are invariably disrupted, often at the expense of the Army's mission and the Federal taxpayer.

Finally, the Army is concerned about the potential for conflict of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust and confidence in the integrity of our Government.

This case does not present the extraordinary circumstances necessary to justify the requested witness' expert testimony. You have demonstrated no exceptional need or unique circumstances that would warrant (his or her) appearance. The expert testimony desired can be secured from non-Army sources. Consequently, we are unable to grant you an exception to the Army's policy.

If you have any questions, please call me or CPT Taylor at 919–882–4500.

Sincerely,

Robert V. Jackansi,

Major, JA, Chief, Administrative Law.

Figure G–4. Sample of Doctor Approval Letter

Department of the Army, Office of the Staff Judge Advocate, Fort Smith, North Dakota 84165, 15 April 1993

Mr. T. Hudson Taylor,
Attorney At Law, 105 Hay Street, Whynot, ND 84167

Dear Mr. Taylor: This responds to your request to depose Dr. (MAJ) J. McDonald, Fort Smith Medical Treatment Facility. Pursuant to 32 CFR §§ 516.33–516.49, you may depose him subject to the following conditions:

He may testify as to his treatment of his patient, Sergeant Rock, as to related laboratory tests he may have conducted, or other actions he took in the regular course of his duties.

He must limit his testimony to factual matters such as his observations of the patient or other operative facts, the treatment prescribed or corrective action taken, course of recovery or steps required for treatment of injuries suffered, or contemplated future treatment.

His testimony may not extend to hypothetical questions or to a prognosis. He may not testify as an "expert." This limitation is based on Department of Defense and Army policy prohibiting present or former military personnel and Army civilian employees from providing opinion or expert testimony concerning official information, subjects, or activities in private litigation. *See* 32 CFR §§ 97.6(e), 516.42.

The witnesses may not provide official information that is classified, privileged, or otherwise protected from public disclosure. To protect the Army's interests, CPT Taylor or another Army attorney will be present during the depositions.

To overcome restrictions imposed by the Privacy Act, 5 U.S.C. § 552a, Dr. McDonald may not discuss matters derived from the patient's medical records absent the patient's written consent or a court order signed by a judge. A subpoena issued by someone other than a judge or magistrate is insufficient. *See Doe* v. *DiGenova, 779 F.2d 74 (D.C. Cir. 1985); Stiles* v. *Atlanta Gas Light Co.*, 453 F. Supp. 798 (N.D. Ga. 1978).

The decision whether to testify in private litigation is within the discretion of the witness, subject to the approval of his supervisors to be absent during the period involved.

Finally, because this is private litigation, the witnesses' participation must be at no expense to the United States. *See* 32 CFR § 516.48.

If you have any questions, please call me or CPT Taylor at 919–882–4500.

Sincerely,

Robert V. Jackansi,

Major, JA, Chief, Administrative Law.

Figure H–1. Procurement Fraud Indicators

Procurement Fraud Indicators

1. During the identification of the government and services.

a. Need determinations for items currently scheduled for disposal or reprocurement, or which have predetermined reorder levels.

b. Excessive purchase of "expendables" such as drugs or auto parts.

c. Inadequate or vague need assessment.

d. Frequent changes in the need assessment or determination.

e. Mandatory stock levels and inventory requirements appear excessive.

f. Items appear to be unnecessarily declared excess or sold as surplus, while same items are being reprocured.

g. It appears that an item or service is being purchased more as a result of aggressive marketing efforts rather than in response to a valid requirement.

h. Need determination appears to be unnecessarily tailored in ways that can only be met by certain contractors.

i. Items and services are continually obtained from the same source due to an unwarranted lack of effort to develop second sources.

2. During the development of the statements of work and specifications.

a. Statements of work and specifications appear to be intentionally written to fit the products or capabilities of a single contractor.

b. Statements of work, specifications, or sole source justifications developed by or in consultation with a preferred contractor.

c. Information concerning requirements and pending contracts is released only to preferred contractors.

d. Allowing companies and industry personnel who participated in the preparation of bid packages to perform on subsequent contracts in either a prime or subcontractor capacity.

e. Release of information by firms or personnel participating in design or engineering to companies competing for prime contract.

f. Prequalification standards or specifications appear designed to exclude otherwise qualified contractors or their productions.

g. Requirements appear split up to allow for rotating bids, giving each contractor his or her "fair share."

h. Requirements appear split up to meet small purchase requirements (that is, $25,000) or to avoid higher levels of approval that would be otherwise required.

i. Bid specifications or statement of work appear inconsistent with the items described in the general requirements.

j. Specifications appear so vague that reasonable comparisons of estimate would be difficult.

k. Specifications appear inconsistent with previous procurements of similar items of services.

3. During the presolicitation phase.

a. Sole source justifications appear unnecessary or poorly supported.

b. Statements justifying sole source or negotiated procurements appear inadequate or incredible.

c. Solicitation documents appear to contain unnecessary requirements which tend to restrict competition.

d. Contractors or their representatives appear to have received advanced information related to the proposed procurement on a preferential basis.

4. During the solicitation phase.

a. Procurement appears to be processed so as to exclude or impede certain contractors.

b. The time for submission of bids appears to be unnecessarily limited so that only those with advance information have adequate time to prepare bids or proposals.

c. It appears that information concerning the procurement has been revealed only to certain contractors, without being revealed to all prospective competitors.

d. Bidders conferences are conducted in a way that apparently invites bid rigging, price fixing, or other improper collusion between contractors.

e. There is an apparent intentional failure to fairly publish notice of the solicitation.

f. Solicitation appears vague as to the details such as time, place and manner, of submitting acceptable bids.

g. There is evidence of improper communications or social contract between contractors and government personnel.

h. Controls over the number and destination of bid packages sent to interested bidders appear inadequate.

i. Indications that government personnel or their families may own stock or have some other financial interest in either a contractor or subcontractor.

j. Indications that government personnel are discussing possible employment for themselves or a family member with a contractor or subcontractor or indications that a proposal for future employment from a contractor or subcontractor to a government employee or his or her family members has not been firmly rejected.

k. Indications that any contractor has received special assistance in preparation of his or her bid or proposal.

l. It appears that a contract is given an expressed or implied reference to a specific subcontractor.

m. Failure to amend solicitation to reflect necessary changes or modifications.

5. During the submission of bids and proposals.

a. Improper acceptance of a late bid.

b. Documents, such as receipts, appear falsified to obtain acceptance of a late bid.

c. Improperly attempting to change a bid after other bidders prices are known.

d. Indications that mistakes have been deliberately planted in a bid to support correction after bid opening.

e. Withdrawal by a low bidder who may later become a subcontractor to a higher bidder who gets the contract.

f. Apparent collusion or bid rigging among the bidders.

g. Bidders apparently revealing their prices to each other.

h. Required contractor certifications appear falsified.

i. Information concerning contractor's qualifications, finances, and capabilities appears falsified.

6. During the evaluation of bids and proposals.

a. Deliberately losing or discarding bids of certain contractors.

b. Improperly disqualifying the bids or proposals of certain contractors.

c. Accepting apparently nonresponsive bids from preferred contractors.

d. Unusual or unnecessary contacts between government personnel and contractors during solicitation, evaluation, and negotiation.

e. Any apparently unauthorized release of procurement information to a contractor or to non-government personnel.

f. Any apparent favoritism in the evaluation of the bid or proposal of a particular contractor.

g. Apparent bias in the evaluation criteria or in the attitude or actions of the members of the evaluation panel.

7. During contract formation and administration.

a. Defective pricing by the contractor usually associated with submitting false cost and pricing data under the Truth in Negotiation Act.

b. Cost/Labor mischarging.

c. Product substitution.

d. Progress payment fraud. For more details on these subjects see DA PAM 27-153, Contract Law, paragraph 23-5.

Figure H-2. Guide for Preparing Remedies Plan

Guide for Preparing a Remedies Plan

(Date of Plan)

Section I (Administrative Data)

A. Subject of Allegation.
B. Principal Investigative Agency.
C. Investigative Agency File Number.
D. Subject's Location.
E. Location Where Offense Took Place.
F. Responsible Action Commander.
G. Responsible MACOM.
H. Contract Administrative Data (If Applicable):
  1. Contract Number.
  2. Type of Contract.
  3. Dollar Amount of Contract.
  4. Period of Contract.
I. Principal Case Agent (Name and Telephone Number).
J. Civilian Prosecutor (If Applicable) (Name, Address, and Telephone Number).
K. Is Grand Jury Investigating This Matter? If So, Where is Grand Jury Located?
L. Audit Agency Involved (If Applicable). Name and Telephone Number of Principal Auditor.
M. Suspense Date for Update of This Plan.

Section II (Summary of Allegations and Investigative Results to Date)

(Provide sufficient detail for reviewers of the plan to evaluate the appropriateness of the planned remedies. If information is "close-hold" or if grand jury secrecy applies, so state.)

Section III (Adverse Impact Statement)

(Describe any adverse impact on the DA/DOD mission. Adverse impact is described in DOD Directive 7050.5, paragraph E.1.g. Identify impact as actual or potential. Describe the impact in terms of monetary loss, endangerment to personnel or property, mission readiness, etc. This information should be considered in formulating your remedies as described below and provided to prosecutors for their use in prosecution of the offenses.)

Section IV (Remedies Taken and/or Being Pursued)

A. Criminal Sanctions. (As a minimum, address the following: Are criminal sanctions appropriate? If so, which ones? If not, why not? Has the local U.S. Attorney or other civilian prosecutor been notified and briefed? What actions have been taken or are intended? If and when action is complete, describe action and final results of the action. Other pertinent comments should be included.)

B. Civil Remedies. (As a minimum address the following: Which civil remedies are appropriate? Has the local U.S. Attorney or other civilian prosecutor been notified and briefed? How, when, where and by whom are the appropriate civil remedies implemented? If and when action is completed, describe action and final results. Other pertinent comments should be included.)

C. Contractual/Administrative Remedies. (As a minimum, address the following: Are contractual and administrative remedies appropriate; If so, which ones? If not, Why? If contractual or administrative remedies are considered appropriate, describe how, when, and by whom the remedies are implemented. If and when action is completed, describe action and results of the action. Other pertinent comments should be included.)

D. Restrictions on Remedies Action. (Comment as to why obvious remedies are not being pursued. For example, the U.S. Attorney requests suspension action held in abeyance pending criminal action.)

Section V (Miscellaneous Comments/ Information)

Section VI (Remedies Plan Participants)

(Record the name, grade, organization, and telephone number of all Remedies Plan participants.)

Section VII (MACOM Coordination Comments)

(Record the name, grade, office symbol, and telephone number of all MACOM officials providing coordination comments; record the date when comments are submitted and append to the Remedies Plan the signed comments provided.)

MACOM Focal Point

(Record the name, grade, office symbol, and telephone number of the MACOM focal point.)

Section VIII (Coordination/Comments)

(Record the name, grade, organization, office symbol, and telephone number of all officials with whom you have coordinated the Remedies Plan or who have provided comments on your plan; append any comments provided to the Remedies Plan.)

Figure H–3. Guide for Testing Defective Items Under Criminal or Civil Investigation

Testing Defective Items Under Criminal or Civil Investigation

1. Under no circumstances is testing to proceed unless the command has committed sufficient funding to cover the entire cost of the projected testing.

2. No testing will be initiated unless there has been a written request for the testing to the appropriate Procurement Fraud Advisor from a criminal investigator or Assistant United States Attorney or Department of Justice Attorney (AUSA is used in these procedures to indicate either an AUSA or Department of Justice attorney). If they have not already done so, criminal investigators should be requested to coordinate their testing requests with the AUSA overseeing the investigation.

3. Barring extraordinary circumstances, only one test will be conducted to support the criminal and civil recovery efforts of a procurement fraud/irregularity matter. Early coordination with the Civil Division of Department of Justice or the local United States Attorneys Office is necessary to ensure that testing funds are not wasted.

4. The request for testing should include a clear, concise statement of the purpose of the testing to include a statement of the allegations made and the contact number(s) involved. *Any test plan which requires destructive testing must be approved by the AUSA.*

5. No testing will be initiated unless a test plan has been developed which states the following:

a. the contract number(s) involved
b. the National Stock Number (NSN) of the item to be tested
c. the purpose of the testing
d. the alleged defect or the contractual requirement violated
e. the CID report of investigation (ROI) number or the DCIS case number
f. cost of the test (a cost proposal should be an attachment to the test plan)
g. where the test will be conducted
h. how the test will be conducted
i. the name and telephone number of the test team leader
j. the names of all test team members
k. the approximate dates of the testing
l. the date that completion of the test is required
m. a clear statement of the desired product (that is test report, raw data, analysis of results, evaluation of test results)
n. the PRON to fund the testing
o. a retention plan.

6. The test plan shall be coordinated with the concurrence received in advance from the appropriate personnel in the Procurement Directorate, Product Assurance and Test Directorate, the Procurement Fraud Advisor, and the investigator/AUSA requesting the test. No testing will be initiated until the criminal investigator/AUSA who requested the testing has approved the test plan.

7. If the items tested are to be retained as evidence, the criminal investigator should arrange for retention of the evidence. While the Command will support evidence retention, this is primarily the responsibility of the criminal investigators. Agents should be advised that putting items in Code L or similar non-use status is insufficient to protect it from being released to the field. *A decision not to retain the tested items as evidence must have the approval of the AUSA.*

8. All items to be tested should be from a statistically valid random sample. The sample should conform with the inspection requirements of the contract or be in conformance with a random sample specifically developed for the instant test plan. It is recommended that a statistician be consulted to determine the feasibility of a random sample specifically created to support the test plan.

9. Results of testing should be available to Command and DA personnel for appropriate contractual and administrative remedies. Any request for testing results that indicates that dissemination of the testing results will be limited by Rule 6(e) of the Federal Rules of Criminal Procedure is to be forwarded through the MACOM or AMC Procurement Fraud Coordinator to DA Procurement Fraud Division prior to the initiation of any testing.

10. Resolution of problems associated with testing requests should be conducted at the local level. In AMC the authority to refuse a testing request resides with the Office of Command Counsel. Any disputes which cannot be resolved at the local level will be forwarded to the AMC or MACOM Procurement Fraud Coordinator for resolution. This includes disputes regarding funding or any time sensitive issues.

11. Second requests for testing of the same item due to a change in the investigative plan require coordination by the PFA with the investigator *and* AUSA overseeing the investigation to determine the deficiencies in the earlier test. Disputes which cannot be resolved between the AUSA, PFA, and investigator regarding testing are to be forwarded simultaneously to the MACOM Procurement Fraud Coordinator and PFD for resolution. The procedures established in paragraphs 5 and 6 apply for second requests for testing with the additional requirement that the Assistant United States Attorney must be requested to approve the test plan.

Figure I–1. Guide for Seeking Legal Advice and Representation Before Office of Special Counsel

Guide for Seeking Legal Advice and Representation Before Office of Special Counsel

1. Overview

a. DA employees or military members asked to provide information (testimonial or documentary) to OSC may obtain legal advice through the Labor Counselor from DA attorneys concerning their rights and obligations. This includes assistance at any interviews with OSC investigators. However, an attorney-client relationship will not be established unless the employee or military member—

(1) Is suspected or accused by the OSC of committing a prohibited personnel practice or other illegal or improper act; and

(2) Has been assigned counsel by the DA General Counsel.

b. Any military member or employee who reasonably believes that he or she is suspected or has been accused by OSC of committing a prohibited personnel practice or other illegal or improper act may obtain legal representation from DA. The counsel assigned will be from another DOD component whenever a DA attorney is likely to face a conflict between the attorney's ethical obligation to the client and DA, or when the suspected or accused individual

has requested representation from another DOD component. Outside legal counsel may be retained by DA on behalf of the member or employee under unusual circumstances and only with the personal approval of the DOD General Counsel.

c. The DA General Counsel will determine whether a conflict is likely to occur if a DA attorney is assigned to represent a military member or civilian. If the DA General Counsel determines a conflict may occur, or if the suspected or accused employee has requested representation from another DOD component, the DA General Counsel will seek the assistance of another General Counsel in obtaining representation outside DA.

2. Requests for Representation

a. To obtain legal representation, military members or civilian employees must—

(1) Submit a written request for legal representation through the Labor and Employment Law Office, Office of the Judge Advocate General, Department of the Army, to DA General Counsel, explaining the circumstances that justify legal representation. Copies of all process and pleadings served should accompany the request.

(2) Indicate whether private counsel, at personal expense, has been retained.

(3) Obtain written certification from their supervisor that—

(a) They were acting within the scope of official duties; and

(b) DA has not initiated any adverse or disciplinary action against them for the conduct being investigated by the OSC.

b. Requests for DA legal representation must be approved by the DA General Counsel.

c. The conditions of legal representation must be explained and accepted in writing by the member or employee.

3. Limitations on Representation

a. DA will not provide legal representation with respect to a DA initiated disciplinary action against a civilian employee for committing or participating in a prohibited personnel practice or for engaging in illegal or improper conduct. This prohibition applies regardless of whether the participation or conduct is also the basis for the disciplinary action proposed by the OSC.

b. In certain situations, counsel provided by DA may be limited to representing the individual only with respect to some of the pending matters, if other specific matters of concern to the OSC or MSPB do not satisfy the requirements contained in this regulation.

4. Attorney-Client Relationship

a. An attorney-client relationship will be established and continued between the suspected or accused individual and assigned DA counsel.

b. In representing a DA employee or military member, the DA attorney designated as counsel will act as a vigorous advocate of the individual's legal interests before the OSC or MSPB. The attorney's professional responsibility to DA will be satisfied by fulfilling this responsibility to the employee or military member. Legal representation may be terminated only with the approval of the DA General Counsel and normally only on the basis of information not available at the time the attorney was assigned.

c. The attorney-client relationship may be terminated if the assigned DA counsel determines, with the approval of the DA General Counsel, that—

(1) The military member or civilian employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge; and

(2) Termination is not in violation of the rules of professional conduct applicable to the assigned counsel.

d. The DA attorney designated as counsel may request relief from the duties of representation or counseling without being required to furnish explanatory information that might compromise confidential communications between the client and the attorney.

5. Funding

This regulation authorizes cognizant DA officials to approve requests from military members or civilian employees for travel, per diem, witness appearances, or other departmental support necessary to ensure effective legal representation by the designated counsel.

6. Status

A military member's or civilian employee's participation in OSC investigations, MSPB hearings, and other related proceedings will be considered official departmental business for time and attendance requirements and similar purposes.

7. Advice to Witnesses

The following advice to military members and civilian employees questioned during the course of an OSC investigation may be appropriate in response to these frequent inquiries:

a. A witness may decline to provide a "yes" or "no" answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's question.

b. Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

c. Means to ensure verifications of an interview by OSC investigators are appropriate, whether or not the military member or civilian employee is accompanied by counsel. Tape recorders may only be used for this purpose when—

(1) The recorder is used in full view.

(2) All attendees are informed.

(3) The OSC investigator agrees to record the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the investigator should be corrected before the member or employee signs the statement. The military member or civilian employee is not required to sign any written summary that is not completely accurate. A military member or civilian employee may receive a copy of the summary as a condition of signing.

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Federal Register

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July 27, 1994

Part III

Department of Labor

Office of the Secretary

29 CFR Part 95

Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, et cetera.; Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 95

Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals and Other Non-Profit Organizations, and With Commercial Organizations, Foreign Governments, Organizations Under the Jurisdiction of Foreign Governments, and International Organizations

AGENCY: Office of the Secretary, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor is issuing these regulations pursuant to the requirements of the Office of Management and Budget (OMB) Circular No. A–110 (Revised), which provides standards for obtaining consistency and uniformity among Federal agencies in the administration of grants and agreements with institutions of higher education, hospitals, and other non-profit organizations. This rule also applies to the Department of Labor's grants to commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments and international organizations.

OMB issued Circular A–110 in 1976 and, except for a minor revision in February 1987, the Circular remained unchanged until revised in 1993. To update the Circular, OMB established an interagency task force to review the Circular. The task force solicited suggestions for changes to the Circular from university groups, non-profit organizations and other interested parties and compared for consistency the provisions of similar provisions applied to State and local governments. The revised Circular and these regulations reflect the results of these efforts.

EFFECTIVE DATE: This rule is effective on July 27, 1994.

ADDRESSES: U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Directorate of Administrative and Procurement Programs, Room S–1522, 200 Constitution Ave., NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Melvin Goldberg, Office of Acquisition Integrity, Division of Procurement and Grant Policy. Telephone 202–219–9174, Extension 109 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

A. Background

OMB published a notice in the **Federal Register** (57 FR 39018) on August 27, 1992, requesting comments on proposed revisions to OMB Circular A–110. Interested parties were invited to submit comments. OMB received over 200 comments from Federal agencies, non-profit organizations, professional organizations and others. All comments were considered in developing this final revision.

On November 29, 1993, at 58 FR 62992, OMB published a notice containing its final revision to Circular A–110. In that publication, OMB presented a summary of the major comments, grouped by subject, and a response to each comment. Other changes were made to increase clarity and readability.

Omitted from part 95 are requirements which DOL must meet pursuant to the Circular. Those requirements deal with the relationship between DOL and OMB and are not necessary to this rulemaking. OMB Circular A–110 gives Federal agencies the discretion to make these regulations applicable to grants and agreements awarded to commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments, and international organizations. The Department of Labor has chosen to do so. As permitted by OMB Circular A–110, the Department has made a few changes to the language of the Circular to fit the particular circumstances of the DOL programs. The Department has added a definition of "commercial organizations" and revised the definition of "program income" for clarification purposes. The Department also has revised the language in § 95.25(e)(2), dealing with extensions, for editorial purposes. The Department has deleted the words "at least" from § 95.22(e)(2) to enhance administrative efficiency by limiting invoicing to once a month. Other minor editorial, technical, and clarifying changes are made as well.

B. Publication in Final

The Department of Labor has determined, pursuant to 5 U.S.C. 553(b)(B), that good cause exists for waiving public comment on this procedural amendment to the regulation because such comment is unnecessary, impracticable, and contrary to the public interest. This finding is made because all executive agencies are required to follow OMB directives with respect to grants or assistance of property. See 41 U.S.C. § 405 (The Office of Federal Procurement Policy Act).

C. Dates

The Department has determined that good cause exists for waiving the customary requirement for delay in the effective date of a final rule for 30 days following its publication. Therefore, this rule shall be effective July 27, 1994. See 5 U.S.C. 553.

D. Procedural Matters

This rule is not a "significant regulatory action" as defined by section 3(f) of Executive Order 12866. Since this rule was not preceded by a proposed rule, a regulatory flexibility analysis is not required. See 5 U.S.C. 601(2). Further, the Department of Labor certifies that the rule will not have a significant economic impact on a substantial number of small entities, because it does not affect the amount of funds provided in the covered programs, but, rather, modifies and updates administrative and procedural requirements. The recordkeeping requirements in this rule have been approved by the Office of Management and Budget, as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, Approval Number 1225–0017.

List of Subjects

29 CFR Part 95

Grants programs, Grants administration, Government contracts, Reporting and record-keeping requirements.

For the reasons set out in the preamble, subtitle A of title 29 of the *Code of Federal Regulations* is amended, by adding a new part 95, as set forth below.

Signed at Washington, DC, this 18th day of July, 1994.

Cynthia A. Metzler,

Assistant Secretary for Administration and Management.

PART 95—GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS, AND WITH COMMERCIAL ORGANIZATIONS, FOREIGN GOVERNMENTS, ORGANIZATIONS UNDER THE JURISDICTION OF FOREIGN GOVERNMENTS, AND INTERNATIONAL ORGANIZATIONS

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95.10 Purpose.
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95.21 Standards for financial management systems.
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95.50 Purpose of reports and records.
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95.60 Purpose of termination and enforcement.
95.61 Termination.
95.62 Enforcement.

Subpart D—After-the-Award Requirements

95.70 Purpose.
95.71 Closeout procedures.
95.72 Subsequent adjustments and continuing responsibilities.
95.73 Collection of amounts due.

Appendix A to Part 95—Contract Provisions

Authority: 5 U.S.C. 301; OMB Circular A–110; Secretary of Labor's Order 4–76.

Subpart A—General

§ 95.1 Purpose.

This part establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, other non-profit organizations, commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments, and international organizations. DOL shall not impose additional or inconsistent requirements, except as provided in §§ 95.4 and 95.14 or unless specifically required by Federal statute or executive order. Non-profit and commercial organizations that implement Federal programs for the States are also subject to State requirements.

§ 95.2 Definitions.

(a) *Accrued expenditures* means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

(b) *Accrued income* means the sum of:

(1) Earnings during a given period from

(i) Services performed by the recipient, and

(ii) Goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

(c) *Acquisition cost of equipment* means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(d) *Advance* means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

(e) *Award* means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by DOL to an eligible recipient. The term does not include: technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

(f) *Cash contributions* means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

(g) *Closeout* means the process by which DOL determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DOL.

(h) *Commercial organization* means any business entity organized primarily for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in or outside the United States. The term includes, but is not limited to, an individual, partnership, corporation, joint venture, association, or cooperative.

(i) *Contract* means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

(j) *Cost sharing or matching* means that portion of project or program costs not borne by DOL.

(k) *Date of completion* means the date on which all work under an award is completed or the date on the award document, or any supplement or

amendment thereto, on which DOL sponsorship ends.

(l) *Disallowed costs* means those charges to an award that DOL determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

(m) *DOL* means the U.S. Department of Labor, including its agencies and organizational units.

(n) *Equipment* means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. However, consistent with recipient policy, lower limits may be established. Equipment includes, but is not limited to, equipment acquired before the publication of these regulations and equipment transferred from prior years.

(o) *Excess property* means property under the control of DOL that, as determined by the Secretary of Labor, is no longer required for its needs or the discharge of its responsibilities.

(p) *Exempt property* means tangible personal property acquired in whole or in part with Federal funds, where DOL has statutory authority to vest title in the recipient without further obligation to the Federal Government.

(q) *Federal agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

(r) *Federal awarding grantor agency* means the Federal agency that provides an award to the recipient.

(s) *Federal funds authorized* means the total amount of Federal funds obligated by DOL for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by DOL's regulations or DOL's implementing instructions.

(t) *Federal share* of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

(u) *Funding period* means the period of time when Federal funding is available for obligation by the recipient.

(v) *Grant officer* means any person authorized to enter into, modify or terminate any financial assistance awards and make related determinations and findings. DOL grant officers shall be designated by name on a "Certificate of Appointment."

(w) *Intangible property and debt instruments* means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

(x) *Obligations* means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

(y) *Outlays or expenditures* means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

(z) *Personal property* means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

(aa) *Prior approval* means written approval by an authorized official evidencing prior consent.

(bb) *Program income* means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in § 95.24(e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

(cc) *Project costs* means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

(dd) *Project period* means the period established in the award document during which Federal sponsorship begins and ends.

(ee) *Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

(ff) *Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment. Real property includes, but is not limited to, real property acquired before publication of these regulations and real property transferred from prior years.

(gg) *Recipient* means an organization receiving financial assistance directly from DOL to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term also includes commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

(hh) *Research and development* means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. "Research" is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. "Development" is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also

includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(ii) *Small awards* means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. § 403(11) (currently $25,000).

(jj) *Subaward* means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of "award" in paragraph (e) of this section.

(kk) *Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term includes foreign organizations and international organizations (such as agencies of the United Nations).

(ll) *Supplies* means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(mm) *Suspension* means an action by DOL that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under DOL's regulations at 29 CFR part 98, implementing E.O.'s 12549 and 12689, "Debarment and Suspension." See 29 CFR part 98, subpart D.

(nn) *Termination* means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

(oo) *Third party in-kind contributions* means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

(pp) *Unliquidated obligations*, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

(qq) *Unobligated balance* means the portion of the funds authorized by DOL that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(rr) *Unrecovered indirect cost* means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

(ss) *Working capital advance* means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 95.3 Effect on other issuances.

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this part shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 95.4.

§ 95.4 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum grant-wide uniformity, exceptions from the requirements of this part shall be permitted only in unusual circumstances. DOL may apply more restrictive requirements to a class of recipients when approved by OMB. DOL may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by DOL.

§ 95.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals, other non-profit organizations, commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments, and international organizations. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," and codified by DOL at 29 CFR part 97 or its successor.

Subpart B—Pre-Award Requirements

§ 95.10 Purpose.

Sections 95.11 through 95.17 prescribe forms and instructions and other pre-award matters to be used in applying for Federal awards.

§ 95.11 Pre-award policies.

Public Notice and Priority Setting. Federal awarding agencies shall notify the public of its intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 95.12 Forms for applying for Federal assistance.

(a) Applicants shall use the SF–424 series or those forms and instructions prescribed by DOL.

(b) The applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from DOL or the *Catalog of Federal Domestic Assistance*. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

§ 95.13 Debarment and suspension.

Recipients shall comply with the nonprocurement debarment and suspension common rule implementing E.O.'s 12549 and 12689, "Debarment and Suspension" codified by DOL at 29 CFR part 98. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 95.14 Special award conditions.

If an applicant or recipient:

(a) Has a history of poor performance,

(b) Is not financially stable,

(c) Has a management system that does not meet the standards prescribed in this part,

(d) Has not conformed to the terms and conditions of a previous award, or

(e) Is not otherwise responsible,

DOL may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: The nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

§ 95.15 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205), declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. DOL shall follow the provisions of E.O. 12770, "Metric Usage in Federal Government Programs."

§ 95.16 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 codified at 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with Section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 95.17 Certifications and representations.

Unless prohibited by statute or codified regulation, DOL requires recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis only, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

Subpart C—Post-Award Requirements

Financial and Program Management

§ 95.20 Purpose of financial and program management.

Sections 95.21 through 95.28 prescribe standards for financial management systems, methods for making payments and rules for: Satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 95.21 Standards for financial management systems.

(a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following:

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 95.52. Though DOL requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, "Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, DOL, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) DOL may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, "Surety Companies Doing Business with the United States."

§ 95.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(1) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(2) Financial management systems that meet the standards for fund control and accountability as established in § 95.21.

Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by DOL to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients are authorized to submit requests for advances monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, "Request for Advance or Reimbursement," or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special DOL instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. DOL may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, DOL shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients are authorized to submit requests for reimbursement monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and DOL has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, DOL may provide cash on a working capital advance basis. Under this procedure, DOL shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, DOL shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, DOL shall not withhold payments for proper charges made by recipients at any time during the project period unless paragraphs (h)(1) or (h)(2) of this section apply.

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements.

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A–129, "Managing Federal Credit Programs." Under such conditions, DOL may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows:

(1) Except for situations described in paragraph (i)(2) of this section, DOL shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (k)(1), (k)(2), or (k)(3) of this section apply.

(1) The recipient receives less than $120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

In keeping with Electronic Funds Transfer rules, (31 CFR Part 206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIRE Deposit system. Recipients who do not have this capability should use a check.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from DOL, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this part, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. DOL shall not require more than an original and two copies of these forms.

(1) SF–270, Request for Advance or Reimbursement. The SF–270 is the standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. DOL, however, has the option of using this form for construction programs in lieu of the SF–271, "Outlay Report and Request for Reimbursement for Construction Programs."

(2) SF–271, Outlay Report and Request for Reimbursement for Construction Programs. The SF–271 is the standard form to be used for requesting reimbursement for construction programs. However, DOL may *substitute* the SF–270 when DOL determines that it provides adequate information to meet Federal needs.

§ 95.23 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other Federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by DOL.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with prior written approval of the grant officer.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If DOL authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of the value determined under paragraph (c)(1) or paragraph (c)(2) of this section.

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the grant officer may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if paragraph (g)(1) or (g)(2) of this section apply.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the grant officer has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§ 95.24 Program income.

(a) Except as provided in paragraph (e) of this section, program income earned during the project period shall be retained by the recipient and added to funds committed to the project by DOL and recipient, and used to further eligible project or program objectives.

(b) Recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(c) Costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(d) Proceeds from the sale of property are not program income and shall be handled in accordance with the requirements of the Property Standards (See §§ 95.30 through 95.37).

(e) Unless DOL's regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 95.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon DOL's requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior written

approvals from the grant officer for one or more of the following program or budget changes:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25-percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa.

(6) The inclusion, unless waived by the grant officer, of costs that require prior approval in accordance with OMB Circular A–21, "Cost Principles for Institutions of Higher Education," OMB Circular A 122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74, Appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, the grant officer may waive cost-related and administrative prior written approvals required by this part and OMB Circulars A–21 and A–122. Such waivers may include authorizing recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior written approval of the grant officer. All pre-award costs are incurred at the recipient's risk (i.e., the grant officer is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply. For one-time extensions, the recipient must notify the grant officer in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances. The one-time extension may not be initiated if:

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the grant officer provides otherwise in the award or in DOL's regulations, the prior written approval requirements described in paragraph (e) are automatically waived (i.e., recipients need not obtain such prior written approvals) unless one of the conditions included in paragraph (e)(2) applies.

(f) DOL may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by DOL. DOL shall not permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j), do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the grant officer for budget revisions whenever paragraphs (h)(1), (h)(2) or (h)(3) of this section apply.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 95.27.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When DOL makes an award that provides support for both construction and nonconstruction work, DOL may require the recipient to request prior written approval before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, recipients shall notify the grant officer in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5,000 or five percent of the award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting written approval for budget revisions, recipients shall use the budget forms that were used in the application.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the grant officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the grant officer shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 95.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations shall be subject to the audit requirements contained in OMB Circular A–133, "Audits of Institutions of Higher Education and Other Non-Profit Institutions" and applicable provisions of DOL regulations at 29 CFR part 96.

(b) Recipients and subrecipients that are State and local governments shall be subject to the audit requirements contained in the Single Audit Act (31 U.S.C. 7501–7) and DOL's regulations implementing OMB Circular A–128, "Audits of State and Local Governments" and applicable provisions of DOL regulations at 29 CFR part 96.

(c) Hospitals not covered by the audit provisions of OMB Circular A–133 shall be subject to the audit requirements of DOL. See 29 CFR part 96.

(d) Commercial organizations shall be subject to the audit requirements specified by the DOL awarding agency or the prime recipient as incorporated into the award document. See 29 CFR part 96.

§ 95.27 Allowable costs.

For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the

entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A–87, "Cost Principles for State and Local Governments." The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A–122, "Cost Principles for Non-Profit Organizations." The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A–21, "Cost Principles for Educational Institutions." The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals." The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

§ 95.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by DOL.

Property Standards

§ 95.30 Purpose of property standards.

Sections 95.31 through 95.37 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. Recipients are required to observe these standards under awards and no additional requirements shall be imposed, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 95.31 through 95.37.

§ 95.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 95.32 Real property.

DOL shall prescribe requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following:

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of DOL.

(b) The recipient shall obtain prior written approval from the grant officer for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by DOL.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the grant officer. The grant officer shall issue one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by DOL and pay DOL for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 95.33 Federally-owned and exempt property.

(a) Federally-owned property.

(1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to DOL. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to DOL for further Federal agency utilization.

(2) If DOL has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless DOL has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710(i)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, "Improving Mathematics and Science Education in Support of the National Education Goals.") Appropriate instructions shall be issued to the recipient by DOL.

(b) Exempt property.

When statutory authority exists, DOL has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions DOL considers appropriate. Such property is "exempt property." Should DOL not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 95.34 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of the grant officer. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally, sponsored activities, in the following order of priority:

(1) Activities sponsored by the DOL agency which funded the original project, then

(2) Activities sponsored by other Federal awarding agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the DOL agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the grant officer. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the written approval of the grant officer.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following:

(1) Equipment records shall be maintained accurately and shall include the following information:

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates DOL for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the grant officer.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of $5,000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original DOL agency. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from DOL. The DOL agency shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within the DOL agency, the availability of the equipment shall be reported to the General Services Administration by DOL to determine whether a requirement for the equipment exists in other Federal agencies. DOL shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern.

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse DOL an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by the awarding agency for such costs incurred in its disposition.

(4) The DOL agency reserves the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards:

(i) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(ii) The DOL agency shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with grant funds and federally-owned equipment. If DOL fails to issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(iii) When DOL exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 95.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 95.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. DOL reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."

(c) DOL has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award.

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without written approval of the grant officer. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 95.34(g).

§ 95.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Grant officers may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

Procurement Standards

§ 95.40 Purpose of procurement standards.

Sections 95.41 through 95.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by DOL upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 95.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to DOL, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 95.42 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 95.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 95.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a)(1), (a)(2), and (a)(3) of this section apply.

(1) Recipients shall avoid purchasing unnecessary items.

(2) Where appropriate, an analysis shall be made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services shall provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal:

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration, the Department of Commerce's Minority Business Development Agency, and DOL's Office of Small Business and Minority Affairs in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.'s 12549 and 12689, "Debarment and Suspension." See 29 CFR part 98.

(e) Recipients shall, on request, make available to DOL, pre-award and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 95.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 95.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum: (a) basis for contractor selection, (b) justification for lack of competition when competitive bids or offers are not obtained, and (c) basis for award cost or price.

§ 95.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 95.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts:

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, DOL may accept the bonding policy and requirements of the recipient, provided DOL has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the

contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, DOL, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable.

Reports and Records

§ 95.50 Purpose of reports and records.

Sections 95.51 through 95.53 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 95.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 95.26.

(b) DOL shall prescribe the frequency with which performance reports shall be submitted. Except as provided in paragraph (f) of this section, performance reports shall not be required more frequently than quarterly or, less frequently than annually. Annual reports shall be due 90 calendar days after the grant year; quarterly or semi-annual reports shall be due 30 days after the reporting period. DOL may require annual reports before the anniversary dates of multiple-year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify DOL of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) DOL may make site visits, as needed.

(h) DOL shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

(Approved by the Office of Management and Budget, Approval Number 1225–0017)

§ 95.52 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients:

(1) SF–269 or SF–269A, Financial Status Report.

(i) Recipients shall use the SF–269, SF–269A, or other OMB-approved forms to report the status of funds for all nonconstruction projects or programs. DOL may, however, have the option of not requiring the SF–269 or SF–269A when the SF–270, Request for Advance or Reimbursement, or SF–272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) DOL shall prescribe whether the report shall be on a cash or an accrual basis. If DOL requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) DOL shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) Recipients shall submit to DOL the SF–269, SF–269A, or other OMB-approved forms (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by DOL upon request of the recipient.

(2) SF–272, Report of Federal Cash Transactions.

(i) When funds are advanced to recipients, the recipient shall submit the SF–272 and, when necessary, its continuation sheet, SF–272a. DOL shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) DOL may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, DOL may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. The DOL agency may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) DOL may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in DOL's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or,

(C) When the electronic payment mechanisms provide adequate data.

(b) When DOL needs additional information or more frequent reports, the following shall be observed.

(1) When additional information is needed to comply with legislative requirements, DOL shall issue instructions to require recipients to submit such information under the "Remarks" section of the reports.

(2) When DOL determines that a recipient's accounting system does not meet the standards in § 95.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. DOL, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) DOL may shade out any line item on any report if not necessary.

(4) DOL may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) DOL may provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

(Approved by the Office of Management and Budget, Approval Number 1225–0017)

§ 95.53 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. DOL shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by DOL. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by DOL, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc., as specified in paragraph (g) of this section.

(c) Copies of original records may be substituted for the original records if authorized by DOL.

(d) DOL shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, DOL may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Federal grantor awarding agency, the Inspector General, the Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, DOL shall not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when DOL can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. § 552) if the records had belonged to DOL.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to DOL or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to DOL or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(Approved by the Office of Management and Budget, Approval Number 1225–0017)

Termination and Enforcement

§ 95.60 Purpose of termination and enforcement.

Sections 95.61 and 95.62 set forth uniform suspension, termination and enforcement procedures.

§ 95.61 Termination.

(a) Awards may be terminated in whole or in part only if paragraphs (a)(1), (a)(2), or (a)(3) of this section apply.

(1) By grant officers, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By grant officers, with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the grant officer written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the grant officer determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, the grant officer may terminate the grant in its entirety under either paragraphs (a) (1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 95.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 95.62 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or

notice of award, DOL may, in addition to imposing any of the special conditions outlined in § 95.14, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by DOL.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, DOL shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless DOL expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraphs (c)(1) and (c)(2) of this section apply.

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under E.O.'s 12549 and 12689 and DOL's implementing regulations. See § 95.13 and 29 CFR part 98.

Subpart D—After-the-Award Requirements

§ 95.70 Purpose.

Sections 95.71 through 95.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 95.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. DOL may approve extensions when requested by the recipient.

(b) Unless DOL authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) DOL shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that DOL has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, DOL shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 95.31 through 95.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, DOL retains the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 95.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of DOL to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 95.26.

(4) Property management requirements in §§ 95.31 through 95.37.

(5) Records retention as required in § 95.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of DOL and the recipient, provided the responsibilities of the recipient referred to in § 95.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 95.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, DOL may reduce the debt by paragraphs (a)(1), (a)(2), or (a)(3) of this section.

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, DOL shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, "Federal Claims Collection Standards."

Appendix A to Part 95—Contract Provisions

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. *Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of $2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. § 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which one is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. § 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing

Federally Financed and Assisted Construction"). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. § 327–333)*—Where applicable, all contracts awarded by recipients in excess of $2,000 for construction contracts and in excess of $2,500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. § 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. § 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), as amended*—Contracts and subgrants of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. § 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. § 1251 et seq.). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. § 1352)*—Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient. See 29 CFR part 98.

8. *Debarment and Suspension (E.O.'s 12549 and 12689)*—No contract shall be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O.'s 12549 and 12689, "Debarment and Suspension." This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principal employees.

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Part IV

Environmental Protection Agency

40 CFR Parts 260, 261, and 273
Hazardous Waste Management System; Modification of the Hazardous Waste Program; Mercury-Containing Lamps; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, and 273

[FRL–5020–1]

RIN 2050–AD93

Hazardous Waste Management System; Modification of the Hazardous Waste Program; Mercury-Containing Lamps

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: Mercury-containing lamps (light bulbs) may be hazardous waste under the Toxicity Characteristic Rule issued under the Resource Conservation and Recovery Act (RCRA) and if so, must be managed as a hazardous waste, unless they are a household waste or are generated by an exempted small quantity generator. Mercury-containing lamps include fluorescent, high pressure sodium, mercury vapor and metal halide lamps. The Environmental Protection Agency (EPA) is today seeking comment on two alternative approaches for the management of mercury-containing lamps. First, EPA is seeking comment on whether an exclusion from regulation as hazardous waste is appropriate for mercury lamps, provided they are disposed in municipal landfills that are permitted by States/Tribes with EPA approved municipal solid waste (MSW) landfill permitting programs or managed in mercury reclamation facilities that are permitted, licensed or registered by States/Tribes. The second approach would add mercury lamps to EPA's Universal Waste Proposal (February 11, 1993, 58 FR 8102). The Universal Waste approach is a streamlined, reduced regulatory structure, which is designed to address the management of certain widely generated wastes currently subject to full Subtitle C RCRA regulations.

Today's proposal presents management options that would be considered less stringent than the existing Federal regulations because they would exempt certain activities now within the purview of RCRA Subtitle C (hazardous waste management). Therefore, States authorized under RCRA section 3006 to administer and enforce a hazardous waste system in lieu of the Federal program would be allowed flexibility in modifying their programs to adopt less stringent regulations regarding the management of mercury-containing lamps, should one of the proposed options be promulgated as a final rule.

DATES: Comments on this proposed rule must be submitted on or before September 26, 1994.

ADDRESSES: Persons who wish to comment on this notice must provide an original and two copies of their comments, include the docket number (F–94–FLEP–FFFFF), and send them to EPA RCRA Docket (OS–305), U.S. EPA, 401 M Street SW., Washington, DC 20460. The RCRA Docket is located at Room M2427, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, the public must make an appointment by calling (202) 260–9327. The public may copy a maximum of 100 pages from any regulatory docket at no cost. Additional copies cost $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/Superfund Hotline toll free at (800) 424–9346. In the Washington, DC metropolitan area, call (703) 412–9810. For information regarding specific aspects of this notice, contact Valerie Wilson, Office of Solid Waste (mail code 5304), U.S. EPA, 401 M Street SW., Washington, DC 20460, telephone (202) 260–4678.

SUPPLEMENTARY INFORMATION:

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I. Legal Authority

These regulations would be promulgated under the authority of sections 1006, 2002(a), 3001–3007, 3010, 3013, 3016–3017, 3018 and 7004 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6937–6938, 6939 and 6974 (commonly referred to as RCRA).

II. Background

A. The Toxicity Characteristic

Under section 3001 of the Resource, Conservation and Recovery Act (RCRA), the U.S. Environmental Protection Agency (EPA) is charged with defining which solid wastes are hazardous by identifying the characteristics of hazardous waste and by listing particular hazardous wastes. Toxicity is one of the four characteristics used by EPA to identify waste as hazardous (along with ignitability, corrosivity, and reactivity). EPA promulgated the Extraction Procedure Toxicity Characteristic (EPTC) on May 19, 1980. The EPTC regulated eight metals, four insecticides, and two herbicides. Section 3001(g) of RCRA, added by the Hazardous and Solid Waste Amendments (HSWA) of 1984, required EPA to revise the EPTC. On March 29, 1990 (55 FR 11798), the EPA promulgated the Toxicity Characteristic (TC) to revise the existing EPTC. Like the EPTC, the TC and its associated testing methodology, the Toxicity Characteristic Leaching Procedure (TCLP) is used to define the toxicity of a waste by measuring the potential for the toxic constituents in the waste to leach out of an unlined municipal landfill into groundwater and contaminate drinking water wells at levels of health or environmental concern if not subject to Subtitle C controls. The TC implemented an improved leaching procedure that better predicts leaching and added several hazardous waste constituents. Twenty-five organic hazardous waste constituents were added to the TC and a model was developed to predict their fate and transport in the groundwater. If wastes exhibit the Toxicity Characteristic they are subject to the hazardous waste management requirements of RCRA Subtitle C.

As discussed in the preamble to the Toxicity Characteristic Rule (March 29, 1990, 55 FR 11813), the regulatory levels for the TC metals were not changed by the promulgation of the

final TC rule. EPA retained the regulatory levels set by the EPTC rule, pending further study of the fate and transport of metals in groundwater.

The Agency is continuing longer-term developmental work on a metal speciation model, called MINTEQ, to be used to evaluate the fate and transport of the TC metals (including mercury) for purposes of reassessing the toxicity characteristic regulatory levels for the TC metals. EPA's preliminary analysis indicates that mercury that would leach out of landfills would not all necessarily travel far enough through the groundwater to contaminate drinking water wells, depending on the distance to the well. A certain percent (still to be determined) will combine with other substances in the soil (via complexation, adsorption, etc.) to form solid substances and remain in the soil. Therefore, the regulatory limits for mercury if re-assessed using the MINTEQ model, when completed, might be higher (less stringent) than the current limits because mercury may be less mobile than the current TC rule indicates. However, these studies are still ongoing (U.S. EPA, 1991b).

Available data (included in the docket for this proposal) indicate that as a result of the use of mercury in the production of fluorescent and high intensity discharge (HID) lamps, a relatively high percentage of these lamps, when spent, exhibit the characteristic of toxicity. (U.S. EPA, 1992a) However, all generators of spent lamps that exhibit the toxicity characteristic may not have to manage those lamps as hazardous waste. EPA has specified different requirements for generators of hazardous waste depending on the amount of hazardous waste generated per month. Conditionally-exempt small quantity generators (CESQG) generate less than 100 kilograms (kg) of hazardous waste each month and can send their waste to a hazardous waste facility, or may elect to send their wastes to a landfill or other facility approved by the State for industrial or municipal non-hazardous wastes (see 40 CFR 261.5). Generators of more than 100 kg of hazardous waste per month are required to fully comply with Federal hazardous waste regulations (although generators of between 100 and 1000 kg of hazardous waste per month are subject to certain reduced regulatory requirements).

For the purposes of this proposal "electric lamp" also referred to as "lamp" is defined as the bulb or tube portion of a lighting device specifically designed to produce radiant energy, most often in the ultraviolet, visible, and infra-red regions of the electromagnetic spectrum. Examples of common electric lamps include but are not limited to, incandescent, fluorescent, high intensity discharge, and neon lamps. Also, a "mercury-containing lamp" is defined as an electric lamp in which mercury is purposely introduced by the manufacturer for the operation of the lamp. The Agency requests comment on whether the definitions of "lamp" and "mercury-containing lamp" are technically correct and on whether they accurately define the appropriate universe of items.

B. Energy-Efficient Lighting Programs

Today's proposal, which would reduce management requirements for lamps, is expected to support the efforts of many existing and planned energy conservation programs, which encourage the installation of energy efficient lighting. Energy efficient lighting consumes less electricity, reducing the generation of pollution from power plants. However, replacing energy inefficient lighting systems with energy efficient lighting systems requires the use and eventual disposal of fluorescent and high intensity discharge (HID) lamps, which contain mercury. Requiring the disposal of lamp wastes as hazardous waste, under full Subtitle C regulations, may discourage participation in energy efficient lighting programs. The Agency anticipates that either of the proposed actions will encourage participation in energy-efficient lighting programs, and will therefore promote the energy-efficiency and the environmental benefits derived from that program.

If energy-efficient lighting were used wherever it is profitable, the nation's demand for electricity could be cut by more than 10 percent. This would result in reductions of estimated annual carbon dioxide emissions of 202 million metric tons (4 percent of the national total), reductions of annual sulfur dioxide emissions of 1.3 million metric tons (7 percent of the national total), and reductions of annual nitrogen oxide emissions of 600,000 metric tons (4 percent of the national total). (U.S. EPA, 1992b)

In 1991, EPA initiated a voluntary energy conservation program called "Green Lights" to encourage pollution prevention through energy efficient lighting. Lighting accounts for 20–25 percent of electricity used annually in the U.S. Lighting for industry, businesses, offices, and warehouses represents 80–90 percent of total lighting electricity use. Available technologies in energy efficient lighting can reduce lighting electricity demand by over 50 percent, enabling power plants to generate less electricity and burn less fuel. It also reduces other types of pollution resulting from mining and transporting power plant fuels and disposing of power plant wastes (U.S. EPA, 1992b). In addition, electric utilities, when burning fossil fuels, emit mercury at a rate of 0.0428 mg/kWh sold, on a national average. Full implementation of Green Lights is estimated to reduce the emission by 9.7 Mg of mercury by the year 2000 (U.S. EPA, 1992b). Further, the energy-efficient fluorescent lamps, used by Green Lights and other energy conservation programs, contain less mercury than energy-inefficient fluorescent lamps.

A goal of Green Lights is to encourage the widespread use of efficient lighting technologies to reduce air pollution from coal combustion. Energy-efficient lighting technologies provide excellent investment opportunities. A typical lighting upgrade yields an internal rate of return of 20–30 percent and a payback of 3–4 years.

Green Lights participants include: Corporations; State, city, and county governments; lighting manufacturing and management companies; electric utilities; non-profit organizations; and hospitals, universities, and other businesses throughout the U.S. Green Lights encourages the establishment of comprehensive energy-efficient lighting programs within an organization that include: Converting from less-efficient fluorescent to more-efficient fluorescent lamps; converting from incandescent to compact fluorescent lamps; converting from magnetic to electronic lighting ballasts; installing occupancy sensors, daylight dimmers, and other lighting control technologies; installing more efficient luminaries or lighting fixtures; and efficient maintenance practices, such as group relamping and regular fixture cleaning.

By signing a partnership agreement with the EPA, Green Lights participants agree to survey and upgrade, within 5 years, 90 percent of all domestic facilities wherever profitable and wherever lighting quality is improved or maintained. In return, these participants should receive reductions (savings) in their monthly energy expenses. A good energy-efficient lighting upgrade typically includes some type of control strategy (such as occupancy sensors) that will reduce lamp burning hours. The result is that the lamp will last longer and need to be replaced less frequently. As of June 30, 1993, over 1,000 organizations have joined the Green Lights program. These organizations have committed over 3.5

billion square feet of facility space to the program.

The Green Lights Program encourages the use of energy-efficient lamps using an initial and scheduled periodic relampings to achieve higher energy efficiency and reduce energy costs. These relampings involve removal and replacement of all lamps in a building or in an area at one time, as opposed to replacement of lamps as they burn out. An initial lighting upgrade and group relamping may result in a large number of fluorescent lamps that require disposal. In some instances, a participant that would usually be a conditionally exempt small quantity generator, could become a large quantity generator of hazardous waste due to the large number of lamps generated in one month. In general, if a generator disposes of more than approximately 350 four foot fluorescent lamps, that generator is a large quantity generator due to lamps alone.

Despite the environmental and financial benefits of energy efficient lighting systems, there are disincentives to participating in an energy conservation program like Green Lights. Establishing a comprehensive energy-efficient lighting program and installing energy-efficient lighting technologies require an initial investment that may be significant, depending on the size and comprehensiveness of the project. Although Green Lights provides information to participants on financing options, many profitable lighting upgrade projects are delayed due to restricted availability of capital. It is especially difficult for smaller businesses and government organizations to raise the necessary capital, although energy-efficient lighting investments are low risk and in the long run will reduce costs. The additional costs associated with managing, transporting, and disposing of lighting wastes as hazardous wastes can create an additional disincentive to join Green Lights and make the initial investment in energy-efficient light technologies. For example, under the hazardous waste regulations, large quantity generators are required to label boxes and drums, notify EPA of status as a hazardous waste generator, transport waste via a hazardous waste transporter, manage waste consistent with the land disposal restrictions, and manage waste at a hazardous waste management facility. In addition, on May 8, 1994, generators of mercury-containing lamps will be required (under the Land Disposal Restrictions) to meet a treatment standard for lamps as hazardous debris. As is discussed in detail in Section VII, Economic Impact Analysis, of this preamble, the Agency estimates that the annual national cost of Subtitle C compliance for large quantity generators could range from 110 to 134 million dollars. EPA's preliminary estimates suggest that an exclusion would save generators of mercury containing lamps approximately 85 to 102 million dollars annually, while the inclusion of lamps in the universal waste management system would save generators approximately 16 to 20 million dollars annually.

Although the Green Lights program may increase the number of large quantity generators on months when mass relamping occurs, the program is not expected to increase the total quantity of used fluorescent lamps in the long run. The lamps recommended by the Green Lights program are more energy efficient and with implementation of energy saving practices, these lamps could have an extended life of four to five years rather than the average three to four years. Therefore, if by reducing the initial costs of participation in the Green Lights program, generators participate in the Green Lights Program, an energy savings will occur. These additional energy savings will decrease the amount of mercury and other pollutants emitted to in the atmosphere from coal-burning.

C. Industry Source Reduction Initiatives

A report, "The Management of Spent Electric Lamps Containing Mercury," by the National Electrical Manufacturers Association (NEMA, 1992) discussed industry efforts to reduce mercury in fluorescent lamps. According to the report, due to the use of more efficient dosing techniques (i.e., placing mercury in the lamp), the average mercury content of a standard 4-foot, 1½ inch diameter, cool white fluorescent lamp was reduced by 14% (48.2 mg/lamp to 41.6 mg/lamp) from 1985 to 1990. Future industry projections of mercury reductions by 1995 show an estimated 35% further reduction (41.6 mg/lamp to 27.0 mg/lamp) for the standard fluorescent lamp.

Source reduction, which is the reduction or elimination of the toxicity and/or volume of a waste product, is at the top of EPA's hierarchy of municipal solid waste (MSW) management methods. With regard to mercury, the most significant source reduction achievement has been the trend toward elimination of mercury from alkaline batteries. Although these batteries are still a significant contributor of mercury to municipal solid waste, discards of mercury from alkaline batteries are dropping dramatically because of source reduction achievement. Mercury-containing lamps are one of the next highest single sources of mercury in the municipal solid waste, accounting for 3.8% of mercury now going to MSW landfills. EPA encourages cost-effective source reduction of mercury in fluorescent lamps. Opportunities exist to reduce mercury content levels in both standard 4-foot fluorescent lamps and the increasingly popular compact fluorescent lamps (U.S. EPA, 1993b). If source reduction is pursued aggressively by the fluorescent lamp manufacturing industry, the overall contribution of mercury from fluorescent lamps to municipal solid waste could remain constant or decrease over time even as fluorescent lamp usage increases.

EPA requests comment on industry and other source reduction initiatives involving the reduction of mercury in fluorescent lamps. Source reduction may be occurring through more efficient dosing techniques, lightweighting of lamps, and changes in phosphor powder technology. The Agency requests comments reflecting these and any other source reduction activities and may use this information to develop a strategy to support and encourage voluntary source reduction.

III. Environmental Release and Fate

This section presents the technical information used by the Agency in developing options for the management of used mercury-containing lamps. Information is provided on the environmental fate and transport in the ground water and air pathway for mercury. Specifically, EPA has reviewed leachate data from municipal landfills and data on air emissions from municipal waste combustors and municipal landfills. In addition, the Agency has estimated possible releases of mercury to the air from lamps broken during storage and transportation. Most of the information considered pertains to management in municipal landfills. Information on other types of non-hazardous landfills is not presented due to a lack of data and the wide variability in design and waste composition of other non-hazardous landfills.

The Agency requests comment on the data presented in this section of the preamble. These data, along with any data submitted in the public comment to this proposal, will be used to determine the risk to human health and the environment from the management of used mercury-containing lamps. Also, some information on the risks of managing mercury-containing lamps in landfills, combustors and recovery facilities was submitted to the Agency in response to a request for such

information in the Universal Waste Proposal (February 11, 1993, 58 FR 8102). This information is included in the rulemaking docket for today's proposal and the Agency requests comment on it.

A. Groundwater Impacts

This section discusses leachate samples collected by EPA from municipal landfills. As previously discussed, the Agency is further developing its groundwater model under the TC to accurately predict the movement of mercury through the groundwater system. The groundwater pathway for mercury is being considered because the TC uses the groundwater pathway to estimate the movement of contaminants from municipal landfills. The leachate data indicate that further analysis may be needed on the behavior and movement of mercury in municipal landfills and in groundwater, although initial analyses indicate that mercury is less mobile than previously believed.

EPA has collected data indicating that mercury may not leach from MSW landfills at levels above the drinking water MCL, despite some mercury disposal in MSW landfills. EPA estimates that approximately 73% of municipal solid waste (MSW) is placed in municipal landfills, while 14% of municipal solid waste is incinerated and 13% is recycled. Based on a study of mercury production and use, the Agency estimates that about 643 metric tons (Mg) of mercury is discarded in MSW landfills per year. A major source of mercury in municipal solid waste is household batteries which accounts for about 88% of the 565 metric tons (Mg) of mercury in municipal solid waste. Most of these batteries fall under the Household Waste Exclusion (see 45 FR 33119, May 19, 1980). Thermostats/thermometers and mercury-containing lamps are second in their contribution of mercury in municipal solid waste, 3.9% and 3.8% respectively. The Agency estimates that, assuming all lamps are disposed of in MSW landfills, approximately 20 Mg of mercury would be placed in MSW landfills per year from used mercury-containing lamps. (U.S. EPA, 1991c).

Data on the amounts of mercury in MSW landfill leachate are included in a study summarizing the available data on MSW landfill leachate characteristics conducted by the Office of Solid Waste (U.S. EPA, 1988). Out of 109 leachate mercury analyses collected, only six (7 percent) were above the drinking water level or maximum contaminant level (MCL) for mercury (0.002 mg/L) and none were above the Toxicity Characteristic (TC) limit for mercury (0.2 mg/L). The average of these MSW leachate analyses was 0.0008 mg/L mercury. The maximum concentration reported is 0.0098 mg/L.

Further analysis indicates that less than 0.01 percent of the mercury in MSW landfills leaches from the landfill. This estimate is supported by a study measuring mercury disposition (in landfill gas and leachate) in four Swiss landfills which found around .007 percent of the mercury from the landfill in the leachate (Baccini et al., 1987).

The behavior of mercury in a MSW landfill is not known in great detail. The complexity of aqueous mercury chemistry makes it difficult to predict and model at this time. However, the available information suggests that chemical conditions tend to favor the metallic form of mercury in MSW landfills. This form has a lower solubility in water (0.02–0.04 mg/L) than other chemical forms. In addition, EPA has identified studies that indicate that municipal solid waste has a significant capacity for retaining mercury in the landfill unless there are unusually large quantities of mercury in municipal solid waste (Gould et al., 1988/Mennerich, 1985). The Agency has not seen field data for industrial non-hazardous landfills.

In addition, the Agency reviewed 1990 and 1991 Superfund Records of Decision (RODs) for information on municipal landfill sites where mercury was listed as a contaminant of concern (COC). A total of twelve out of sixty-six 1990 and 1991 RODs for landfills accepting municipal waste listed mercury as a COC. Of these 12 sites, 5 had mercury detections in ground-water over the MCL. All but one of these sites had confirmed industrial waste codisposal. At this site only onsite ground-water exceeded the MCL for mercury (maximum of 0.013 mg/L); all offsite ground-water samples were below detection limits.

In conclusion, preliminary data and analysis suggest at this time that mercury in municipal solid wastes is not being readily released by leaching processes that typically occur in the MSW landfill environment. This indication is also supported by controlled leaching studies of high-concentration mercury-containing wastes codisposed with municipal solid waste (Borden et al., 1990/Gould et al., 1988). However, the Agency requests that commenters provide any MSW landfill leachate or groundwater data, or data from industrial Subtitle D landfills, that EPA has not considered in its analysis.

B. Air Exposure

The Agency is also reviewing data on the air pathway for mercury because low levels of mercury in surface water have caused elevated fish concentrations at many sites in Minnesota, Michigan, Wisconsin, Florida, and other States, and these elevated levels of mercury have been attributed to atmospheric deposition from non-specific sources (U.S. EPA, 1993a). Therefore, EPA reviewed data on mercury emissions to air from a number of sources, including those potentially related to lamp disposal. EPA also considered available data on the fate and transport of mercury of mercury emitted to the air.

Because of elemental mercury's high vapor pressure, it is easily volatilized into the atmosphere. Two factors are believed to contribute to the recent increases in atmospheric deposition of mercury compounds. The first factor is increased atmospheric levels from mercury emissions from coal-fired power plants, chloralkali plants, MWC facilities, and other sources. The second factor is increased oxidation of atmospheric elemental mercury vapor to more soluble oxidized forms which is enhanced by anthropogenic (i.e., pollution from man-made sources) increases in atmospheric oxidizing agents, such as ozone and inorganic acids. Based on current mercury emissions inventories EPA believes that major mercury emission source categories include coal fired power plants, municipal waste combustors and medical waste combustors. (U.S. EPA, 1993).

Mercury that is methylated is strongly biomagnified through the food chain through bioconcentration in animals, and in plant tissue. Methylation is a chemical process in which a methyl unit is added to either elemental or oxidized mercury. The primary environmental human exposure pathway for mercury is through the consumption of contaminated fish. Fish bioconcentration factors (fish tissue concentration/water concentration) are as high as 85,000. Recently, elevated levels of mercury in fish in isolated, pristine lakes have been identified in widespread areas around the country. There are currently over 1,550 fish consumption bans or advisories due to mercury in effect in the United States (Sorensen et al, 1990).

Although there may be insufficient data to determine whether mercury from lamps will endanger human health and environment by the release of mercury to the air, there are concerns over emissions of mercury from lamps from

municipal waste combustors, possibly landfill gas, as well as concerns with the handling and disposal of mercury lamps. In this section, available information will be discussed pertaining to the hazards of mercury via air exposure.

(1) Incineration

The Agency estimates that approximately 14% of U.S. municipal solid waste is burned in municipal waste combustors (MWCs), comprising 23 million metric tons (Mg) of waste. Approximately 100 Mg of mercury-containing waste is burned in municipal waste combustors, of which about 3 Mg/yr is mercury-containing lamps (U.S. EPA, 1990). Because of its low boiling point, elemental mercury in the waste is largely vaporized during municipal waste combustion and, without controls specific to mercury, passes out of the municipal waste combustor into the atmosphere with the flue gas. Measurements have shown that for several municipal waste combustors with emissions controls for sulfur and nitrogen oxide particulates, average MWC mercury emission factors range from 70 to 90 percent of the mercury input (Vogg et al, 1986/Reiman, 1989). If we assume that 98% of the mercury in incinerated municipal solid waste is volatilized during combustion this would potentially generate 98 Mg/year mercury emissions of this, about 2.9 Mg/year would be from mercury-containing lamps. Post-combustion mercury control at the municipal waste combustor's would reduce mercury levels by 80% to 90%.

EPA plans to propose mercury emission limits for new and existing municipal waste combustors in 1994 (U.S. EPA, 1991a). The mercury emission limits will be based on the use of activated carbon injection for mercury control as demonstrated by EPA at tests at the Stanislaus municipal waste combustor (California) and Camden municipal waste combustor (New Jersey). These tests demonstrated activated carbon injection technology as available for post-combustion mercury control at municipal waste combustors and achieved mercury reduction levels of 80 to 90 percent. During the tests, activated carbon was injected into the flue gases upstream of the acid gas control system and collected (with the mercury) in the particulate matter control system. The ash from the particulate matter control system was then landfilled.

It is unclear to what degree the mercury being released from municipal waste combustors would contribute to increased mercury levels in surface waters because the transport and cycling of atmospheric mercury emissions are complex and poorly understood. It is uncertain how long mercury will stay in the atmosphere after being released. The oxidation state of mercury dictates how long it remains in the air. Elemental mercury could stay in the atmosphere for months to years, whereas an oxidized species of mercury would stay for only days to weeks. Although controversy remains over the form of mercury as it leaves the MWC stack, it is likely that mercury from a municipal waste combustor would be more oxidized and therefore would not remain in the atmosphere for a long period of time.

However, since MWC facilities comprise one anthropogenic source of atmospheric mercury, there are probably regional-scale or global-scale impacts from such sources (Glass et al., 1986/Johnson, 1987). The elimination of mercury-containing lamps from municipal waste combustors would reduce annual atmospheric mercury emissions from these significant sources by around 3 metric tons, or about 3 percent of the total mercury-bearing waste that is incinerated. The Agency is considering proposing air emission controls for mercury later this year which would, when implemented, reduce these emissions.

(2) Mercury in Landfill Gas

EPA evaluated emissions of mercury in landfill gas emission in its "Preliminary Risk Assessment" which is available in the public docket (EPA, 1993). EPA reviewed studies on the amount of mercury that may be released to the air from municipal solid waste landfills. Specifically, this section presents in detail the results of two studies that attempt to measure mercury air releases.

A Swiss study (Baccini et al., 1987) measured the amount of landfill gas from four municipal landfills. This study is comparable to municipal solid waste landfills in the U.S. because the study indicated that these Swiss MSW landfills contained approximately 2 parts per million (ppm) of mercury, which, given the standard error range, is comparable to the approximately 3.6 ppm of mercury in U.S. municipal solid waste (U.S. EPA, 1990). The Swiss study indicated that mercury concentrations in landfill gases had a mean value of about 0.4 µg/cubic meter. The annual total mercury release also was low (0.0065 mg/Mg waste, average). Using this gas release value, and the amount of municipal solid waste annually disposed in U.S. landfills (118 million Mg), the amount of mercury annually released in landfill gas can be estimated as 0.8 kg, about 0.0001 percent of the total mercury load entering MSW landfills (643 Mg). Adjusting the proportion of total mercury contributed by mercury-containing lamps to the MSW stream (3.8 percent), provides an estimate of annual landfill gas emissions from lamps of about 0.03 kg, less than 0.00001 percent of the total municipal solid waste mercury input (EPA, 1993). The amount of mercury from lamps emitted into the atmosphere by landfill gas is very small (.00003 Mg) when compared to the 3 Mg of mercury from lamps that is estimated to be emitted into the atmosphere through municipal waste combustors.

EPA also received a study (National Environmental Protection Board et al, 1989) in a comment to the Universal Waste Proposal that provided data on mercury gas from four municipal landfills in Sweden. The Swedish study measured the ambient air quality above four municipal landfills. The study did not indicate the level of mercury in the municipal landfills. Mercury was measured using differential optical adsorption spectroscopy (DOAS), located two meters above the landfill, compared with background mercury concentrations measured at each of the four landfills. The mean ranged from 10.2 ng/m^3 to 23.6 ng/m^3 with background mercury levels at 4 ng/m^3 to 8ng/m^3. The report stated that because all measurements were close to the detection limit for the DOAS technique, the reliability of the results was questioned. After a review, it was determined that although the quantification was uncertain because of a low signal-to-noise ratio, the concentration above the landfills was significantly above background mercury levels, indicating that mercury was being released to the atmosphere. However, since it is unknown how much mercury is found in Swedish municipal solid waste landfills, the results of this study cannot be readily compared to the situation in the U.S.

(3) Crushing and Breakage of Lamps

Mercury remains in lamps until they are broken. When lamps break, the elemental mercury inside becomes available for evaporation, adsorption, or reaction. EPA modeled mercury emissions from broken lamps based on two different methods of transportation (EPA, 1993). Discarded lamps may be transported in one of two ways: In refuse trucks as household or commercial trash, and in closed vans or trailers as part of a bulk relamping program. Based on available information, it was assumed for the

purposes of this model that as much as 6.6% of mercury could be released in the air from a lamp broken during the collection, storage and transport of mercury-containing lamps in garbage trucks. The Agency recognizes that it is uncertain how much mercury is released from broken lamps. The amount of mercury released would vary depending on the ambient air temperature, the time the broken lamps are directly exposed to the air and the number of lamps broken. The Agency requests any available data concerning releases of mercury during storage, transportation and waste management (e.g., landfill and recyclers) activities.

C. Technical Considerations and Request for Comments

The available data on landfill leachate suggests that mercury-containing lamps may not pose a threat to groundwater when placed in a state-controlled municipal landfill due to the low levels of mercury found in landfill leachate.

However, available information also indicates that an important route of exposure for mercury is bioaccumulation up the food chain, causing mercury poisoning to both wildlife and humans (i.e., through fish consumption). Although it is unclear how mercury moves through the atmosphere and what conditions enhance or retard it, information suggests that given the high vapor pressure of mercury, it can readily volatilize to the air and be transported, perhaps long distances, and be deposited on surface water or soil (which can run off into surface water). Some mercury that is subsequently methylated will bioaccumulate in the food chain.

The actual amount of mercury released from fluorescent or HID lamps is unknown. It is estimated that lamps that are incinerated will release 98% of their mercury due to the high temperatures needed for the incineration process. However, because mercury is such a volatile metal, amounts of mercury could be released into the air from lamps broken during transportation or lamps broken at the landfill. For purposes of this proposal, EPA has made assumptions on the amount of mercury that may be released from a broken lamp but few studies have directly measured the amount of mercury released from a lamp over time.

More information on the air release, transport and exposure pathway for mercury is needed in order to better evaluate the proper management methods for spent mercury-containing lamps. The Agency requests information on air transport of mercury from mercury-containing lamps, the mercury methylation process (both in general and in landfills) and any studies that directly measure the amount and form of mercury released from broken mercury-containing lamps.

IV. Management Options

The information presented in this notice has led the Agency to re-evaluate the management of waste mercury-containing lamps because of their importance in promoting energy-efficiency. As mentioned earlier in this notice, the use of energy-efficient lighting can reduce mercury emissions from coal-burning power plants as well as emissions of carbon dioxide and sulfur oxide. In light of the benefits derived from the use of these lamps, EPA is seeking comment on two proposed options based the data which indicate that these lamps may be better managed either outside of the hazardous waste system or in a reduced regulatory structure within the hazardous waste system.

However, since there remain uncertainties in the data, more information on the air exposure pathway for mercury from lamps would facilitate a decision by EPA on the management of lamps. Additional information could clarify which kind of reduced management structure would be most appropriate for mercury-containing lamps. The Agency has requested that information, if available, be submitted with the public comment to this proposal.

Given these technical uncertainties, EPA has developed two proposed alternative approaches for the management of mercury-containing lamps. The first approach is a conditional exclusion for mercury-containing lamps from regulation as hazardous waste. Under this approach, mercury-containing lamps would no longer be considered hazardous waste provided that they are managed under the conditions of the exclusion. The second approach is to add mercury-containing lamps to the universal waste management system, which was proposed for batteries and pesticides on February 11, 1993 (58 FR 8102). Under the universal waste management system, lamps that fail the TC would be considered hazardous waste, but they would be subject to streamlined hazardous waste management requirements, which are described in detail later in this notice. The major difference between these two options is whether lamps are disposed of under Subtitle D requirements or under Subtitle C requirements. Recycling of lamps would be allowed under either option.

If EPA concludes, after considering data from the public comment on this proposal, that the risk from mercury release from mercury-containing lamps is not significant enough to warrant Subtitle C regulation, the Agency may choose to finalize a conditional exclusion. However, if EPA concludes, after considering data received in public comment that the risk from mercury release from lamps is significant, the Agency may choose to keep mercury-containing lamps in Subtitle C, under the universal waste management system.

The following sections describe the two approaches in detail.

A. Conditional Exclusion

Section 3001 of RCRA charges EPA with identifying the characteristics of hazardous waste and listing particular hazardous wastes. Section 1004(5) of RCRA defines waste as "hazardous" if the waste poses a "substantial present or potential hazard" to human health or the environment when improperly managed. The groundwater data discussed earlier in this notice suggest that mercury-bearing lamps, if they are disposed of according to the conditions of the proposed exclusion, may not pose a substantial present or future threat to human health or the environment. Based on the Agency's authority to identify characteristics of hazardous waste and the statutory definition of hazardous waste, EPA is considering whether an exclusion of used mercury-containing lamps from regulation as hazardous waste would be appropriate. EPA requests comment on the data presented in the proposal, as well as on whether to exclude these lamps from regulation as hazardous waste.

The exclusion under consideration today has two conditions. In order to qualify for the exclusion:

(1)(a) Generators would be required to either dispose of these lamps in a municipal solid waste landfill that is permitted by a State/Tribe with an EPA-approved MSW permitting program, or

(b) If generators do not send these lamps to a MSW landfill, they would send them to a State permitted, licensed, or registered mercury reclamation facility; and

(2) Generators would be required to keep a record of the lamps shipped to management facilities.

The Agency is proposing to limit the exclusion to spent lamps disposed in MSW landfills (requirements of MSW landfills are discussed later in this section), rather than allowing disposal in any nonhazardous waste landfill,

because EPA has field data on leachate (including mercury levels) only for MSW landfills (among Subtitle D facility categories). The available information (discussed above) suggests that the amount of mercury from mercury-containing lamps that is released from MSW landfill gas is very small and its effect on ambient air quality may not pose a significant hazard to human health or the environment. EPA requests any information on the levels and impacts of mercury in MSW landfill gas. Further, data on leachate quality and air emissions from other nonhazardous waste landfills, including industrial solid waste landfills, is very limited. However, some soil column data also suggest that mercury dissolution into soil pore water occurs at very low levels (Eichholz et al., 1986). EPA requests comment on this approach and any information on mercury releases from other nonhazardous waste landfills. Based on EPA's existing data and any additional data received, EPA may expand the exclusion to include disposal in non-municipal, solid waste, Subtitle D disposal facilities.

While this proposed exclusion from Subtitle C of RCRA is supported by data from municipal solid waste landfills with a range of design and operating conditions, EPA believes that limiting the exclusion to spent lamps disposed only in MSW landfills that are permitted by States or Tribes with EPA-approved MSW landfill permitting programs will provide further assurance that human health and the environment will be protected. In particular, these MSW landfill permitting controls will provide added protection to the management of these lamps.

In October 1991, EPA promulgated new requirements for municipal solid waste landfills (40 CFR Part 258, October 9, 1991, 56 FR 51016). These requirements cover location restrictions, landfill design and operations, groundwater monitoring, corrective action measures, financial assurance, and conditions for closing the landfill and post closure care. The majority of landfill owners/operators accepting greater than 100 tons per day must comply with the majority of the requirements by October 9, 1993. On October 1, 1993 (58 FR 51536), EPA delayed the October 9, 1993 effective date for six months for landfills accepting less than 100 tons per day (in addition to other criteria) and delayed the effective date for two years for landfills in arid or remote regions that accept less than 20 tons per day.

States/tribes are in the process of incorporating these new municipal solid waste landfill standards into their permitting programs and applying for EPA approval of their permitting programs. EPA is currently evaluating these State permitting programs to determine their adequacy in incorporating the new municipal solid waste landfill criteria (40 CFR part 258). As of June 30, 1993, EPA approved thirty-six State municipal solid waste landfill programs. In addition, EPA is actively reviewing numerous State permitting program applications and expects to approve the remaining State landfill permitting programs by April 1994, well before this proposed rule would become effective as a final rule. EPA expects to issue "partial" program approvals to some States because their landfill permitting programs may not fully address all elements of the EPA municipal solid waste landfill criteria. For purposes of today's rule, EPA would consider "partial" program approvals, as well as "full" program approvals, to be "EPA-approved" State municipal solid waste landfill permitting programs. Further, States with "partial" approval have agreed to an EPA approved schedule for full approval. The Agency believes that limiting today's proposed exclusion to landfills that are permitted by States that have incorporated EPA's new municipal landfill standards will provide further assurance that spent lamps will be safely managed in municipal solid waste landfills. EPA requests comment on this approach and any alternative approaches.

The second condition, which limits the proposed exclusion to lamps managed in State permitted, licensed, or registered mercury reclamation facilities, is also consistent with the Agency's support for environmentally sound reclamation of waste. EPA believes that with adequate State oversight, mercury containing lamps can be safely recycled and the mercury reclaimed from them. However, EPA is concerned that, in States without oversight over recyclers, recycling activities could pose a threat to human health and the environment because of inadequate or non-existent waste management controls. Therefore, the Agency is requesting information on recycling operations and practices. EPA is aware that several technologies are available to recycle lamps and recover mercury from them. However, the Agency does not have complete information on which technologies are currently being used by recycling companies and if these technologies can address all different kinds of lamps (e.g., tube, U-shaped, compact, etc.). The Agency also seeks information that tracks mercury as it moves through the recycling process. Further, EPA would like to know the operating capacity of existing or planned reyclers of mercury-containing lamps. The Agency is also requesting information on what markets exist for the mercury and other materials recovered from lamps. This information will be useful to the Agency in understanding and assessing possible risks to human health and the environment as well as to determine the potential or actual use of the materials recovered from lamps in the market.

Under the conditional exclusion, regulated lamp generators (i.e., those that generate more than the conditional-exempt small quantity generator (CESQG) limit of 100 kilograms of hazardous waste per month which would be about 350 mercury-containing lamps) would not be able to send lamps to a municipal waste combustor for disposal. EPA does not propose to extend the exclusion to lamps disposed in municipal waste combustors because of concern over mercury air emissions from these sources. However, this proposed option would not affect municipal waste combustors' ability to continue the combustion of traditional municipal solid waste which contains limited quantities of unregulated household or CESQG mercury-containing lamps. Because mercury-containing lamps do not burn, it is unlikely that truck loads of mercury-containing lamps (i.e., containing more than 350 lamps) would have been acceptable to most operators. The exclusion would assure that this disposal alternative is not considered in any situation. The Agency requests comment on the proposal to limit the exclusion to permitted municipal solid waste landfills (i.e., regulated lamp generators would not be allowed to send lamps to a municipal waste combustor for disposal).

EPA also requests comment on adding to the exclusion handling requirements to minimize mercury emissions during storage and transportation (e.g., packaging to reduce breakage). These management controls could be the same as those proposed in the universal waste management system. The Agency is interested in data on the cost of and human health protection provided by these handling requirements for lamps.

The third condition is that generators taking advantage of the exclusion would be required to maintain a written certification indicating the disposal or recycling location for the lamps. The proposed certification, to be signed by the generator or its authorized representative, would state that on a

specified date a specified amount of lamps was consigned to a specified transporter for disposal or recycling at a specified facility. This certification would be required for each shipment of lamps and would be maintained by the generator for three years from the date of shipment. The Agency is proposing this documentation as a mechanism for verifying that the conditions of the exclusion have been met. Failure to maintain the required documentation would disqualify the generator from eligibility for the exclusion. The existence of the certification, however, would not protect a generator from an enforcement action if the lamps were not actually disposed of or recycled in accordance with the conditions.

The Agency is proposing that separate documentation be required for each shipment based on its belief that most lamp generation is sporadic (every three to four years), as opposed to on-going generation which would lead to a continuous relationship with the same disposal or recycling facility. Given that the life span of mercury-containing lamps is approximately three to four years, businesses that participate in mass relampings would only dispose of their lamps every few years. Under the current hazardous waste regulations, many of these businesses would be subject to hazardous waste regulation because mass relamping could cause them to exceed the conditionally-exempt small quantity generator level (approximately 350 four foot lamps, if lamps are the only hazardous waste generated). However, small businesses and other facilities that generate just under the CESQG limit of hazardous waste (100 kg per month) may exceed this limit with attrition relamping. For these generators, this recordkeeping requirement could be more burdensome. The Agency requests comments on whether there are alternative mechanisms that can be used by generators to demonstrate compliance with the conditions of the exclusion. The Agency also requests comment on whether, if the Agency determines that documentation is necessary to demonstrate compliance with the conditions, the form and frequency of documentation proposed are appropriate.

In addition to requesting comment on the conditions of the exclusion, the Agency requests comment on having a 3 to 5 year sunset provision on the exclusion. A sunset provision would require the Agency to re-evaluate the exclusion after a period of three to five years, to determine whether an exclusion is indeed appropriate for lamps given any unanticipated management or risk issues that develop as a result of the exclusion. The Agency would then determine whether to extend the exclusion.

Finally, the Agency requests comments on other alternatives that still achieve the overall RCRA goal of protection of human health and the environment. EPA is interested in data on the benefits, costs, and legal authority for any alternatives and the Agency will consider such options.

B. Universal Waste Management System

1. Background

On February 11, 1993, EPA proposed a streamlined, reduced regulatory management structure for certain widely-generated hazardous wastes currently subject to full RCRA Subtitle C regulation, in an effort to facilitate their collection and proper management (the "universal wastes" proposal, 58 FR 8102). The proposed reduced regulatory structure, known as a special collection system, is designed to ensure that management of these hazardous wastes is conducted in a manner that is protective of human health and the environment, given the diffuse and diverse population of generators of these wastes. See the February 11, 1993 preamble discussion, for a detailed discussion of the proposal.

The general waste types that EPA believes may be appropriately managed under this streamlined regulatory structure are known as "universal wastes" and share several characteristics. These wastes:

- Are frequently generated in a wide variety of settings other than the industrial settings usually associated with hazardous wastes;
- Are generated by a vast community, the size of which poses implementation difficulties for both those who are regulated and the regulatory agencies charged with implementing the hazardous waste program; and
- May be present in significant volumes in the municipal waste stream.

The February 11, 1993, proposal included specific regulatory text addressing the management of two waste types; hazardous waste batteries, and suspended and/or canceled hazardous waste pesticides that are recalled. The proposal also included a petition process and a set of criteria to be used to determine whether it would be appropriate to add additional waste types to the special collection system in the future. Several waste types such as automotive antifreeze, paint application wastes, and mercury-containing items such as thermostats and thermometers were discussed as possible additions to the Universal Waste proposal, also referred to as the special collection system.

2. Universal Waste System Alternative for Lamps

In the February 11, 1993, proposal EPA mentioned fluorescent lamps (58 FR 8110), explaining that the Agency was examining the risks of managing these wastes in landfills and requesting data on the risks of various management methods for these wastes. Comments received in response to that request are included in the docket for this proposal. The Agency will respond to these comments in the final rule together with those submitted in response to Today's proposal. The Agency is requesting comment on using the proposed special collection system for the management of spent lamps as another approach to the management of mercury-containing lamps. The Agency has not yet promulgated a final universal waste rule but anticipates doing so in the near future. Should EPA select the universal waste option for lamps as a final rule, the Agency will ensure consistency with the more comprehensive universal waste final rule.

The Agency believes that spent lamps may appropriately be considered "universal wastes" in that they are generated in a wide variety of settings, are generated by a very large number of generators, and are present in significant volumes in the municipal waste stream. The special collection system approach may be an appropriate option for addressing the collection phase of managing lamps that are hazardous waste. The special collection system approach (which is consistent with the February 11, 1993 proposal), would not change any of the requirements applicable to the ultimate treatment and disposal or recycling of any wastes collected, but would minimize the regulatory requirements applicable to collection of these wastes (i.e., generation, transportation, and intermediate storage/consolidation) for proper management.

Special collection system regulations also could remove some existing barriers to management of hazardous waste lamps under the Subtitle C system by reducing the technical and paperwork requirements applicable to collection, thus making collection more efficient and economical. At the same time, management requirements included in special collection system regulations could be designed to minimize the hazards posed in collection of these wastes (e.g., special packaging could be required to minimize the risk of breakage).

By removing some of the barriers to Subtitle C management for lamps, a special collection system approach could minimize concerns about decreased participation in the Green Lights program by simplifying and clarifying the requirements for mercury-containing lamp collection while maintaining Subtitle C control over final treatment and disposal (or recycling) for these lamps. Such an approach could help in assuring that the substantial environmental benefits offered by the Green Lights program are realized through increased participation. Management costs under the special collection system approach proposed on February 11, 1993, would be lower than full Subtitle C management because hazardous waste transporters and manifests would not be required for lamp shipments between the generator and the consolidation facility, and permits would not be required for storage at interim consolidation points. However, under the Special Collection System the management of mercury-containing lamps (after reaching the consolidation point) would be more expensive than the management of these lamps under the conditional exclusion (although the larger volumes managed at these consolidation points may result in certain economies of scale for transport and disposal or recycling).

The Agency requests comment on whether spent hazardous waste lamps should be regulated under the special collection system approach proposed February 11, 1993. Documents included in the docket for this proposal include estimates indicating that approximately 3.9 billion spent lamps of all types may be disposed of annually in the country (including 550 million spent fluorescent lamps) and that lighting is one of the second largest contributors of mercury to the municipal waste stream (from all types of mercury-containing lamps). In addition, the Agency believes that spent mercury-containing lamps of some type must be generated by almost every commercial and industrial establishment in the country.

In addition, a special collection system approach could address all types of spent lamps that fail the toxicity characteristic and are therefore hazardous waste, not only mercury-containing lamps. Such an approach seems appropriate since any type of waste lamp is likely to be "universal" in nature. The Agency requests comment on whether various types of spent lamps (e.g., incandescent, neon), other than mercury-containing lamps, typically fail the TC test (or exhibit other characteristics) and would be hazardous waste under the current RCRA Subtitle C toxicity characteristic (40 CFR 261.24). Indeed, should the Agency choose, in a final rule, to conditionally exempt mercury-containing lamps from regulation under Subtitle C, the Agency may still elect to add other types of lamps to the universal waste management system. The Agency requests comment on this approach and on whether, how frequently, and for what TC constituents various lamp types may fail the toxicity characteristic. The Agency also requests that commenters submit any additional data that may be available on this question.

The Agency requests comment on a special collection system for management of spent lamps including the same basic structure and requirements for generators, transporters, consolidation points, and destination facilities as proposed on February 11, 1993 for management of hazardous waste batteries and pesticides. The Agency is also specifically requesting comment on the items discussed below.

First, in the February 11, 1993, proposal the Agency proposed a quantity limit for storage of batteries above which generators and consolidation points would be required to notify the Agency of their storage activities. The Agency requests comment on a notification requirement for generators and consolidation points storing more than 35,000 spent mercury-containing lamps. This requirement is similar in substance to the notification requirement proposed in the Universal Wastes rule (proposed § 273.11(c) and § 273.13(d) (58 FR 8129–8130)). EPA is suggesting a numerical limit rather than a weight limit because lamp packaging (e.g., the cardboard boxes in which new replacement lamps were shipped) may constitute a large proportion of the total weight of a shipment or stored quantity of lamps. In addition, industry practice appears to be to quantify inventories by number of lamps rather than by weight, calculated by multiplying the number of boxes of lamps in storage or in a shipment by the number of lamps per box. Since about 35,000 lamps roughly correspond to a full truckload of packaged fluorescent lamps, the Agency is suggesting a 35,000 limit for fluorescent lamps. The Agency also requests comment on appropriate quantity limits for notification for other hazardous waste lamps types.

Second, the Agency is requesting comment on the options proposed in the Universal Waste proposal § 273.11(b)(2) and § 273.13(a)(2) (58 FR 8129–8130) for demonstrating that lamps are not stored for greater than one year. In addition, with respect to tracking of lamp shipments, the Agency is requesting comment on several alternatives. The approach included in today's proposed regulatory text is the same as that included in the universal wastes proposal for batteries (§ 273.12(b) of the universal waste proposal). This approach requires that the manifest system be used (which triggers the use of hazardous waste transporters) for shipments from the last consolidation point to a destination facility, but that no manifests or other records (or hazardous waste transporters) be required for shipments from generators to consolidation points, between consolidation points, or from generators to destination facilities. On the other hand, because a number of comments received on the proposed universal wastes rule disagreed with this approach, the Agency is also requesting comment on two additional approaches. The first alternative, which was suggested in several comments on the universal wastes rule, would be to require that persons initiating and receiving shipments of lamps retain shipping papers documenting the shipments. The minimum data elements required for such records could be specified (e.g., quantity of lamps, date of shipment or receipt, name and address of shipper and receiver). The second alternative would be not to specifically require any specific record keeping for shipments of lamps, but, as with all exemptions, the person claiming the exemption would have to keep documentation to show they qualify (see § 261.2(f)). The Agency is requesting comment on this second alternative because it is believed that due to the large volumes of lamps, shipments are more likely to be made directly from the generator to a destination facility. Records would be available for such shipments because destination facilities are already required under 40 CFR 264.73(b)(1) or 265.73(b)(1) to maintain records including the description and quantity of each hazardous waste received. It is likely that lamps would be shipped directly from generators to disposal facilities because volumes are likely to be large enough that consolidation will not be necessary to make full truckloads. In addition, the storage space and careful handling required for management of these wastes make consolidation less attractive and shipment directly to the destination facility more likely.

A third question on which the Agency requests comment is what management controls would be appropriate to impose on collection of lamps under a special collection system approach. Some of the

data included in the docket for this proposal discuss the risks of the types of management likely in lamp collection such as management at the generator's site, transportation, and storage (U.S. EPA, 1993a). Requirements could include packaging that would be required to meet a performance standard of minimizing breakage for unbroken spent lamps. A wide variety of containers would probably satisfy such packaging requirements. EPA expects that packaging in which new replacement lamps are shipped from the manufacturer would frequently be reused to store and transport removed, used lamps. Another option could be to impose a prohibition on intentional breakage of spent lamps by generators.

In addition, requirements could be imposed on the storage and transportation of spent lamps that are inadvertently broken, to prevent further mercury emissions. Steel 55-gallon drums or any enclosed container could be used to hold broken lamps for transportation to the disposal site. In summary, the Agency requests comment on whether the exclusion should include requirements to minimize mercury emissions during storage and transportation of spent lamps. Management standards would apply to transporter and consolidation points as well as for generators. The Agency requests comment on management practices for lamps, the risks posed by these practices, and appropriate technical controls to minimize these risks while at the same time not inhibiting collection and proper management. The Agency also requests comment on whether generators or consolidation points should be allowed to intentionally crush lamps to minimize volume for storage or shipment and what, if any, standards should be imposed to protect against mercury releases during crushing or the subsequent management of crushed lamps. The proposed universal waste management system includes a prohibition on treatment (crushing is considered treatment) of lamps at the generator, transporter and consolidation points.

A fourth question on which the Agency requests comment is whether to include a 3 to 5 year sunset provision on the universal waste system for lamps. A sunset provision will require EPA to re-evaluate the effectiveness of the universal waste system in addressing the disposal of lamps after 3 to 5 years. The Agency can then decide whether less controls or more controls are needed to maintain the safe management of lamps and whether to extend the inclusion of lamps in the universal waste system.

VI. State Authority

A. Applicability of Rules in Authorized States

Under Section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program with the State. (See 40 CFR part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for authorization are found at 40 CFR part 271.

Prior to the Hazardous and Solid Waste Amendments (HSWA) of 1984, a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State and EPA could not issue permits for any facility in the State that the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the authorized State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in non-authorized States. EPA is directed to implement HSWA requirements and prohibitions in an authorized State, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, HSWA applies in authorized States in the interim.

B. Effect on State Authorizations

The conditional exclusion and the universal waste management system would not be HSWA regulations, and thus would not be immediately effective in authorized States. Thus, the exemption would be applicable only in those States that do not have final authorization for the base (non-HSWA) portion of the RCRA program.

Section 3009 of RCRA allows States to impose more stringent regulations than the Federal program. Accordingly, authorized States are only required to modify their programs when EPA promulgates Federal regulations that are more stringent than the authorized State regulations. For those changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their programs. Today's proposed options are considered less stringent or smaller in scope than the existing Federal regulations because that portion of today's proposal would exempt certain activities now within the purview of RCRA Subtitle C. Therefore, authorized States are not required to modify their programs to adopt regulations consistent with and equivalent to the proposed exclusion or the proposed universal waste management system for lamps.

Even though States will not be required to adopt today's proposed options (if either is finalized), EPA would encourage States to do so. As already explained in the preamble, a conditional exclusion of mercury-containing lamps or the addition of lamps to the universal waste management system could reduce barriers to participation in EPA's Green Lights program, which encourages pollution prevention through energy savings. Further, it could help to clarify for the regulated community the proper management of mercury-containing lamps.

In addition, the proposed options, by making regulations less stringent for management of lamps, would give States more freedom to develop programs for lamp disposal that would be appropriate for their situation.

VII. Economic Impact Analysis

Under Executive Order No. 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or

the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, this section of the preamble summarizes the costs (savings) and the economic impact analysis of (option 1) the proposed mercury-containing lamp exclusion and of (option 2) the proposed special collection of mercury-containing lamps. Based upon the economic impact analysis for today's rule, the Agency's best estimate is that the exclusion of mercury-containing lamps from Subtitle C hazardous waste regulatory requirements (option 1) may result in nationwide annualized savings of approximately $93 million, and the special collection of mercury containing lamps (option 2) may result in a nationwide annualized savings of approximately $17 million. A complete discussion of the economic impact analysis is available in the regulatory docket for today's proposed rule (EPA, 1994).

The Agency requests information to better evaluate the human health and environmental effects of the two options described in this notice and current disposal practices. Human and environmental exposure to mercury could occur during the collection, transportation, processing, recycling, treatment, and disposal of spent lamps. EPA estimated the potential mercury air emissions resulting from some of these activities, but is uncertain about the extent and likelihood of human and environmental exposure. The Agency is also aware that the two regulatory options may pose different worker and transportation injury risks as well as different environmental risks. The Agency requests information on the overall risks to human health and the environment associated with current practices and the two proposed options.

A. Compliance Costs (Savings) for Regulatory Options Considered

This section briefly describes (1) the universe of spent mercury-containing lamps and lamp generators, (2) the current regulatory baseline and (3) the major options for the regulation of spent mercury-containing lamps included in today's proposal for consideration. Descriptions of the baseline and the major options also include a summary of the methodology used in estimating compliance costs (savings). Results of the analysis are summarized in section 5.

1. Universe of Spent Lamps and Spent Lamp Generators

The Agency estimates that approximately 310 to 380 million mercury-containing lamps, and 47,000 to 64,000 facilities could be affected annually by today's proposal.

The spent lamp generation number is based on sales data,[1] adjusted to account for (1) Lamps generated by Conditionally Exempt Small Quantity Generators (CESQG), which would not be affected by either one of the proposed options, and (2) lamps generated in States where spent bulb management regulations exist (California, Minnesota, and Wisconsin). (It was assumed that these State controls would be more stringent than the options considered in today's proposal and would therefore supersede any Federal exemption of spent mercury-containing lamps from Subtitle C requirements).

2. Baseline Costs

EPA assumed that baseline requirements are the continuation of current Subtitle C regulatory standards for the treatment and disposal of mercury-containing lamps which currently fail the TC. Under this scenario, generators of spent mercury containing lamps which fail the TC continue to be subject to the full spectrum of hazardous waste management standards including record keeping and manifesting of all mercury-containing lamp shipments, Agency notification and Subtitle C transport, treatment, storage and disposal standards.

In the cost analysis, all spent mercury-containing lamps were assumed to be TC (Toxicity Characteristic) hazardous wastes. All spent lamps were also assumed to be in the low risk category for mercury, requiring stabilization as treatment under the Land Disposal Restrictions.

Cost drivers for the baseline management of spent lamps include hazardous waste transportation, and Subtitle C disposal. The bulk of mercury-containing lamps currently disposed (97%) are assumed to be stabilized and disposed of in hazardous waste landfills. The remainder, based upon volume data from the spent mercury-containing lamp recovery industry, are recycled. Based upon conversations with the recycling industry, which indicate planned increases in recycling capacity, the analysis assumed a small annual increase in the baseline recycling rate of mercury-containing lamps over the first three years of the analysis. Unit costs for stabilization, landfilling, recycling and hazardous waste transport were applied on a per ton basis.

[1] Source: National Electrical Manufacturing Association.

Generator specific requirements which applied to all large quantity generators of spent mercury-containing lamps included record-keeping, manifesting, exception reporting, and BRS (Biennial Reporting System) reporting. Other generator requirements, including rule familiarization, notification, personnel safety training and emergency[2] planning were only assessed for new facilities which spot relamp and store (up to 90 days for large quantity generators; up to 180 days for small quantity generators) spent lamps on site. It is assumed that costs resulting from generator requirements which are incurred on a per shipment basis (i.e. manifesting, exception reporting) will be incurred by group relampers once every three years (once per relamp). Spot relampers will incur these costs twice a year (for small quantity generators) or four times per year (for large quantity generators).

3. Option 1: Conditional Exclusion From Subtitle C Standards Costs

The first option under consideration in today's proposal is to exclude mercury-containing lamps from Subtitle C management standards with the condition that these lamps are managed in permitted municipal landfills or recycling facilities. The proposed exclusion also includes a minor generator record keeping requirement. As the exclusion would be deregulatory, primary economic impacts to small and large quantity generators of mercury-containing lamps resulting from this action would be in the form of cost savings from avoided Subtitle C regulatory management, particularly for transport and disposal of spent lamps.

In the cost analysis, it was assumed that, given the proposed conditional exclusion, all small and large quantity generators of spent mercury-containing lamps would opt for management in municipal landfills in order to reduce disposal costs.

Some generators may have slightly higher disposal costs than others as a result of the proposed exclusion of mercury-containing lamps from municipal combustors. If these generators currently manage their non-hazardous waste in municipal combustors, the combustor exclusion

[2] According to 40 CFR part 265 Subpart D of the Resource Conservation and Recovery Act, all large quantity generators of hazardous waste must draft a contingency plan describing the actions facility personnel will take should a fire, explosion, or any unplanned sudden or non-sudden releases of hazardous waste constituents to air, soil, or surface water occur. Local emergency response teams use the information required in the contingency plan to minimize unanticipated damage from the storage of hazardous waste.

may require these generators to: (1) Keep their spent lamps separate from the rest of their municipal solid waste, (2) store spent lamps on site until enough volume has been generated to make disposal cost effective, and (3) haul spent lamps greater distances to municipal solid waste landfills.

In short, overall savings to be accrued from the proposed exclusion may vary slightly from generator to generator.

4. Option 2: Special Collection Costs

The second option, special collection, included in today's proposal would allow small and large quantity generators of spent mercury-containing lamps to reduce certain administrative activities required under Subtitle C standards, including biennial reporting, notification, manifesting and personnel training. Additionally the option also allows generators to store spent mercury-containing lamps on-site for up to one year without a hazardous waste permit, and to transport their spent lamps direct to final disposal or recycling using non-hazardous waste haulers.

The option also includes similar reduced requirements for interim spent lamp storage facilities and "special collection centers." Transportation to these facilities or centers from the generator would not be regulated under Subtitle C standards, however, transport to final disposal or recycling from these facilities would be regulated under Subtitle C standards.

The costs estimated for Special Collection Option assumes for urban generators direct shipment using non-hazardous waste haulers, as allowed under this option, from generators to final disposal; thus the costs of creating and operating an interim storage facility or special collection center are not included for urban generators. The rationale for this omission is twofold: (1) It is assumed that spent lamp generation is large enough to create economies of scale for direct non-hazardous waste transport; the need for special collection centers is precluded by non-hazardous waste transport "milk runs" for spent lamps, and (2) although there may be economies of scale generated for long-haul transport of spent lamps from collection centers, the special collection option requires Subtitle C transport from the centers to final disposal or recycling, thus making the use of a collection center with Subtitle C final transport more expensive than Subtitle D direct transport to the disposal facility.

5. Results

a. *National Annualized Costs (Savings).* A summary of estimated national annual compliance costs associated with the exclusion option and the special collection option, along with estimated baseline compliance costs are presented below in exhibit VII.1. Also presented are estimated incremental savings above baseline compliance costs for each option. Costs were annualized over a twenty-year period, using a 7% discount rate. The analysis used projected growth in the U.S. population over the twenty-year time frame of the analysis to estimate the increase in growth of spent lamp generation. Total estimated annualized savings range between approximately $85 million and $102 million for the exclusion and savings estimates for the special collection option range between $16 million and $20 million in savings.

The above savings estimate is based on the assumption in the baseline that all facilities are properly managing their mercury-containing spent lamps as Subtitle C waste. Currently, however, some lamp generators may not be aware that fluorescent lamps are hazardous waste and therefore may not be following Subtitle C requirements. Hence, estimated savings may represent savings from a future scenario of full compliance with current law, rather than savings from current lamp management. EPA expects that if no regulatory action is taken, Subtitle C management of mercury-containing lamps will become more prevalent over the next few years.

EXHIBIT VII.1.—ANNUALIZED COSTS (SAVINGS) OF REGULATORY OPTIONS

[Costs (savings) are presented in millions of 1992 dollars/year[3]]

Regulatory option	Total annualized costs	Incremental annualized costs/(savings) above baseline
Baseline: Subtitle C Standards.	$110–$134; BE: $118.	NA.
Option 1: Conditional Exclusion from Subtitle C.	$25–$32; BE: $25.	($85)–($102); BE: ($93).
Option 2: Special Collection.	$94–$115; BE: $101.	($16)–($20); BE: ($17).

[3] Numbers may not add up due to rounding. BE=Best Estimate.

b. *Individual Generator Savings.* Average total savings per generator for both options were simply assessed by dividing total savings by the estimated number of generators above (refer to the methodology section). The average annual baseline Subtitle C cost per generator is estimated to be between $2,000 to $2,250 per generator. Average per generator savings for the two deregulatory options are indicated below in exhibit VII.2. Individual generator savings, however, will vary due to facility size, proximity to disposal or recycling facility, and regional disposal/recycling costs.

EXHIBIT VII.2.—AVERAGE ANNUAL COST (SAVINGS) PER REGULATED GENERATOR

[In 1992 dollars]

Regulatory option	Average annual cost (savings)/generator
Exclusion from Subtitle C Standards.	($1,500)—High Savings Scen. ($2,000)—Low Savings Scen. ($1,600)—Best Estimate.
Special Collection	($300)—High Savings Scen. ($300)—Low Savings Scen. ($300)—Best Estimate.

c. *Savings Per Waste Lamp Generated.* As with average savings per generator estimates, average savings per waste lamp generated were derived by simply dividing total upper and lower bound costs (savings) by the estimated number of waste lamps accounted for by small and large quantity generators in states without specific spent lamp management standards. The average baseline Subtitle C cost per bulb is estimated to be $.34 to $.36. The resulting savings per lamp is estimated at $.27 per bulb for the conditional exclusion option (both high and low savings scenario) and at $.05 per bulb for the special collection option. Again, cost per bulb may vary significantly due to site specific factors.

6. Sensitivity Analysis

This section presents the results of EPA's analysis of the effects of varying selected major parameters in the cost analysis (where the Agency used considerable judgment in arriving at the parameter's value) on the estimated savings incurred under the proposed conditional exclusion and the proposed Universal Waste Rule. The following assumptions were analyzed in the sensitivity analysis for EPA's analysis of spent lamp management costs:

(1) Percentage of Lamps Generated at Small and Large Quantity Generators. In the sensitivity analysis, EPA set its lower bound estimates of the percentage

of lamps generated at SQGs and LQGs at fifty percent of total spent lamp generation and its upper bound estimates at ninety percent. (Seventy-five percent was used in the initial cost analysis).

(2) Cost to Transport Subtitle C Waste. In the sensitivity analysis, EPA increased the upper bound estimates of the costs of transporting spent lamps as Subtitle C by a factor of three, based on price quotes from commercial transporters, over original estimates.

(3) Cost to Dispose of Subtitle C Waste. Based on price quotes from commercial hazardous waste disposal facilities, EPA increased the upper bound estimates of the Subtitle C disposal costs by a factor of four over original estimates.

(4) Cost of Employee Training. To reflect uncertainty over whether a professional trainer would be required and over how many employees would need to be trained, EPA increased and decreased the cost of employee training required by 50 percent.

The costs associated with the high-end scenario were estimated using the upper bound estimates for each cost element included in the sensitivity analysis. The costs associated with the low-end scenario combined the lower bound estimates for each cost element. The results from these two analyses suggest that the range of total annual savings from the proposed condition exclusion for spent lamps could be $65 million to $289 million, and the range of total annual savings from the proposed Universal Waste RCRA requirements for generators of spent lamps could be $15 million to $39 million. The range in cost savings is mainly the result of uncertainty over Subtitle C transportation and disposal costs for lamps. Although EPA has received price quotes for management of lamps as Subtitle C waste that are considerably higher than the average cost of managing hazardous waste in Subtitle C landfills, it is not appropriate to directly compare price quotes to engineering costs because the price quotes reflect a constrained market place which tends to inflate prices well above costs. However, a three-fold difference between the price quotes for spent lamps and standard Subtitle C management cost may also be due to other factors beyond the inflated prices of the constrained market, including the low density of lamps (i.e. a ton of lamps has a greater volume than a ton of hazardous waste sludge), or difficulty in handling lamps. EPA requests comment on the true costs, as well as the reasoning behind these costs, of managing spent lamps as Subtitle C waste.

B. Proposed Rule Impacts

1. Impacts on Generators of Mercury-Containing Waste Lamps

As indicated above, option 1, the exclusion, is estimated to result in average annual savings per small and large quantity spent lamp generator ranging from $2,000 to $2,250. Option 2, special collection, is estimated to result in an average annual per generator savings of approximately $300.

2. Secondary Effects

While total incremental savings from the proposed exclusion (option 1) and from the proposed special collection system (option 2) over a Subtitle C management approach appear to be high, the Agency does not expect significant immediate shifts in demand or price for the lamps or for products manufactured or sold by firms which consume these lamps due to the proposed options. Because the impacts to lamp generators are positive (i.e. net savings), the Agency does not expect the rule to result in adverse impacts to businesses, or to affect employment or international trade to any appreciable degree.

EPA believes that, with the exception of lamps generated in States with existing lamp disposal requirements, most small and large quantity generators of mercury containing lamps will choose to dispose of their waste lamps in municipal solid waste landfills under option 1, the proposed exclusion from Subtitle C. This is because Subtitle D disposal is significantly less expensive per bulb than recycling or Subtitle C disposal.[4] Subsequently, most waste lamps currently being handled according to Subtitle C standards by permitted hazardous waste haulers, disposal sites and spent lamp processing facilities, would be handled by Subtitle D haulers and disposal facilities. Thus Subtitle C waste haulers, disposal and spent lamp processing facilities would be affected negatively while Subtitle D haulers and disposal facilities would be affected positively under option 1.

The exclusion, option 1, may also have an impact upon mercury-containing lamp processors. The Agency estimates that there are currently 15 facilities which process spent mercury-containing lamps. Two of these facilities recover spent mercury through retorting; the remaining 13 facilities separate the glass and aluminum ends, and send the mercury-containing phosphor powder to the two facilities that retort. Ten of the 15 lamp processing facilities are located in the three States where spent lamp management regulations exist. Although most recovery facilities are located in States with stringent State lamp disposal requirements, and would most likely will not be affected by today's proposed exclusion, a certain percentage of the spent lamps currently recovered at these facilities are generated in States with no specific lamp disposal requirements. EPA believes that a portion of mercury-containing lamps would no longer be sent for recovery under the proposed exclusion (option 1) since disposal in municipal landfills would be significantly less expensive.[5] Assuming that lamps generated outside of these States will not be sent for recovery, it is possible that 17 percent, or 16 million lamps, may be diverted. Using a lamp/revenue ratio for recovery facilities of $.44, total impact to the industry could be approximately $7 million dollars[6] in lost revenues ($469,000 per facility). Future recycling efforts may also be impacted since many of these facilities may retract plans for expansion in States which currently have no specific lamp disposal requirements.

Under option 2, the proposed special collection system, small and large quantity generators would not be allowed to choose to dispose of hazardous waste lamps in a municipal solid waste landfill. Thus the above impacts on Subtitle C waste haulers, disposal and spent lamp processing facilities would not be observed under the second option.

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[4] EPA estimates that the average cost per ton for Subtitle D disposal is $35 as compared to $400 per ton for Subtitle C disposal and $1,375 per ton for recycling.

[5] EPA estimates that Subtitle D landfilling costs range between $10 and $150 per ton depending upon the region of the country. Compared with an average recycling cost of $1375 per ton, Subtitle D landfilling is significantly less expensive.

[6] Similar estimates were not derived for Subtitle C waste haulers or disposal sites.

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IX. Paperwork Reduction Act

The information collection requirements in today's proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR# 1699.01) and a copy may be obtained from Sandy Farmer, Information Policy Branch, U.S. Environmental Protection Agency, 401 M Street, S.W. (2136); Washington, DC 20460 or by calling (202) 260–2740.

The public record keeping burden for this collection of information is estimated to average 4.7 hours per response annually, including time for reviewing instructions, searching existing data sources, gathering and maintaining the required data, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, 2236, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

X. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 requires Federal agencies to consider "small entities" throughout the regulatory process. Section 603 of the RFA requires an initial screening analysis to be performed to determine whether small entities will be affected by the regulation. If affected small entities are identified, regulatory alternatives must be considered to mitigate the potential impacts. Small entities as described in the Act are only those "businesses, organizations and governmental jurisdictions subject to regulation."

The only entities directly subject to today's proposed rule are small and large quantity generators of spent mercury containing lamps (conditionally exempt small quantity generators are not directly subject to today's proposed rule). In order to meet the definition of a regulated entity under today's rule, a generator must produce over 100 kg of spent lamps (350 four foot fluorescent lamps) in a given month. It is conceivable that some of these generators would meet the definition of "small business" as defined by the Regulatory Flexibility Act (i.e. mid-sized firms that group relamp and generate in excess of 346 spent fluorescent lamps in a given month); however the Agency does not have an estimate of the number of such "small entities." However, both of the proposed options are expected to result in net savings to the regulated entities. Option 1, excluding mercury containing lamps from Subtitle C management standards, is estimated to result in per generator savings of between $2,000 and $2,250 annually. Option 2, managing spent lamps under a special collection system is estimated to result in an average annual per generator savings of approximately $300. Thus, since generator impacts are positive for both options, EPA has determined that small regulated entities will not be adversely impacted, and thus, no "mitigating" options are being analyzed in this section. Hence, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), "the Administrator certifies that this rule will not have a significant economic impact on a substantial number of entities."

Dated: July 13, 1994.

Carol M. Browner,

Administrator.

List of Subjects

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste.

40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements, Waste treatment amd disposal.

40 CFR Part 273

Environmental protection, Hazardous materials, Packaging and containers.

For the reasons set out in the preamble, 40 CFR parts 260 and 261, and 40 CFR part 273 as proposed in the **Federal Register** on February 11, 1993 at 58 FR 8102, are proposed to be amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

Subpart B—Definitions

2. Section 260.10 is amended by adding in alphabetical order the definitions for "electric lamp" and "mercury-containing lamp" to read as follows:

§ 260.10 Definitions.

* * * * *

Electric lamp means the bulb or tube portion of a lighting device specifically designed to produce radiant energy, most often in the ultraviolet (UV), visible, and infra-red (IR) regions of the electromagnetic spectrum. Examples of common electric lamps include, but is not limited to, incandescent, fluorescent, high intensity discharge, and neon lamps.

* * * * *

Mercury-containing lamp is an electric lamp in which mercury is purposely introduced by the manufacturer for the operation of the lamp.

* * * * *

Option 1

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

3. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, and 6938.

4. In § 261.4, paragraph (b)(16) is added to read as follows:

§ 261.4 Exclusions.

* * * * *

(b) * * *

(16) Spent mercury-containing lamps which are disposed in municipal solid waste landfills in States or Indian Tribes with an EPA approved State or Tribal municipal solid waste landfill program or managed in mercury reclamation facilities that are permitted, licensed or registered by a State or Tribe. To qualify for this exclusion, a generator must maintain in its operating records for three years from the date of shipment a certification for each shipment of mercury-containing lamps that is signed by the generator or its authorized representative and that states the following:

I certify, under penalty of law, that on [date], I consigned [amount] of mercury-containing lamps to [name and address of transporter] for [disposal] [recycling] at [name and address of disposal or recycling facility]. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Option 2

PART 273—STANDARDS FOR SPECIAL COLLECTION SYSTEM WASTES

5. The authority citation for part 273 continues to read as follows:

Authority: 42 U.S.C. 6922, 6923, 6924, 6925, 6930, and 6937.

6. In § 273.3, definitions for "electric lamp" and "mercury-containing lamp" are added in alphabetical order to read as follows:

§ 273.3 Definitions.

* * * * *

Electric lamp means the bulb or tube portion of a lighting device specifically designed to produce radiant energy, most often in the ultraviolent (UV), visible, and infra-red (IR) regions of the electromagnetic spectrum. Examples of common electric lamps include, but are not limited to, incandescent, fluorescent, high intensity discharge, and neon lamps.

* * * * *

Mercury-containing lamp is an electric lamp in which mercury are purposely introduced by the manufacturer for the operation of the lamp.

* * * * *

7–8. Subpart D is added to Part 273 to read as follows:

Subpart D—Lamps That Are Hazardous Wastes

Sec.

273.30 Applicability.
273.31 Generator requirements.
273.32 Transporter requirements.
273.33 Consolidation point requirements.
273.34 Destination facility requirements.
273.35 Export requirements.
273.36–273.39 [Reserved].

Subpart D—Lamps That Are Hazardous Wastes

§ 273.30 Applicability.

(a) *Covered wastes.* (1) This subpart sets forth standards for managing lamps that are hazardous wastes.

(2) Lamps that are hazardous wastes and that are not managed in compliance with the requirements of this Part must be managed under the hazardous waste regulations in 40 CFR parts 260 through 272 of this chapter.

(b) *Household and conditionally exempt small quantity generator waste lamps.* (1) Persons managing the wastes listed below may, at their option, manage them under the requirements of this subpart without changing the wastes' exempt status:

(i) Household hazardous waste lamps that are exempt under 40 CFR 261.4(b)(1); and/or

(ii) Conditionally exempt small quantity generator hazardous waste lamps that are exempt under 40 CFR 261.5.

(2) Persons who commingle household hazardous waste lamps and/or conditionally exempt small quantity generator hazardous waste lamps together with hazardous waste lamps regulated under this subpart must manage the commingled lamps under the requirements of this subpart.

§ 273.31 Generator requirements.

(a) *Generation of hazardous waste lamps.* (1) The date a used lamp becomes a waste is the date the generator permanently removes it from its fixture.

(2) The date an unused lamp becomes a waste is the date the generator decides to throw it away.

(3) A waste lamp is a hazardous waste if it exhibits one or more of the characteristics identified in 40 CFR part 261, subpart C.

(b) *Condition of hazardous waste lamps.* A generator of hazardous waste lamps must at all times:

(1) Contain unbroken lamps in packaging that will minimize breakage during normal handling conditions; and

(2) Contain broken lamps in packaging that will minimize releases of lamp fragments and residues.

(c) *Storage.* (1) A generator may store a hazardous waste lamp for no longer than one year from the date the lamp became a waste.

(2) A generator who stores hazardous waste lamps must be able to demonstrate that lamps are not stored for more than one year from the date they became a waste. A generator may make this demonstration by:

(i) Placing the lamps in a container and marking or labeling the container with the earliest date that any lamp in the container became a waste;

(ii) Marking or labeling an individual lamp with the date that it became a waste;

(iii) Maintaining an inventory system that identifies the date each lamp in storage became a waste;

(iv) Maintaining an inventory system that identifies the earliest date that any lamp in a group of lamps became a waste; or

(v) Placing the lamps in a specific storage area and identifying the earliest

date that any lamp in the storage area became a waste.

(d) *Notification.* (1) A generator who stores more than 35,000 hazardous waste lamps at any time must have, before exceeding the 35,000 lamp quantity limit, sent written notification of hazardous waste lamp storage to the Regional Administrator and received an EPA Identification Number.

(2) This notification must include:

(i) The generator's name and mailing address;

(ii) The name and business telephone number of the person at the generator's site who should be contacted regarding the lamp storage activity;

(iii) The address or physical location of the lamp storage activity;

(iv) A statement indicating that the generator stores more than 35,000 hazardous waste lamps.

(e) *Prohibitions.* A generator of hazardous waste lamps is:

(1) Prohibited from diluting or disposing of them;

(2) Prohibited from treating them, except by responding to releases as provided in paragraph (f)(2) of this section; and

(3) Prohibited from sending or taking the hazardous waste lamps to a place other than a consolidation point, destination facility, or foreign destination.

(f) *Lamp management.* (1) A generator must at all times manage hazardous waste lamps in a way that minimizes lamp breakage.

(2)(i) A generator must immediately contain all releases of residues from hazardous waste lamps.

(ii) A generator must determine whether any materials resulting from the release are hazardous wastes, and if so, the generator must manage them in accordance with all applicable requirements of 40 CFR parts 260 through 272.

(3) A generator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relative to their responsibilities during normal facility operations and emergencies.

§ 273.32 Transporter requirements.

(a) Shipments from a generator to a consolidation point, from a generator to a destination facility, or from one consolidation point to another consolidation point.

(1)(i) A transporter must at all times contain unbroken lamps in packaging that will minimize breakage during normal handling and transport conditions; and

(ii) A transporter must at all times contain broken lamps in packaging that will minimize releases of lamp fragments and residues.

(2) A transporter of hazardous waste lamps may only store them at a transfer facility for ten days or less.

(3) A transporter of hazardous waste lamps is prohibited from:

(i) Diluting or disposing of them;

(ii) Treating them, except by responding to releases as provided in paragraph (a)(4) of this section; and

(iii) Transporting them to a place other than a consolidation point, destination facility, or foreign destination.

(4)(i) A transporter must at all times manage hazardous waste lamps in a way that minimizes lamp breakage.

(ii) A transporter must immediately contain all releases of residues from hazardous waste lamps.

(iii) A transporter must determine whether any materials resulting from the release are hazardous wastes, and if so, the transporter must manage them in accordance with all applicable requirements of 40 CFR parts 260 through 272.

(b) *Shipments from a consolidation point to a destination facility.* A transporter who transports shipments from a consolidation point to a destination facility must comply with 40 CFR part 263.

§ 273.33 Consolidation point requirements.

(a) *Condition of lamps.* The owner or operator of a consolidation point managing hazardous waste lamps must at all times:

(1) Contain unbroken lamps in packaging that will minimize breakage during normal handling conditions; and

(2) Contain broken lamps in packaging that will minimize releases of lamp fragments and residues.

(b) *Storage.* (1) The owner or operator of a consolidation point may store a hazardous waste lamp for no longer than one year from the date that the owner or operator receives it.

(2) The owner or operator of a consolidation point who stores hazardous waste lamps must be able to demonstrate that lamps are not stored for more than one year from the date they were received. The owner or operator may make this demonstration by:

(i) Placing the lamps in a container and marking or labeling the container with the earliest date that any lamp in the container was received;

(ii) Marking or labeling an individual lamp with the date that it was received;

(iii) Maintaining an inventory system that identifies the date each lamp in storage was received;

(iv) Maintaining an inventory system that identifies the earliest date that any lamp in a group of lamps was received; or

(v) Placing the lamps in a specific storage area and identifying the earliest date that any lamp in the storage area was received.

(c) *Prohibitions.* The owner or operator of a consolidation point managing hazardous waste lamps is:

(1) Prohibited from diluting or disposing of them;

(2) Prohibited from treating them, except by responding to releases as provided in paragraph (d)(2) of this section; and

(3) Prohibited from sending or taking them any place other than a consolidation point, destination facility, or foreign destination.

(d) *Lamp Management.* (1) The owner or operator of a consolidation point must at all times manage hazardous waste lamps in a way that minimizes lamp breakage.

(2)(i) The owner or operator of the consolidation point must immediately contain all releases of residues from hazardous waste lamps.

(ii) The consolidation point owner/operator must determine whether any materials resulting from the release are hazardous wastes, and if so, the owner/operator must manage them in accordance with all applicable requirements of 40 CFR parts 260 through 272.

(3) The consolidation point owner or operator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relative to their responsibilities during normal facility operations and emergencies.

(e) *Notification.* (1)(i) A consolidation point owner or operator who stores more than 35,000 hazardous waste lamps at any time must have, before exceeding the 35,000 lamp quantity limit, sent written notification of hazardous waste lamp storage to the Regional Administrator and received an EPA Identification Number.

(ii) This notification must include:

(A) The owner's or operator's name and mailing address;

(B) The name and business telephone number of the person who should be contacted regarding the lamp storage activity;

(C) The address or physical location of the lamp storage activity;

(D) A statement indicating that the owner or operator stores more than 35,000 hazardous waste lamps.

(2)(i) A consolidation point owner or operator who sends a shipment of hazardous waste lamps directly from the

consolidation point to a destination facility, who is not required to notify under paragraph (e)(1) of this section, must have, before initiating the shipment, sent written notification of hazardous waste lamp shipments to a destination facility to the Regional Administrator and received an EPA Identification Number.

(ii) This notification must include:

(A) The owner's or operator's name and mailing address;

(B) A statement that the owner or operator intends to ship hazardous waste lamps to a destination facility;

(C) The name and business telephone number of the person who should be contacted regarding the lamp storage activity; and

(D) The address or physical location of the lamp storage activity.

(f) *Uniform Hazardous Waste Manifests.* The owner or operator of a consolidation point who sends a shipment of hazardous waste lamps directly to a destination facility must comply with subpart B of part 262 and §§ 262.30 through 262.33, 262.40(a), 262.40(d), and 262.42 of this chapter when initiating a shipment.

§ 273.34 Destination facility requirements.

(a) Owners or operators of destination facilities that recycle, treat, store, or dispose of hazardous waste lamps must comply with all applicable requirements of parts 264, 265, 266, 268, 270, and 124 of this chapter, and the notification requirement under section 3010 of RCRA.

(b) Owners and operators of destination facilities that recycle hazardous waste lamps without storing them before they are recycled must comply with 40 CFR 261.6(c)(2).

§ 273.35 Export requirements.

(a) A generator who sends hazardous waste lamps to a foreign destination, without first sending them to a consolidation point or destination facility, must:

(1) Comply with the requirements applicable to a primary exporter in 40 CFR 262.53, 262.56(a)(1) through (4), (6), and (b) and 262.57;

(2) Export such materials only upon consent of the receiving country and in conformance with the EPA Acknowledgement of Consent as defined in subpart E of part 262 of this chapter; and

(3) Provide a copy of the EPA Acknowledgement of Consent for the shipment to the transporter transporting the shipment for export.

(b) A transporter transporting a shipment of hazardous waste lamps to a foreign destination may not accept a shipment if the transporter knows the shipment does not conform to the EPA Acknowledgment of Consent. In addition the transporter must ensure that:

(1) A copy of the EPA Acknowledgment of Consent accompanies the shipment; and

(2) The shipment is delivered to the facility designated by the person initiating the shipment.

(c) An owner or operator of a consolidation point who sends hazardous waste lamps to a foreign destination, without first sending them to another consolidation point or destination facility, must:

(1) Comply with the requirements applicable to a primary exporter in 40 CFR 262.53, 262.56(a) (1) through (4), (6), and (b) and 262.57;

(2) Export such materials only upon consent of the receiving country and in conformance with the EPA Acknowledgement of Consent as defined in subpart E of part 262 of this chapter; and

(3) Provide a copy of the EPA Acknowledgement of Consent for the shipment to the transporter transporting the shipment for export.

(d) A destination facility sending hazardous waste lamps to a foreign destination must also comply with the generator requirements of part 262 of this chapter, and with 40 CFR 264.71(c) or 265.71(c) pertaining to initiating the manifest.

§§ 273.36–273.39 [Reserved]

[FR Doc. 94–18045 Filed 7–26–94; 8:45 am]

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July 27, 1994

Part V

Federal Emergency Management Agency

44 CFR Part 354

Fee for Services To Support FEMA's Offsite Radiological Emergency Preparedness Program; Proposed Rule

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 354

RIN 3067–AC10

Fee for Services To Support FEMA's Offsite Radiological Emergency Preparedness Program

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Proposed rule.

SUMMARY: Under its appropriation for fiscal year (FY) 1993 (Pub. L. 102–389), FEMA was authorized to assess and collect fees from Nuclear Regulatory Commission (NRC) licensees to recover approximately, but not less than, 100 per centum of the amounts anticipated by FEMA to be obligated for its Radiological Emergency Preparedness (REP) program. This appropriations act further provided for the Director of FEMA to promulgate, through rulemaking, a schedule of fees applicable to persons subject to FEMA's radiological emergency preparedness regulations. Public Law 102–389 provided the authority for these user fees to be assessed and collected for fiscal year 1993 services only. FEMA's appropriation for FY 1994 (Pub. L. 103–124) continued the user fee provisions of Public Law 102–389, and FEMA anticipates that the Congress will provide such authority again in FEMA's appropriation for FY 1995. If such authority is provided, FEMA proposes to revise its existing interim rule to change for FY 1995 the methodology used to assess the user fees. One advantage of the proposed change in methodology would be the ability to issue user fee bills during the first quarter of the fiscal year. This proposed rule is being published at this time in order to publish the resulting revised rule in time to meet the FY 1995 billing schedule, as well as to notify all potentially affected parties of this proposed change and to invite and request comments on the proposed revised methodology.

DATES: Comments from the public on this proposed rule are encouraged and invited on or before September 12, 1994.

ADDRESSES: Written comments should be addressed to the Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, room 840, 500 C Street, SW., Washington, DC 20472; (facsimile) (202) 646–4536.

FOR FURTHER INFORMATION CONTACT: Linda H. Vasta, Chief, Regulatory Services Coordination Unit, Preparedness, Training, and Exercises Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4570.

SUPPLEMENTARY INFORMATION: On March 6, 1991, FEMA published in the **Federal Register** (56 FR 9452–9459) the final rule, 44 CFR part 353, that established a structure for assessing and collecting user fees from NRC licensees. Under 44 CFR part 353, REP services provided by FEMA personnel and FEMA contractors were reimbursable only if these services were site-specific in nature and directly contributed to the fulfillment of emergency preparedness requirements needed for licensing by the NRC under the Atomic Energy Act of 1954, as amended. Although FEMA is proposing a new approach for the assessment and collection of fees from licensees for FY 1995, part 353 remains in effect and will apply in any subsequent fiscal year for which FEMA is not authorized to collect user fees for generic services.

Public Law 102–389, October 6, 1992, 106 Stat. 1571–1619, expanded reimbursable REP Program activities by authorizing FEMA to charge licensees of commercial nuclear power plants fees to recover the full amount of the funds budgeted for FEMA's REP Program for FY 1993. On July 1, 1993, FEMA published in the **Federal Register** (58 FR 35770–35775) an interim rule, 44 CFR part 354, to establish and set forth the policies and administrative basis for assessing and collecting these fees. FEMA reserved the option of applying, reissuing, or amending part 354 for other fiscal years provided that appropriate authority was enacted. Public Law 103–124, September 23, 1993, 107 Stat. 1297, directed FEMA to continue assessing and collecting fees to recover the full amount of the funds budgeted for FEMA's REP Program for FY 1994. In addition, the Administration has proposed assessing such fees for subsequent fiscal years.

Using the methodology established by the interim rule, 44 CFR part 354, the final hourly user fee rate for FEMA personnel during FY 1993 was calculated at $122.88. On December 13, 1993, a notice to this effect was published in the **Federal Register** (58 FR 65274). The notice also explained that FEMA would not publish a final rule at that time, pending a reconsideration of the methodology used for FY 1993, taking into consideration the comments received on interim rule 44 CFR part 354. The methodology established by the interim rule 44 CFR part 354 was continued in effect for FY 1994 as noticed in the **Federal Register** (59 FR 26350) published on May 19, 1994. Although the revised interim rule would, if authorized by FEMA's FY 1995 appropriation, be restricted to FY 1995, FEMA reserves the option of reissuing or amending part 354 for other fiscal years provided that appropriate authority is enacted.

Under this proposed revision of 44 CFR part 354, fees for FY 1995 would be assessed at a flat rate based on fiscal year budgeted funds for REP Program services performed by FEMA personnel and FEMA contractors whether or not these services directly support NRC licensing requirements. Under Section 354.4, Assessment of Fees, charges for services would be determined by dividing the total amount of funds budgeted for the REP Program, i.e., salaries and expenses, including travel, and Emergency Management Planning and Assistance (EMPA) funding, by the total number of licensed commercial nuclear power plant sites benefiting from REP Program services, as defined under § 354.2, Scope. The total amount of funds budgeted for the REP Program would be recovered by dividing the funds equally among the NRC licensees on a per site basis; thus, all sites will be charged the same flat fee. Under this methodology, site-specific and generic services would not be distinguished.

Among the comments in response to interim rule 44 CFR part 354 considered by FEMA were those submitted by the Nuclear Management and Resources Council (NUMARC), which has now become part of the Nuclear Energy Institute. In its comments, NUMARC recommended a methodology whereby the hourly rate for FEMA personnel would be determined by dividing that percentage of the total FEMA Salaries and Expenses budget item attributable to site-specific activities by the total number of site-specific hours expended. This hourly rate then would be applied only to site-specific activities performed by FEMA personnel. Site-specific activities performed by contractor personnel would be billed on an actual cost basis. Finally, under the proposed NUMARC methodology, costs for generic services provided by FEMA personnel and FEMA contract personnel would be recovered by charging each licensee equally for these activities.

The methodology recommended by NUMARC was considered by FEMA, but the flat fee approach is being proposed instead because a flat fee would: (1) Provide each licensee with a bill early in the fiscal year, thus facilitating the licensee's planning and budgeting process by greatly increasing the predictability of the licensee's bill; (2) enable States and licensees to request needed technical assistance without

considering any cost implications associated with site-specific oriented methodologies; (3) benefit the U.S. taxpayer by earlier deposit of funds in the U.S. Treasury; and (4) reduce the FEMA resources required to track administrative costs, thus making the accounting and billing process more efficient and cost-effective for the Government and freeing up FEMA resources for other REP program activities.

In addition to the above considerations, FEMA used actual FY 1993 billing data to calculate a flat fee and compared this with the fees that would have been generated using the methodology proposed by NUMARC. Using FY 1993 data, the flat fee (for each site) would have been $149,928. Under the proposed NUMARC methodology, the generic portion of the bill alone for each site would have been $87,702. The site-specific portion, consisting of exercise, plan review, and other site-specific activities, would be added to this amount for the total bill.

A further comparison of the results of these calculations indicated that, under the proposed NUMARC methodology, 23 sites would have had bills equal to or higher than the flat fee, averaging approximately $90,000 more than the flat fee. Forty-seven sites would have had bills lower than the flat fee, averaging approximately $42,000 less than the flat fee. An analysis of the results using the proposed NUMARC methodology also indicated that the size of a site's bill was, in most instances, directly related to the biennial exercise cycle; i.e., the bill was higher if a site had an exercise in FY 1993, and the bill was lower if a site had not had an exercise in FY 1993. Thus, a majority of the bills below the flat fee in FY 1993 would be higher than the flat fee in FY 1994, and vice versa. Over a two-year period the bills would average out to an amount reasonably close to the flat fee.

Based upon the results of the above calculations, FEMA believes the flat fee to be fair and equitable because (1) although under the proposed NUMARC methodology, more bills were below the flat fee than were above it, those bills lower than the flat fee were, on the average, considerably closer to the flat fee than were the bills higher than the flat fee, and (2) the flat fee would eliminate the extreme year-to-year fluctuation in bill amount due to a site's position in the exercise cycle, and, thus, each site's bills would be more equitable in size over any given biennial cycle.

FEMA's services primarily are provided in support of a Memorandum of Understanding (MOU) between the NRC and FEMA published on September 14, 1993 (58 FR 47996), and regulations issued by both FEMA (44 CFR parts 350, 351, and 352) and the NRC (10 CFR parts 50 and 52).

Radiological emergency response plans and exercises are evaluated using joint FEMA–NRC criteria, NUREG–0654/FEMA–REP–1, Revision 1 and Supplement 1. When State and local governments do not participate in the development of an emergency plan, the licensee may submit a licensee offsite plan to the NRC. Pursuant to the MOU, the NRC can request that FEMA review a licensee offsite plan and provide its assessments and findings on the adequacy of such plans and preparedness evaluated under Supplement 1.

All funds collected under this proposed rule would be deposited in the U.S. Treasury to offset funds budgeted for FEMA's REP Program. In response to a FEMA request for a waiver from the Department of Treasury's cash management provisions of the Treasury Financial Manual (TFM), I–TFM 6–8000, Section 8025.10, the Department of the Treasury granted FEMA a waiver from the I–TFM 6–8000, Section 8025.10, requirement to bill within five days of service. A waiver was not granted to allow 45 days for payment of bills by licensees. However, if the authority for the proposed revised interim rule is enacted, the Department of the Treasury will grant a one-time exemption to the 30 day payment requirement in order to permit licensees to pay the FY 1995 bill, which would be issued in November 1994, in January of 1995. Also, the Department of the Treasury requested that the user fee rule provide for the use of electronic billing and payment mechanisms. FEMA worked with the Department of the Treasury to effect these procedures and now provides for payment of bills by electronic transfers through Automated Clearing House credit payments. The Department of the Treasury publication I–TFM 6–8000 has been recently revised to require, under section 8025.30, all funds to be collected by electronic funds transfer when such collection would be cost-effective, practicable, and consistent with current statutory authority.

Regulatory Flexibility Act

The Director certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the rule would not apply to a substantial number of small entities as defined by the Small Business Size Standards, 13 CFR 121.601, Division E, Major Group 49, as amended, 57 FR 62520, December 31, 1992, and would not be expected (1) to have significant secondary or incidental effects on a substantial number of small entities, nor (2) to create any additional burden on a substantial number of small entities.

National Environmental Policy Act

The Director has determined under the National Environmental Policy Act of 1969 and FEMA Regulation, 44 CFR part 10, Environmental Considerations, that this proposed rule would not be a major Federal action significantly affecting the quality of the human environment. Therefore, an environmental impact statement is not required.

Executive Order 12866, Regulatory Planning and Review

This proposed rule would not be a significant regulatory action under Executive Order 12866 of September 30, 1993, Regulatory Planning and Review. It would not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The proposed rule would not create a serious inconsistency or interference with an action taken or planned by another agency. It would not materially alter the impact of entitlements, grants, or loan programs, nor would it raise novel legal or policy issues. To the greatest extent possible the proposed rule would adhere to the regulatory principles set forth in Executive Order 12866. This proposed rule has not been reviewed under the procedures of Executive Order 12866.

Paperwork Reduction Act

This proposed rule would not contain collection of information requirements and would not be subject to the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 et seq.).

Executive Order 12612, Federalism

A Federalism assessment under E.O. 12612 has been prepared and a copy is available for inspection and copying for a fee from the Rules Docket Clerk, address noted above.

List of Subjects in 44 CFR Part 354

Disaster assistance, Intergovernmental relations, Nuclear powerplants and reactors, Radiation protection, Technical assistance, Offsite radiological emergency planning and preparedness.

Accordingly, 44 CFR chapter I would be amended by revising part 354 to read as follows:

PART 354—FEE FOR SERVICES TO SUPPORT FEMA'S OFFSITE RADIOLOGICAL EMERGENCY PREPAREDNESS PROGRAM

Sec.
354.1 Purpose.
354.2 Scope.
354.3 Definitions.
354.4 Assessment of fees.
354.5 Description of services.
354.6 Billing and payment of fees.
354.7 Failure to pay.

Authority: Sec. 109, Pub. L. 96–295, 94 Stat. 780; Sec. 2901, Pub. L. 98–369, 98 Stat. 494; Title ____, Pub. L. 104–____, Stat. ____; EO 12148, 3 CFR, 1979 Comp., p. 412 (50 U.S.C. App. 2251 note); EO 12657, 3 CFR, 1988 Comp., p. 611. [Authority citation to be inserted if enacted]

§ 354.1 Purpose.

This part establishes the methodology for FEMA to assess and collect user fees from Nuclear Regulatory Commission (NRC) licensees of commercial nuclear power plants to recover at least 100 percent of the cost of services provided by the Federal Emergency Management Agency (FEMA) through its Radiological Emergency Preparedness (REP) Program as authorized under Title ____, Public Law 104–____, ____ Stat. ____ [Authority citation to be inserted if enacted]. As stipulated by Public Law 104–____ [Authority citation to be inserted if enacted], the methodology for assessment and collection of fees shall be fair and equitable, and shall reflect the full amount of costs of providing radiological emergency planning, preparedness, response and associated services. Such fees will be assessed in a manner that reflects the use of agency resources for classes of regulated persons and the administrative costs of collecting such fees. Fees received pursuant to this section shall be deposited in the general fund of the Treasury as offsetting receipts. Assessment and collection of such fees are only authorized during fiscal year (FY) 1995.

§ 354.2 Scope.

The regulation in this part applies to all persons or licensees who have applied for or have received from NRC:

(a) A license to construct, operate or decommission a commercial nuclear power plant;

(b) A possession-only license for a commercial nuclear power plant;

(c) An early site permit for a commercial nuclear power plant;

(d) A combined construction permit and operating license for a commercial nuclear power plant; or

(e) Any other NRC licensee that is now or may become subject to requirements for offsite radiological emergency planning and preparedness.

§ 354.3 Definitions.

As used in this part, the following terms and concepts are defined:

(a) *FEMA* means the Federal Emergency Management Agency.

(b) *NRC* means the U. S. Nuclear Regulatory Commission.

(c) *Technical assistance* means services provided by FEMA to facilitate offsite radiological emergency planning and preparedness, including but not limited to, provision of support for the preparation of offsite radiological emergency response plans and procedures, and provision of advice and recommendations for specific aspects of radiological emergency planning and preparedness, such as alert and notification and emergency public information.

(d) *Persons or Licensee* means the utility or organization that has applied for or has received from the NRC:

(1) A license to operate or decommission a commercial nuclear power plant;

(2) A possession-only license for a commercial nuclear power plant;

(3) An early site permit for a commercial nuclear power plant;

(4) A combined construction permit and operating license for a commercial nuclear power plant; or

(5) Any other NRC license that is now or may become subject to requirements for offsite radiological emergency planning and preparedness activities.

(e) *RAC* means Regional Assistance Committee chaired by FEMA with representatives from the Nuclear Regulatory Commission, Environmental Protection Agency, Department of Health and Human Services, Department of Energy, Department of Agriculture, Department of Transportation, Department of Commerce, Department of Interior, and other Federal departments and agencies as appropriate.

(f) *REP* means Radiological Emergency Preparedness as in FEMA's REP Program.

(g) *Fiscal Year* means the Federal fiscal year commencing on the first day of October through the thirtieth day of September.

(h) *Federal Radiological Preparedness Coordinating Committee (FRPCC)* means a committee chaired by FEMA with representatives from the Nuclear Regulatory Commission, Environmental Protection Agency, Department of Health and Human Services, Department of the Interior, Department of Energy, Department of Transportation, Department of Agriculture, Department of Commerce, Department of State, Department of Veterans Affairs, General Services Administration, National Communications System, the National Aeronautics and Space Administration and other Federal departments and agencies as appropriate.

(i) *Site* means the location at which one or more commercial nuclear power plants (reactor units) have been, or are planned to be, constructed.

(j) *Site-specific services* mean offsite radiological emergency planning, preparedness and response services provided by FEMA personnel and by FEMA contractors that pertain to a specific commercial nuclear power plant site.

(k) *Generic services* mean offsite radiological emergency planning, preparedness, and response services provided by FEMA personnel and by FEMA contractor personnel that do not pertain to a specific commercial nuclear power plant site.

(l) *Obligate or obligation* means a legal reservation of appropriated funds for expenditure.

§ 354.4 Assessment of fees.

Assessment of fees for licensees will be based on the following methodology that includes, but does not distinguish between, charges for both site-specific and generic services provided by FEMA personnel and FEMA contractors. Fees will be assessed for REP Program services provided by FEMA personnel and by FEMA contractors and not for those services provided by other Federal agencies involved in the FRPCC or the RACs.

(a) *Determination of charges for services.* Charges for services will be determined by dividing the total amount of fiscal year funds budgeted for the REP Program, i.e., salaries and expenses, including travel, and Emergency Management Planning and Assistance (EMPA) funding, by the total number of commercial nuclear power plant sites, as defined under § 354.2, Scope. The total amount of funds budgeted for the REP Program will be recovered by dividing the funds equally among the NRC licensees on a per commercial nuclear power plant site basis; thus, all sites would be charged the same amount. Under this methodology, site specific and generic services will not be distinguished.

(b) *Discontinuation of Charges.* Upon receipt of official written notification

from the NRC that offsite radiological emergency planning and preparedness is no longer required at a particular commercial nuclear power plant site, FEMA will discontinue REP Program services and will close out the official docket. Commencing with the next fiscal year after closing out the official docket, user fees will no longer be assessed for that site.

§ 354.5 Description of services.

REP Program services provided by FEMA and FEMA contractors for which licensees would be assessed fees include, but are not limited to, the following:

(a) Evaluation of State and local offsite radiological emergency plans and preparedness.

(b) Scheduling of exercises.

(c) Development of exercise objectives and scenarios.

(d) Pre-exercise logistics.

(e) Conduct of exercises and evaluations.

(f) Preparing, reviewing and finalizing exercise reports, notice and conduct of public meetings.

(g) Scheduling, conducting and evaluating remedial exercises, medical services drills, or other exercises and drills including participation in meetings and the preparation and review of associated reports.

(h) Preparation of findings and determinations on the adequacy or approval of plans and preparedness.

(i) Conduct of the formal 44 CFR part 350 review process.

(j) Providing technical assistance to States and local governments.

(k) Review of licensee submissions pursuant to 44 CFR part 352.

(l) Review of NRC licensee offsite plan submissions under the NRC/FEMA Memorandum of Understanding on Planning and Preparedness, and NUREG–0654/FEMA–REP–1, Revision 1, Supplement 1. Copies of the NUREG–0654 may be obtained from Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–7082.

(m) Participation in NRC adjudicatory proceedings and any other site-specific legal forums.

(n) Alert and notification system reviews.

(o) Responses to petitions filed under 10 CFR 2.206.

(p) Disaster-initiated reviews and evaluations.

(q) Congressionally-initiated reviews and evaluations.

(r) Responses to licensee's challenges to FEMA's administration of the fee program.

(s) Response to actual radiological emergencies.

(t) Development of regulations, guidance, planning standards and policy.

(u) Coordination with other Federal agencies to enhance the preparedness of State and local governments for radiological emergencies.

(v) Coordination of REP Program issues with constituent organizations such as the National Emergency Management Association, Conference of Radiation Control Program Directors, and the Nuclear Energy Institute.

(w) Implementation and coordination of REP Program training with FEMA's Emergency Management Institute (EMI) to assure effective development and implementation of REP training courses and conferences.

(x) Participation of REP personnel as lecturers or to perform other functions at EMI, conferences and workshops.

(y) Services associated with the assessment of fees, billing, and administration of this part.

§ 354.6 Billing and payment of fees.

FEMA will forward bills to licensees based on the assessment methodology set forth in § 354.4 to recover the full amount of the funds budgeted by FEMA to provide REP Program services. The assessments for each site and licensee, as stated above, will not distinguish between site-specific and generic services provided by FEMA personnel and FEMA contractors. Licensees with multiple sites will receive consolidated bills. FEMA will forward one bill to each licensee during the first quarter of the fiscal year, with payment due within 30 days. There will be a one-time adjustment to the billing cycle in the first quarter of FY 1995 to accommodate a transition to the new methodology. During this quarter, an adjusted final bill for FY 1994 REP Program services will be issued along with the bill for all of FY 1995, with a possible second bill if minor adjustments are necessary. In order to avoid having the licensees pay two bills during the same fiscal year (FY 1994) for activities performed in two different fiscal years, FEMA, with the concurrence of the Department of the Treasury, will structure the due date of these two bills so that the adjusted bill for FY 1994 will be due and payable by the end of December 1994 and the full bill for FY 1995 will be due and payable in January of 1995.

§ 354.7 Failure to pay.

In any case where FEMA believes that a licensee has failed to pay a prescribed fee required under this part, procedures will be implemented in accordance with 44 CFR part 11, subpart C, to effectuate collections under the Debt Collection Act of 1982 (31 U.S.C. 3711 *et seq.*).

James L. Witt,

Director.

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July 27, 1994

Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 36

Regulations for the Management of Cabins on National Wildlife Refuges in Alaska; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 36

RIN 1018–AB46

Regulations for the Management of Cabins on National Wildlife Refuges in Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule clarifies, updates and modifies existing regulations on the management of cabins on national wildlife refuges (refuges) in Alaska. These regulations are necessary in order to comply with the National Wildlife Refuge System Administration Act of 1966 and the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) concerning the administration of cabins on Alaska refuges. These regulations are being revised to ensure proper and uniform management of all cabins on national wildlife refuges in Alaska. In addition, a technical amendment is made to eliminate reference to sections regarding general provisions which have been removed earlier.

EFFECTIVE DATE: This rule is effective August 26, 1994.

ADDRESSES: U.S. Fish and Wildlife Service, 1011 East Tudor Road, Attention: Daryl Lons, Anchorage, Alaska 99503.

FOR FURTHER INFORMATION CONTACT: Daryl Lons at the address above; Telephone: (907) 786–3354.

SUPPLEMENTARY INFORMATION:

Background

Sections 1303 and 1315 of ANILCA (16 U.S.C. 3193 and 3203) allow the Secretary of the Interior to permit cabins on refuges in Alaska under certain conditions. Section 304 of ANILCA reemphasizes the authority of the Secretary to prescribe such regulations as necessary to ensure the compatibility of uses with refuge purposes.

The original cabin policy for the U.S. Fish and Wildlife Service (Service) was developed in 1981 and revised in 1984. This policy was the basis for regulations printed in the Code of Federal Regulations Title 50. In September 1987, the Service, believing revisions of the existing cabin policy and regulations were needed, published a Draft Cabin Management Policy for Cabins on National Wildlife Refuges in Alaska. The purpose of the cabin policy is to provide uniform guidance to both the public and refuge managers on human use and occupancy of cabins located on refuges in Alaska. The policy further serves to define under what conditions use and occupancy of a cabin may be compatible with the purposes for which the refuge was established.

Comments and suggestions on the draft policy were solicited during a 60-day public review period. The Service made extensive revisions in response to the comments. Because of the number and nature of revisions made, the Service published a revised draft of the policy in December 1988 to give the public another opportunity to comment before the policy was made final.

The revised draft was completely reorganized. It better described the objectives of the policy and set forth the guidelines needed to comply with ANILCA and the National Wildlife Refuge System Administration Act of 1966. The comment period for the revised draft was also 60 days. The final cabin policy was issued in August, 1989.

The next step in the process was to publish proposed rules to afford the public an opportunity to participate in the rulemaking process and solicit public comment. A proposed rule was published in the **Federal Register** on April 25, 1991 (56 FR 19074). The proposed rule had a 60 day public comment period and public hearings were held in Anchorage and Fairbanks, Alaska.

Both the proposed and the final rules contain significantly more guidance relating to cabin management than existing regulations. However, only minor changes are made in permit application procedures. The existing requirement that individuals apply for nontransferable renewable five year special use permits is retained. However, this final rule requires two additional items (date of construction or acquisition of the cabin and the dimensions of the cabin and related structures) to be submitted in the application. In addition to the increased application requirements, the rule has additional requirements of permittees such as getting permission from the refuge manager before major modification or rehabilitation is conducted on existing cabins.

Summary of Public Comments

Four persons presented oral comments at the public hearings and the Service received an additional eight letters providing written comments from the public. A number of changes were made in the final rule from the proposed rule after consideration of all public comments received.

Some comments requested changes that were *not* made, however, and the Service first addresses these comments as noted below.

(a) Exemptions for Certain Types of Facilities

Comment: The regulations should exempt facilities such as headquarters sites, visitor centers, and state facilities used to support fish and wildlife related management.

Response: It is the Service's position that cabins used by the State for support of fish and wildlife related management are administrative cabins and should not be exempted from the regulations. Visitor centers and headquarters sites do not need to be exempted since they are not within the scope of the cabin regulations.

(b) Access

Comment: The final cabin regulations should address rights of access.

Response: The Service does not believe it is necessary to repeat such language in the cabin regulations since the intent of ANILCA Section 1110(a) regarding access is already articulated in 50 CFR 36.12 and 43 CFR Part 36.

(c) Definition of Family and Immediate Family

Comment: The definition of "family" should be broadened and the definition of "immediate family" should be deleted.

Response: The definitions, as proposed, fully meet the intent of ANILCA Section 1303(c)(1) regarding permit renewal for the life of claimants and immediate family. The definition of "immediate family" was broadened by deleting "legal" from the term "legal spouse."

(d) Public Use of Seasonally Permitted Cabins

Comment: The definition of "public use cabin" should be revised to allow seasonally permitted cabins to also be used as public use cabins during the other parts of the year.

Response: The Service does not have the authority to allow use of "existing" cabins which are privately owned. Although "new" cabins are government property, the permittees usually have a considerable amount of private property in and around the cabin. The Service does not believe it is reasonable to make the permittees' private belongings accessible to the public or require the permittees to seasonally remove all of their property.

(e) Permits for New Cabins Generally Only for Subsistence Purposes

Comment: The language "In general, new cabin permits will be given only to local residents to pursue a legitimate subsistence activity[.]" should be deleted.

Response: This statement meets the intent of ANILCA and the Service believes it is appropriate to include in the regulations.

(f) Construction and Use of Cabins in Wilderness Areas

Comment: The language which only allows new cabins to be constructed in wilderness areas that are built specifically for the administration of the area, for public safety, or for trapping where trapping has been a traditional and customary use should be deleted.

Response: The language as proposed meets the intent of the Wilderness Act, as well as ANILCA, and is appropriate to include in the regulations.

(g) Guests in Cabins

Comment: There was some objection to the requirement that guests occupying a cabin during the absence of the permittee are required to obtain a letter of authorization from the permittee.

Response: Unauthorized use and vandalism of permitted cabins has been a problem in the past. The Service believes this is a reasonable requirement to reduce the problem.

(h) Recreational Use

Comment: One commenter recommended revising the language "No special use permit will be issued for the construction of a cabin for private recreational use or for the private recreational use of an existing cabin" in order to comply with a recent court case.

Response: The language as proposed does comply with the decision of the court. The case simply made it clear that permittees and their guests have the right to recreate while occupying cabins for which permits were issued for purposes other than recreation.

(i) Nontransferable Permits

Comment: It was recommended that permits for existing cabins be transferable to another person at the election or death of the original permittee.

Response: Nontransferability is a condition of all Service special use permits, regardless of the use being authorized. The requirement is consistent with ANILCA and is appropriate to be included in the regulations.

(j) Compatibility Criteria

Comment: The criteria for determining cabin compatibility should be included in the regulations.

Response: Compatibility determinations are site specific and relate directly to the specific purposes for which each refuge was established. The 16 refuges established/redesignated by ANILCA have different purposes.

(k) Relationship of Proposed Regulations With Policy

Comment: The intent, clarifications, and directions in the Service's cabin policy should be included in the regulations or be adopted by reference.

Response: The Service's cabin policy was widely distributed to the public and is available by request to all interested parties. Some of the information in the policy is of a subjective nature which is not appropriate for regulations. All elements of the Service's cabin policy that were determined to be appropriate as regulatory language were included in the regulations.

(l) Environmental Protection Requirements

Comment: Language should be included that recognizes there are other Federal and State regulations governing environmental compliance with activities associated with cabins (e.g., disposal of sewage and solid waste, drinking water, fuel storage, etc.).

Response: Standard conditions of all special use permits issued by the Service require the permittees to follow other applicable State and Federal regulations. Therefore, the inclusion of regulatory language referencing other applicable regulations is not necessary.

(m) Late Application for Existing Cabins

Comment: The requirement that claimants who fail to meet application deadlines for "existing" cabins (within one year from the date these regulations are published) will only be allowed to apply for "new" cabins, no matter when the cabin was built or first used should be deleted.

Response: The regulations provide a one year application period following the effective date of the regulations. The Service believes that the deadline is reasonable since regulations requiring the permits have been in place since 1981 and considerable time and effort has been expended in notifying cabin occupants.

(n) Other Related Structures

Comment: The definition of "other related structures" should be revised to clarify that the term only includes those structures in the vicinity and directly related to the operation of a cabin. The commenter also requested clarification that temporary facilities may also occur under other regulations unrelated to the cabin regulations.

Response: The Service believes that the context of the definition makes it clear that the other related structures only include those associated with cabins. A statement that temporary facilities may be authorized under other regulations is irrelevant to the cabin regulations.

We appreciate these comments; however, as noted, the Service did not make substantive changes to reflect such requests for revisions for the reasons stated above.

The following is a section by section analysis of all substantive changes that the Service made in the final rule.

Analysis of Changes Made to the Proposed Rule

Section 36.33(a) Definitions

A definition for *commercial cabin* was included in this section for clarification purposes. The definition of *immediate family* was revised in response to two public comments. The definition of *guest* was revised in response to one public comment. A definition for the term *private recreational use* was included in this section in response to one public comment. The definition of *trespass cabin* was deleted, in response to one comment which pointed out that the term was not used in the regulations other than as a definition.

Section 36.33(b) All cabins.

A clarification was made that the regulations only apply on public lands within refuges and do not apply to temporary facilities in response to one comment. Descriptions of the terms "adequate notice" for unclaimed cabins and "administrative process" for permit revocation were included in response to one comment.

Section 36.33(c) Existing cabins.

A provision was included in paragraph (1) regarding the privileges and rights of existing cabin users in response to one comment. The period for applications for permits for existing cabins which are not currently under a valid permit was revised from 90 days to one year following the effective date of these regulations. This was done in response to two comments. Vandalism was included in paragraph (5) as a cause to reconstruct existing cabins in response to one comment.

Section 36.33(d) New cabins.

The sentence, "The activity must be traditional and customary for the applicant and the area, and the need for a cabin must be clearly proven." was deleted from the language of paragraph 1 in response to two public comments.

Section 36.33(e) Commercial cabins.

Clients were added to the list of persons that can occupy commercial cabins in response to one comment.

Conformance With Statutory and Regulatory Authorities

The impact of these regulations on subsistence uses has been evaluated as required by Section 810 of ANILCA. Subsistence use and access are expected to differ little from existing use. The regulations are consistent with the purposes and intent of Section 810 and will result in no significant restrictions on subsistence activities.

Properly regulated and managed cabin use is consistent with the purposes for which the various refuges in Alaska were established.

National Environmental Policy Act Compliance

The promulgation of these cabin management regulations would generally maintain the status quo existing under the current rules. Additionally, changes in environmental effects would be negligible. Therefore the implementation of regulations relative to cabin management on refuges in Alaska is determined to be a categorical exclusion as detailed in the Department of Interior Manual (516 DM 6, Appendix 1). An Environmental Action Memorandum documenting this decision was signed on June 7, 1990.

Paperwork Reduction Act

The collections of information contained in Section 36.33 have been approved by the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* and assigned clearance number 1018–0077.

Economic Effects

This rulemaking was not subject to Office of Management and Budget review under Executive Order 12866. A review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) has been done to determine whether the rulemaking would have a significant effect on a substantial number of small entities, which include businesses, organizations or governmental jurisdictions. This rulemaking would have no significant effect on such entities as, in most cases, this merely continues pre-existing uses of public lands.

Technical Amendment

Section 36.3 *Information Collection* refers to § 36.21(f) with respect to receiving a benefit. This section has previously been removed; therefore, this rulemaking will revise Section 36.3 to remove all reference to that section.

Primary Author

Daryle Lons, Refuges and Wildlife, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska, is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 36

Alaska, Recreation and recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

For the reasons set out in the preamble, Part 36 of Title 50 of the Code of Federal Regulations (CFR) is amended as follows:

PART 36—[AMENDED]

1. The authority citation for Part 36 continues to read as follows:

Authority: 16 U.S.C 460(k) *et seq.*, 668dd *et seq.*, 742(a) *et seq.*, 3101 *et seq.*, and 44 U.S.C. 3501 *et seq.*

2. Section 36.3 is revised to read as follows:

§ 36.3 Information collection.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. et seq. and assigned clearance number 1018–0077. The information is being collected to assist the Service in administering these programs and, particularly, in the issuance of permits and the granting of statutory or administrative benefits. The information requested in the application form is required to obtain a benefit. The public reporting burden for this collection of information is estimated to average 1.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, MS 224 ARLSQ, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (1018–0077), Washington, DC 20530.

3. Section 36.33 is revised to read as follows:

§ 36.33 Cabins and other related structures.

(a) *Definitions.* As used in this section, the term:

(1) *Administrative cabin* shall mean any cabin only used by refuge or other authorized personnel for the administration of the refuge.

(2) *Cabin* shall mean a small, usually single-story, three or more sided structure that is permanently and completely enclosed with a roof and walls. The roof and walls are not fabric, cannot be easily disassembled, and are not removed seasonally.

(3) *Commercial cabin* shall mean any cabin which is used in association with a commercial operation including but not limited to commercial fishing activities and recreational guiding services.

(4) *Existing cabin* shall mean any cabin situated on Federal lands before December 2, 1980. A cabin legally situated on lands that subsequently become refuge will also be considered an "existing" cabin providing the applicant meets the appropriate application deadlines.

(5) *Family* shall include the spouse (including what is known as a common-law relationship), children by birth or adoption, and other blood relatives within the second degree of kindred.

(6) *Guest* shall mean a person who occasionally visits the permittee in the cabin. This term does not include clients using commercial cabins.

(7) *Immediate family* shall include the spouse and children, either by birth or adoption, of the claimant residing in the cabin or structure.

(8) *New cabin* shall mean any permitted cabin constructed on refuge lands after December 2, 1980. This may also include a cabin whose claimant failed to meet the application deadline for existing cabins but is otherwise a permitted cabin.

(9) *Other related structures* shall mean those structures or devices essential to the activities for which the cabin special use permit is issued. This includes but is not limited to outdoor toilets, food caches, storage sheds, and fish drying racks.

(10) *Private recreational use* shall mean a use associated with leisure activities, not including bona fide subsistence uses or authorized commercial uses.

(11) *Public use cabin* shall mean a cabin owned and administered by the Fish and Wildlife Service and available for use by the public.

(b) *All cabins.* The regulations in this paragraph (b) shall apply to all cabins, claimants, occupants, and guests. The regulations in this paragraph (b) do not apply to temporary facilities: any structure or man-made improvement which can readily be completely dismantled and removed from the site when the period of authorized use is terminated.

(1) A special use permit is required to construct, use and/or occupy a cabin on Fish and Wildlife Service lands within the refuge. The permit may also authorize the use of related structures and other necessary appurtenances.

(2) After adequate public notice has been given, unclaimed cabins become the property of the Federal Government. Adequate public notice shall include: Posting notices of trespass on unclaimed cabins; publication of notices of trespass in Anchorage and Fairbanks newspapers and in at least one local newspaper if available; and posting notices of trespass at appropriate community post offices. A Government-owned cabin may be used for refuge administration, used for emergency purposes by the public, permitted to another applicant, designated a public use cabin, or destroyed. Disposal of excess cabins and structures will be according to regulations pursuant to Title 41, Chapter 114 of the Code of Federal Regulations.

(3) Willful noncompliance with the conditions and stipulations of a special use permit shall be considered grounds to invoke the administrative process leading to notice and hearing, and possible revocation of the permit. The refuge manager will attempt to resolve problems of noncompliance with the permittee as soon as possible after the situation becomes known. If this effort fails, the refuge manager shall provide written notice to the permittee within 30 days of that date, informing the permittee of noncompliance, giving specific instructions for compliance and providing appropriate time for the permittee to comply.

(4) No special use permit will be issued for the construction of a cabin for private recreational use or for the private recreational use of an existing cabin.

(5) Guests are allowed to occupy a cabin only during the activity period identified on the special use permit. Guests occupying a cabin during the absence of the permittee shall obtain a letter of authorization from the permittee. The guest must have a copy of the letter in his/her possession. In commercial cabins, the permittee or another person listed on the permit must be present when the cabin is occupied by guests or clients.

(6) A person whose permit application (new or renewal) for a cabin has been denied or whose cabin permit has been revoked by the refuge manager may appeal to the Regional Director as described in § 36.41(b).

(c) *Existing cabins.* In addition to paragraph (b) of this section, the regulations in this paragraph (c) shall apply to all existing cabins, claimants, occupants, and guests.

(1) Where a valid cabin permit or lease was in effect on December 2, 1980, or at the time the land was subsequently added to the refuge, the refuge manager shall provide for the continuation of the permit or lease under the same conditions. The new permit shall be nontransferable and renewable every five years unless the continuation would directly threaten or significantly impair the purposes for which the refuge was established. The cabin and related structures are the personal property of the claimant and can be removed by him/her upon non-renewal or revocation. The owner of a cabin may sell his/her interest in the cabin to another person; however, the new owner does not automatically qualify for a permit and must apply for a new one.

(2) To obtain a special use permit for a cabin that was not under permit or lease before December 2, 1980, or at the time the land was subsequently added to the refuge, a claimant should submit to the refuge manager an application that includes the following:

(i) Reasonable proof of possessory interest or right to occupy the cabin as shown by affidavit, bill of sale, or other document.

(ii) Date of construction or acquisition.

(iii) A sketch or photograph that accurately depicts the cabin and related structures.

(iv) The dimensions of the cabin and related structures.

(v) A U.S. Geological Survey topographic map that shows the geographic location of the cabin and related structures.

(vi) The claimant's agreement to vacate and remove all personal property from the cabin and related structures within one year from receipt of a non-renewal or revocation notice.

(vii) The claimant's acknowledgment that he/she has no legal interest in the real property on which the cabin and related structures are located.

(viii) A list of family members residing with the claimant in the cabin being applied for. It need only include those immediate family members who may be eligible to renew a permit for continued use and occupancy upon the original claimant's death (this is not applicable to cabins used for commercial purposes).

(3) Applications for permits for existing cabins, which are not currently under valid permits, will only be accepted for a period of one year following the effective date of these regulations. However, cabins that were legally located on lands that subsequently become refuge will also be considered "existing" cabins. The owners will have two years following the date the lands become refuge to apply for a permit. Following those dates, all applications for cabins will be for "new" cabins only, no matter when the cabin was built or first used. If ownership is not established within three years after the land becomes refuge, the cabin may be considered abandoned, and it will become Federal property in accordance with Federal regulations.

(4) The occupancy of a noncommercial cabin is limited to the permittee and his/her family, bona fide partners, and guests.

(5) Major modification or rehabilitation of an existing cabin must be approved by the refuge manager before construction begins. The modifications will be done by the permittee or designated agent and will remain the property of the permittee. Major additions (e.g., larger than the original cabin) may fall under the ownership provisions for new cabins. Although cabins destroyed by accidents, vandalism or natural causes may be reconstructed, they must be approved by the refuge manager before construction and must meet the construction guidelines for new cabins, even though remaining the property of the claimant.

(d) *New cabins.* In addition to paragraph (b) of this section, the regulations in this paragraph (d) shall apply to all new cabins, claimants, occupants, and guests.

(1) A nontransferable, five year special use permit shall only be issued upon a determination that the proposed construction, use and maintenance of the cabin is compatible with refuge purposes and that the cabin use is either directly related to refuge administration or is needed for continuation of an ongoing activity or use otherwise allowed within the refuge where the applicant lacks a reasonable off-refuge site. In addition, these activities must have historically been supported by the construction and use of cabins in the geographic area. In general, new cabin permits will be given only to local residents to pursue a legitimate subsistence activity. In determining whether to permit the construction, use,

and occupancy of cabins or other structures, the refuge manager shall be guided by factors such as other public uses, public health and safety, environmental and resource protection, research activities, protection of historic or scientific values, subsistence uses, endangered or threatened species conservation and other management considerations necessary to ensure that the activities authorized pursuant to a permit are compatible with the purposes for which the refuge was established.

(2) To obtain a special use permit for a new cabin, an applicant should submit to the refuge manager an application that includes the following:

(i) A sketch that accurately depicts the proposed cabin and related structures.

(ii) The dimensions of the proposed cabin and related structures.

(iii) A U.S. Geological Survey topographic map that shows the geographic location of the proposed cabin and related structures.

(iv) The applicant's agreement to vacate and remove all personal property from the cabin and related structures within one year from receipt of a non-renewal or revocation notice.

(v) The applicant's acknowledgment that he/she has no legal interest in the cabin and related structures or in the real property on which the cabin and related structures are located.

(vi) A list of family members residing with the applicant in the cabin being applied for. It need only include those immediate family members who may be eligible to renew a permit for continued use and occupancy upon the original claimant's death.

(3) The permitting instrument shall be a nontransferable renewable five year special use permit. It shall be renewed every five years (upon request) until the death of the original claimant's last immediate family member unless the special use permit has been revoked or the cabin has been abandoned.

(4) No new cabins will be constructed in designated wilderness areas unless they are built specifically for the administration of the area, for public safety, or for trapping where trapping has been a traditional and customary use.

(5) New trapping cabins in wilderness will be available for public use to ensure public health and safety.

(6) The occupancy of a noncommercial cabin is limited to the permittee, and his/her family, bona fide partners, and guests.

(e) *Commercial cabins.* In addition to paragraph (b) of this section, the regulations in this paragraph (e) shall apply to all commercial cabins, permittees, clients, guests, and occupants.

(1) A special use permit is required for all cabins used for commercial purposes. Refuge managers may also issue special use permits that authorize additional commercial use of an existing cabin used for guiding, etc. The use of a new cabin shall be limited to the type of use specified in the original permit. The refuge manager may permit the use of an existing cabin on non-wilderness refuge lands for the exercise of valid commercial fishing rights. Such a permit may be denied if, after conducting a public hearing in the affected locality, it is found that the use is inconsistent with refuge purposes and is a significant expansion of commercial fishing activities within the unit beyond 1979 levels.

(2) When the commercial fishing or guiding rights associated with a permittee's existing cabin are acquired by a new party, the privilege of using the cabin cannot be sold and the new party does not necessarily qualify for a cabin permit. He/she must apply for a permit and meet the criteria described in this paragraph (e) before issuance of a special use permit by the refuge manager. He/she may not occupy the cabin before issuance of a permit.

(3) No new commercial cabins will be permitted in wilderness areas.

(4) Commercial cabins may be occupied only by persons legitimately involved in the commercial enterprise, assistants, employees, their families, guests and clients and only during the time that the authorized activity is occurring. The names of those individuals, excluding guests and clients, will be listed on the permit. The permittee or another individual listed on the permit must be present when the cabin is occupied.

(5) Special use permits for commercial cabins may be renewed annually in conjunction with the special use permit renewal for the commercial activity itself. The cabin permit may be issued for periods of up to five years and is a separate permit from one issued for the commercial activity.

(f) *Administrative and government-owned public use cabins.* In addition to paragraph (a) of this section, the regulations in this paragraph (f) apply to all administrative and government-owned cabins.

(1) The refuge manager can designate those cabins not under permit as administrative cabins to be used for official government business. Administrative cabins may be used by the public during life-threatening emergencies. On a case-by-case basis, they may also be designated as public use cabins when not needed for government purposes. In such cases, the refuge manager must inform the public and post dates or seasons when the cabins are available.

(2) The refuge manager may designate government-owned cabins as public use cabins. They are only intended for short-term public recreational use and occupancy. The refuge manager may develop an allocation system for managing public use cabins for short-term recreational use. No existing public use cabins shall be removed or new public use cabins constructed within wilderness areas designated by the Alaska National Interest Lands Conservation Act of 1980 or subsequently designated wilderness areas until the Secretary of the Interior notifies the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources.

Dated: February 11, 1994.

George T. Frampton, Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

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