The final decision on this proposal will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to the Field Supervisor of the Carlsbad Field Office (see ADDRESSES section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein is available upon request from the U.S. Fish and Wildlife Service, Carlsbad Field Office (see ADDRESSES above).

Author

This rule was prepared by the staff of the Carlsbad Field Office (see ADDRESSES section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

PART 17—[AMENDED]

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. It is proposed to amend § 17.12(h) by adding the following, in alphabetical order under the families indicated, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
*	*	*	*	*	*	*
Campanulaceae—Bell-flower family:						
*	*	*	*	*	*	*
Downingia concolor var. *brevior.*	Cuyamaca Lake downingia	U.S.A. (CA)	E	....	NA	NA
*	*	*	*	*	*	*
Limnanthaceae—False mermaid family:						
*	*	*	*	*	*	*
Limnanthes gracilis ssp. *parishii.*	Parish's meadowfoam	U.S.A. (CA)	T	....	NA	NA
*	*	*	*	*	*	*

Dated: July 26, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–18930 Filed 8–1–94; 8:45 am]

BILLING CODE 4310–55–P

Thursday
August 4, 1994

Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Ch. I

Food and Safety Assurance Program; Development of Hazard Analysis Critical Control Points; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Ch. I

[Docket No. 93N–0325]

Development of Hazard Analysis Critical Control Points for the Food Industry; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is asking for public comment about whether and how the agency should develop regulations that would establish requirements for a new comprehensive food safety assurance program for both domestically produced and imported foods. Such regulations, if promulgated, would enhance FDA's ability to ensure the safety of the U.S. food supply. In this document, FDA is proposing that this program be based upon the principles of Hazard Analysis Critical Control Points (HACCP). FDA is requesting comments on a number of specific issues, as well as on all aspects of such a food safety program.

DATES: Written comments by December 2, 1994.

ADDRESSES: Written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, 301–443–1751.

FOR FURTHER INFORMATION CONTACT: John E. Kvenberg, Center for Food Safety and Applied Nutrition (HFS–10), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–4010.

SUPPLEMENTARY INFORMATION:

I. Background

A. Status of the Food Safety Assurance Program in the United States

FDA's mandate to ensure the safety of the nation's food supply is derived principally from the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321 *et seq*). Under the act, FDA has authority to ensure that all foods in interstate commerce, or that have been shipped in interstate commerce, are not contaminated or otherwise adulterated, are produced under sanitary conditions, and are not misbranded or deceptively packaged [1]. The agency also has authority to ensure food safety under the Public Health Service Act (the PHS act) (42 U.S.C. 264), which relates to the control of the spread of communicable diseases from one State, territory, or possession to another, or from outside the United States into this country.

To carry out its mandate to ensure the safety of the U.S. food supply, FDA conducts periodic inspections of food processors, shippers, food packers and repackers, food labelers and relabelers, and food warehouses. Some inspections are carried out by the States, under contract with FDA. In addition, although subject to FDA jurisdiction, the many hundreds of thousands of retail food outlets and restaurants in the United States are inspected by State and local health departments with technical assistance and training from FDA. FDA's program to ensure the safety of the U.S. food supply also includes sample analyses of food offered for import, research into rapid detection methodologies for potential hazards, enforcement activities, and education and information sharing programs. The goal of all of these regulatory and enforcement activities is to ensure that the food supply is, and remains, safe.

Although the current food safety assurance program has generally functioned effectively, it currently faces new stresses and challenges. New food processing and packaging technologies, new food distribution and consumption patterns, increasing public health concerns about low levels of certain chemical contaminants, and new microbial pathogens all contribute to today's food safety challenge. For example, the composition of the food supply has changed dramatically in the 55 years since passage of the act. More people consume commercially processed or commercially prepared foods than ever before, and there is increased consumer demand for "fresh" foods in convenient, ready-to-cook forms, which has fostered the development of sophisticated processing and packaging systems that can significantly extend the shelf life of a variety of foods. However, new food safety risks can be associated with these new food products, new packages, and new patterns of distribution and consumption.

One of the most important challenges to FDA's current food safety assurance program is the increasing number of new food pathogens. Although food borne illness has always been a public health problem, such illness appears to be on the rise, and new pathogens are appearing (Ref. 1). In addition, because foods are more extensively processed and handled, there is now a greater opportunity for food to be contaminated.

Food borne illness is a major cause of morbidity in the United States; estimates of the yearly incidence of food borne illness vary greatly, ranging from 6.5 million (Ref. 1) to 12.6 million cases per year (Ref. 2), and from 24 to 81 million cases per year (Ref. 3). In the 15 years between 1973 and 1988, the number of recognized food borne pathogens broadened considerably. During that period, bacteria not previously recognized as important food borne pathogens emerged, including *Campylobacter jejuni, Escherichia coli Listeria monocytogenes, Yersinia enterocolitica*, and a variety of *Vibrio* spp. During that same period, experts recognized that certain food borne illnesses may be followed by serious complications, such as arthritis, kidney damage, heart disease, and neurological damage (Ref. 3).

Pathogens are not the only potential contaminants of food, however. The extensive use of industrial chemicals, coupled with past failures to deal adequately with chemical waste, have resulted in significant chemical pollution of the environment in some regions. Many of these chemicals have found their way into the food chain. The legal use of pesticides in agriculture may also result in residues in food. Naturally occurring chemicals, such as toxic elements and mycotoxins, can also be found in food at levels of concern. The sheer number of these potential contaminants, the concerns about their toxicity even at very low levels, and the difficulty and expense associated with many of the analytical methods used to quantify their levels in food, make exhaustive endpoint monitoring of the food supply virtually impossible.

The size and diversity of the food industry adds to the stress on the current food safety assurance program. FDA's current inventory lists over 30,000 food manufacturers and processors, and in excess of 20,000 food warehouses. The number of foreign manufacturers and processors shipping food products to the United States continues to increase. In 1992, there were well over 1 million food import entries into the United States. In addition, the diversity of food imports

[1] Two other Federal agencies share with FDA the responsibility for regulating the safety of the food supply. The U.S. Department of Agriculture (USDA) has authority under the Meat Inspection Act (21 U.S.C. 601), the Poultry Inspection Act (21 U.S.C. 451), and the Egg Products Inspection Act (21 U.S.C. 1031) to inspect facilities in which meat, poultry, and eggs, respectively, are processed, and to regulate such products. The U.S. Environmental Protection Agency has authority, under provisions of the act, to establish legal limits (tolerances) for residues of pesticides on foods. FDA and USDA enforce such tolerances.

continues to increase, with a rising volume of foods entering the United States in processed forms.

Finally, the current food safety program is under stress internally. It is unlikely that FDA will ever have sufficient resources to inspect, sample, and analyze more than a small percentage of imported food shipments. State and local governments, on which FDA relies heavily for surveillance of the growing retail food sector, are also under severe resource constraints. Indeed, some States are considering proposals to reduce their food safety programs.

FDA's current regulatory strategy for ensuring food safety, with its emphasis on periodic visual inspection of food facilities and end-product testing, was designed to control the problems that were known to exist when the act was established in 1938. The agency has struggled to keep up with the enormous growth and changes in the food industry and the resulting new food safety challenges. FDA's current regulatory approach is relatively resource intensive and inefficient compared to other ways of ensuring food safety. Inspections that FDA conducts under the current system can determine the adequacy of conditions in a food plant at the time of the inspection but not whether the company has in place a food safety assurance program that is operating reliably and consistently to produce safe food at all times. Furthermore, the current inspectional approach is generally reactive, not preventive. It is effective in detecting and correcting problems after they occur, but, except in certain limited areas such as the regulation of infant formula and low acid canned foods, it is not currently based on a system of preventive controls.

For all of these reasons, FDA believes that it is appropriate at this time for the agency to consider improvements to its food safety assurance program to focus the program on prevention of food safety risks and problems. FDA's goals in establishing additional food safety regulations would be to: (1) Make the food supply safer through prevention of food safety problems; (2) enable FDA and its State and local counterparts to make more efficient use of the existing resources devoted to ensuring food safety, and (3) enhance the ability of the Federal Government to provide consumers with the assurance they seek that the U.S. food supply is safe.

FDA recognizes that risks vary across the food supply and that measures to make food safer should focus on the potential of particular foods or possible contaminants in those foods to cause illness. The agency also recognizes that there is no proven method or approach for ensuring the safety of food that will eliminate risk in all circumstances. Indeed, one purpose of this notice is to seek public comment on the degree of potential risks posed by those microorganisms, chemicals, and physical hazards (e.g., broken glass) that can get into food and be passed on to the consumer, if appropriate care is not exercised. FDA also desires comments on the consequences of these risks if they occur. In addition, the agency seeks comment on how these risks can best be controlled and which systems of quality control can best protect consumers from potentially unsafe food.

Although the agency has reached no final conclusions about how its regulatory programs should be revised to make food as safe as possible, FDA has tentatively concluded that the improvements in the agency's current food safety assurance program should be based on a state-of-the-art, preventive approach known as HACCP. HACCP was developed approximately 30 years ago by the U.S. food industry, and it is currently used in a number of domestic food processing facilities. HACCP is internationally regarded as the most effective system for producing safe food. FDA is considering HACCP as the foundation for revision of the U.S. food safety assurance program because, although simple in its basic concepts, HACCP is a sophisticated and powerful tool for ensuring food safety. HACCP is a science based, systematic approach to preventing food safety problems by anticipating how such problems are most likely to occur and by installing effective measures to prevent them from occurring. HACCP thus requires that the processor and the regulatory authority be aware of the state-of-the-art science relative to food safety and processing technology. HACCP appropriately affirms that the food industry has primary responsibility for producing safe food, and it provides an important opportunity to link the food industry's system for producing safe food with the Government's system of regulatory oversight. A more in-depth discussion of the HACCP concept follows.

B. The HACCP System

The HACCP concept (Ref. 4) is a systematic approach to the identification, assessment of risk (likelihood of occurrence and severity), and control of the biological, chemical, and physical hazards associated with a particular food production process or practice. HACCP is a preventive strategy. It is based on development by the food producer of a plan that anticipates food safety hazards and identifies the points in the production process where a failure would likely result in a hazard being created or allowed to persist; these points are referred to as critical control points (CCP's). Under HACCP, identified CCP's are systematically monitored, and records kept of that monitoring. Corrective actions are taken when control of a CCP is lost, including proper disposition of the food produced during that period, and these actions are documented.

Use of the HACCP system for the food industry will underscore the industry's role in continuous problem prevention and problem solving, rather than relying solely on traditional facility inspections by regulatory agencies to detect loss of control. HACCP provides for real time monitoring procedures to assess the effectiveness of control. Each HACCP plan would reflect the uniqueness of a food, its method of processing, and the facility in which it is prepared.

HACCP has been endorsed by the National Advisory Committee on Microbiological Criteria for Foods (NACMCF) as an effective and rational means of ensuring food safety from harvest to table. The NACMCF was established in 1988 by USDA in conjunction with FDA to fulfill a recommendation of the National Academy of Sciences, and includes officials from FDA, USDA, the National Oceanic and Atmospheric Administration, and the Department of Defense, as well as experts from academia and the food industry. HACCP is also recognized in the international food safety community as the state-of-the-art means to ensure the safety and integrity of food. In particular, the Committee on Food Hygiene of the United Nations' Codex Alimentarius Commission (Codex) has endorsed the HACCP concept as a world wide guideline. Indeed, the European Union (EU) and other countries around the world have begun to require that foods produced within their borders be processed under HACCP requirements.

The NACMCF has developed the following seven principles that describe the HACCP concept:

1. Hazard Analysis

The first step in the establishment of a HACCP system for a food process or practice is the identification of the hazards associated with the product. The NACMCF defines a hazard as a biological, chemical, or physical property that may cause a food to be unsafe for consumption. The hazard analysis step should include an assessment of both the likelihood that such a hazard will occur and its severity if it does occur. This analysis should also involve the establishment of preventive measures to control identified hazards.

2. Identification of CCP's

A CCP is a point, step, or procedure at which control can be applied, the result being that a potential food safety hazard can be prevented, eliminated, or reduced to acceptable levels. Points in the manufacturing process that may be CCP's include cooking, chilling, specific sanitation procedures, product formulation control, prevention of cross contamination, and certain aspects of employee and environmental hygiene.

3. Establishment of Critical Limits for Preventive Measures Associated With Each Identified CCP

This step involves establishing a criterion that must be met for each preventive measure associated with a CCP. Critical limits can be thought of as boundaries of safety for each CCP and may be set for preventive measures such as temperature, time, physical dimensions, moisture level, water activity, pH, and available chlorine.

4. Establishment of Procedures to Monitor CCP's

Monitoring is a planned sequence of observations or measurements to assess whether a CCP is under control and to produce an accurate record for use in future verification procedures. Continuous monitoring is possible with many types of physical and chemical methods. When it is not possible to monitor a critical limit on a continuous basis, monitoring intervals must be frequent enough to permit the manufacturer to determine whether the step/process/procedure designed to control the hazard is under control.

5. Establishment of Corrective Actions To Be Taken When Monitoring Shows That a Critical Limit Has Been Exceeded

While the HACCP system is intended to prevent deviations in a planned process from occurring, total prevention can rarely, if ever, be achieved. Therefore, there must be a corrective action plan in place to ensure appropriate disposition of any food produced during a deviation, to fix or correct the cause of noncompliance to ensure that the CCP is once again under control, and to maintain records of corrective actions taken.

6. Establishment of Effective Recordkeeping Systems That Document the HACCP System

This principle requires the preparation and maintenance of a written HACCP plan that lists the hazards, CCP's, and critical limits identified by the firm, as well as the monitoring, recordkeeping, and other procedures that the firm intends to use to implement the plan. This principle also requires the maintenance of records generated during the operation of the plan.

7. Establishment of Procedures to Verify That the HACCP System is Working

This process involves verifying that the critical limits are adequate to control the hazards identified, ensuring that the HACCP plan is working properly and verifying that there is documented, periodic revalidation of the plan to confirm that the plan is still performing its intended function under existing plant conditions at any point in time.

C. FDA's Authority to Mandate HACCP

In the **Federal Register** of January 28, 1994 (59 FR 4142), FDA proposed regulations that would require HACCP controls in the seafood industry. The agency believes that it is now appropriate to explore the application of HACCP to segments of the industry other than seafood. At this time the agency would plan to proceed in a stepwise fashion with those segments of the industry that are suitable candidates for adoption of HACCP principles. This document is intended to explore how the agency should pursue that broader HACCP program. FDA is doing so because the agency believes that such a program would be an effective and efficient way to ensure that food meets the act's safety standards and to implement section 402(a)(4) of the act (21 U.S.C. 342(a)(4)). As explained below, if FDA proceeds with a HACCP proposal covering additional segments of the food industry, such proposal would be made pursuant to the authority of sections 402 and 701(a) of the act (21 U.S.C. 371(a)).

Section 201 of the act defines the term "food" as "articles used for food or drink for man or other animals." Under section 402(a)(4) of the act, a food is deemed adulterated if it has been "prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health." Proof that a food is actually contaminated or otherwise hazardous is not required to establish that a food is adulterated under section 402(a)(4) of the act. (See *United States* v. *H. B. Greggory Co.*, 502 F.2d 700, 704 (7th Cir. 1974), cert. denied, 422 U.S. 1007 (1975).) Instead, such adulteration requires only a showing that the conditions under which food is prepared, packed, or held create a "reasonable possibility" of contamination. (See *Berger* v. *United States*, 200 F.2d 818, 821 (8th Cir. 1952).)

In its enforcement of section 402(a)(4) of the act, FDA has considered, among other things, prevailing industry standards and the technical state-of-the-art in determining, on a case-by-case basis, whether the conditions under which a company is processing or otherwise handling food violate the standard of section 402 (a)(4). FDA's current intention is to propose to codify, in a future rulemaking, a state-of-the-art standard based upon HACCP principles. This standard would establish those conditions of food manufacturing, packing, and holding that are consistent with section 402(a)(4) of the act. Such regulations would thus ensure the agency's efficient enforcement of section 402(a)(4) and the other food safety provisions of the act, as authorized by section 701(a) of the act.

At this juncture, the regulations that FDA is considering for proposal would specify the requirements that the agency believes are the minimum necessary to ensure that food products under FDA's jurisdiction are not adulterated under section 402(a)(4) of the act. Under the program that FDA is considering, if a food purveyor covered by the program does not adopt and implement a HACCP plan that complies with the program's requirements or does not operate the plan in accordance with the program, food prepared, packed, or held in that facility would be adulterated under section 402(a) (4) of the act and potentially subject to regulatory action by FDA.

D. Rationale for a HACCP Approach

FDA expects that adoption of HACCP by some or all segments of the food industry, coupled with Government verification through inspections of the HACCP system, will more effectively and efficiently ensure the safety of the American food supply. The agency has tentatively chosen a HACCP approach because HACCP addresses the root causes of food safety problems in production, storage, transportation, etc., and is preventive. Two principal alternatives to HACCP exist; end-product testing and comprehensive current good manufacturing practice (CGMP) regulations. End-product testing does not address the root causes of food safety problems; it is not preventive by design and requires that a large number of samples be analyzed to ensure product integrity. Similarly, CGMP's are not a practical approach because of the breadth and diversity of the food industry, the limited resources available within FDA to prepare the many specific CGMP regulations that would be needed to cover effectively such a diverse industry, and the time required to implement such regulations. However, FDA may consider the promulgation of CGMP's for certain food processes or types if such regulations would be more effective than a HACCP system for such processes. For example, some of the comments have suggested that sanitation would be better addressed through CGMP's than through a HACCP plan.

A HACCP system for food safety assurance has numerous distinct advantages including the following: (1) HACCP focuses on prevention and is designed to prevent hazards from entering food; (2) HACCP permits more effective and efficient Government oversight; (3) HACCP places primary responsibility for ensuring food safety appropriately on the food manufacturer/distributor; and (4) HACCP assists food companies in competing more effectively in the world market.

The primary purpose of any HACCP system is to prevent problems through the systematic analysis and control of the production system by industry. This analysis and control would be confirmed by Government verification of the industry's monitoring. As such, a HACCP approach provides an appropriate balance between the responsibilities of industry and Government in ensuring food safety. A HACCP based program will also allow FDA and its State and local government counterparts to conduct more efficient and focused inspections of food facilities.

In addition to being preventive in nature and more efficient, a HACCP approach offers two additional benefits over conventional inspection techniques. First, in contrast to FDA's current regulatory approach, a HACCP approach requires industry to analyze, in a rational, scientific manner, its production processes in order to identify CCP's and to establish critical limits and monitoring procedures. An essential part of the industry's role under HACCP is to establish and maintain records to document adherence to the critical limits relating to the identified CCP's, which will result in continuous self inspection.

Second, HACCP allows the regulator to monitor more effectively a firm's compliance with food safety laws. With its current system of inspection, FDA can determine the conditions at a food plant only during the period of inspection. The agency must therefore make assumptions about conditions before and after the inspection based on a snapshot of plant conditions and practices at the time of the inspection.

With an HACCP-based program in place, an investigator can determine and evaluate both current and past conditions critical to ensuring the safety of food produced by the facility. As discussed above, an essential part of a HACCP system is maintenance of monitoring records. By examining such records, the Government inspector can, in effect, look back through time at the conditions of a facility. Under the proposal that FDA currently envisions, the agency would have access to CCP monitoring records to verify that the HACCP plan is working. Government monitoring under a HACCP system would provide assurance that systems of preventive controls are in place and functioning properly and thus afford greater public assurance of food safety.

Current Federal inspection and surveillance strategies attempt to gauge the industry's knowledge of hazards and preventive control measures largely by inference, i.e., whether a company's products are in fact adulterated, or whether conditions in a plant are in compliance with CGMP's. Consequently, the current inspection system places a great deal of responsibility on Government regulators to uncover problems and to take regulatory action to address those problems. Under a HACCP-based inspection system, it would be the responsibility of the company to develop a plan for producing safe food, and the role of Government inspectors would be to verify that the company is carrying out its plan.

Finally, adopting a HACCP system could potentially enhance international trade opportunities for the United States. Although enhancing trade has no direct effect on public health, participation in international trade in food products is critical to the U.S. economy. The United States is by far the world's major food exporter, with exports of raw agricultural and processed food products of over $40 billion per year. The United States also imports a substantial quantity of food products each year from many countries around the world. HACCP will improve FDA's ability to monitor such imports and thus ensure confidence in their safety. Also, HACCP is becoming the world-wide standard to ensure the safety of food and will thus serve as basis for harmonizing U.S. food safety regulations with those of other nations.

The Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) has resulted in further focus on this area. The Agreement on the Application of Sanitary and Phytosanitary Measures states the desire of member countries, including the United States, to further "* * * the use of harmonized sanitary and phytosanitary measures between members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission * * *" (Ref. 5). This trend toward harmonization, coupled with the current recommendations of the Codex Alimentarius Commission encouraging the international use of HACCP, provide further support for FDA's serious consideration of a HACCP program for all or part of the food industry.

E. How the Agency Intends to Proceed

FDA began its initiative to mandate HACCP with a proposal covering the seafood industry due in large part to the fact that a substantial amount of work on the application of HACCP to seafood processing and importation, including the development of specific HACCP models, has already been done by the Federal Government, some States, academia, and by the seafood industry itself. Thus, there is a considerable body of literature and expertise, which can facilitate the development of HACCP systems by seafood processors and importers. Moreover, seafood industry representatives have been urging the Federal Government to adopt a mandatory HACCP program. The National Fisheries Institute, the largest seafood industry trade association, has testified repeatedly at congressional hearings in support of legislation that would mandate such a system. The agency recommends that interested persons refer to the seafood proposal to understand how the HACCP approach might work with respect to one category of food product.

The body of knowledge and experience on the application of HACCP to food production has not, as far as the agency is aware, been developed for other commodities to the extent that it has for seafood. (One possible exception is the low acid canned food industry, where much work has been done in HACCP's application due to FDA's long standing regulatory program for this industry.) Moreover, the food industry is extremely diverse and complex. For these reasons, FDA has decided to issue this advance notice of proposed rulemaking to request comments on various aspects of the implementation of a mandatory HACCP program for some or all other sectors of the food industry. Those comments may suggest that an industry-wide HACCP requirement is appropriate or may indicate that such a program should be phased-in as data on individual commodities is compiled. FDA is open to any other suggestions. Specific issues on which FDA is particularly interested in receiving comments are set out below.

The agency believes that it could benefit from experience with the application of HACCP to selected commodities outside the seafood area. To gain this experience the agency has announced a voluntary pilot HACCP program and invited interested food producers to participate.

Some of the objectives of this pilot program are to obtain data on the hazards associated with particular types of food, and to develop and implement HACCP plans to control those hazards in conjunction with the participating firms. The pilot program could provide the agency and the industry with the practical knowledge and experience that would assist in the development and implementation of a HACCP program for particular segments of the food industry.

FDA recognizes that an ongoing exchange of scientific, technical, and operational information between the agency, the food industry, trade associations, consumer groups, FDA's State and local counterparts, and other affected parties is essential for the successful implementation of HACCP in the food industry. Consequently, FDA intends to maintain a dialogue with all affected parties during the process of developing its proposed regulations. In particular, FDA will meet with the food industry, consumer groups, and other interested parties during the comment period on this advance notice of proposed rulemaking.

FDA anticipates that it will receive a substantial number of comments in response to this document. The agency will review these comments and have further dialogue with industry and consumer representatives, as well as other groups and organizations knowledgeable in food safety, as part of its process for determining the appropriate regulatory approach prior to publication of a proposed rule.

FDA intends to work closely with USDA, as it considers development of its own HACCP regulations for meat and poultry products, to ensure that the two regulatory bodies have a consistent approach in applying HACCP principles to the food industry, while recognizing that inherent differences may exist between food commodity groups that will necessitate different approaches.

FDA also intends to work closely with its State and local counterparts that regulate the retail segment of the food industry. One principal way FDA conveys its recommended food regulatory policy to the nation's State and local food control agencies is through FDA's model Food Code. A notice of availability of the latest revision of the Food Code, which incorporates certain HACCP principles and terminology, was published in the **Federal Register** of January 28, 1994 (59 FR 4085).

II. Request for Comments

Under the act, the food industry has the primary responsibility for ensuring the safety of the food it produces and distributes. In its simplest terms, the role of Government is to verify that the industry is carrying out its responsibility and to initiate regulatory or other appropriate action when the industry fails to do so. FDA believes that establishing a HACCP program throughout the food industry could enable both the industry and FDA to carry out their respective responsibilities far more efficiently and effectively. FDA invites comments on this point, as well as on specific issues relating to the application of HACCP to foods other than seafood, as set out below.

A. Scope of a HACCP Regulation

NACMCF supports the adoption of HACCP throughout the food industry ((Ref. 4). Additionally, the Codex Ailmentarius Committee on Food Hygiene considers HACCP to be the most efficient and cost effective means to manage food safety (Ref. 4). FDA recognizes, however, that not all foods pose the same inherent risks. The agency intends to work with the Centers for Disease Control and Prevention and other Federal and State agencies as well as health professionals, industry, and consumer groups to access and evaluate data on the relative risks associated with various foods. FDA has concluded that HACCP has great potential to improve food safety and can be successfully used beyond seafood. However, specific HACCP requirements established for the various segments of the industry may be different because of differences in risk as well as differences in processes, etc. The agency encourages the food industry generally to begin using HACCP more widely.

FDA specifically requests comments on the scope of any mandatory HACCP program proposed by the agency. Should FDA mandate HACCP for all segments of the food industry? Or should HACCP be required only for certain segments of the food industry? In deciding whether to cover all or some segments of the food industry by a mandatory HACCP rule, what criteria should FDA use? In particular, should any exclusions from a HACCP requirement be determined on any basis other than the risk presented by the particular activity? Are there categories of activities, such as the warehousing of certain types of foodstuffs, that deserve exclusion?

The agency also requests comment on how a mandatory HACCP rule should apply to those in the chain of distribution of imported foods. How should the agency ensure that imported foods are produced and handled safely? In the seafood proposal, FDA is proposing that all domestic and foreign processors and importers adopt HACCP controls, and FDA is proposing to take steps to ensure that the HACCP controls are in fact implemented by foreign processors. The seafood proposal broadly defines "processor" to include packers, repackers, wholesalers, and warehousers. Should the agency adopt the same approach with respect to foreign processors, handlers, and importers of all other foods?

FDA also solicits comments on whether and how a mandatory HACCP rule should apply to food retailers. The agency's seafood proposal specifically excludes retailers from the definition of "processor." Should a similar exclusion be made for retailers of all other foods as well? The agency notes that its updated Food Code, which serves as guidance to the States as part of an ongoing cooperative program for regulating the retail sector, incorporates several HACCP elements. The agency requests comment on this cooperative program for the retail sector and on how governments at all levels can best collaborate to ensure the safety of food from farm or fishery to the dinner table, including food sold ready-to-eat at the retail level. Should HACCP be required in restaurants and other retail outlets? Should HACCP requirements be applied directly to raw material suppliers and transportation companies? Or should such requirements be imposed indirectly through the HACCP plans of processors and others who receive food (e.g., by using purchase specifications)?

FDA also specifically requests comment on how small firms should be covered by any mandatory HACCP regulations. In the seafood proposal, FDA has made no distinctions in the application of proposed requirements based on firm size. If small firms should be exempt, on what basis should the exemption be made?

B. Focus of HACCP

NACMCF believes that HACCP and HACCP plans should address food safety, including all biological, chemical, and physical hazards that would affect a particular food. Consistent with this view, FDA has limited the scope of the HACCP requirements in the seafood proposal to safety concerns and has not included food quality and labeling standards and requirements. Although the agency believes that the primary focus of a HACCP program should be safety, FDA is aware that food quality is also important to consumers and is an issue in international trade.

Should FDA's HACCP program for the broader food industry be limited to food safety and the hazards presented by a particular activity? If so, how broadly should hazard be defined? What level of risk warrants HACCP-type control? Should different levels of control be required in HACCP plans for different levels of risk? Or should FDA's proposal mandate that food quality issues be included in HACCP plans? Should sanitation practices within the plant be required to be included in HACCP plans?

C. Implementation of HACCP

FDA recognizes that, because of the size and diversity of the overall food industry, any mandatory HACCP program would likely be costly for some segments of the food industry and need to be phased in gradually. Development of HACCP plans would require at least some segments of the industry to adopt new ways of thinking and operating. Review by FDA of HACCP plans and monitoring records as part of its plant inspections would necessitate additional training of FDA, State, and local investigators.

In view of the scope of the task, what would be a reasonable time period for the implementation of HACCP? In the seafood proposal, FDA is proposing a 1-year period for implementation, measured from the date of the final regulations. This proposed lead time takes into account the fact that a considerable amount of developmental work has already been done on the application of HACCP to seafood processing. Are there special considerations for other types of foods that could affect implementation time? Are there circumstances that would require some industry segments to need an implementation period longer than 1 year after final rule promulgation?

If implementation of HACCP is to be phased in (i.e., certain segments would gradually be subject to the HACCP requirements established), how should this be accomplished? How should firms or segments of the food industry be differentiated for purposes of such a phased in implementation? What would be appropriate time intervals between each implementation phase? What criteria should be used to decide the order of implementation for the various segments of the food industry? For example, should potential food safety risks associated with the product be considered in determining an implementation schedule, and if so, what factors should be used in ranking foods with respect to potential risk? Likewise, for example, should firm size be considered in determining the order of implementation?

The agency is interested in learning about the experiences that food manufacturers have had with the implementation of HACCP and therefore requests comments from firms who have had actual experience in the application of HACCP concepts to food production, both on what has worked and on what has not worked. In particular, FDA seeks information on: (1) How long it took to implement a HACCP program; (2) the start-up and maintenance costs; and (3) the impact of implementing HACCP on the safety of the product, the efficiency of the firm's operation, and any long-term savings (cost effectiveness). The agency is also interested in any measures that have been, or could be, used to measure the effectiveness of HACCP to improve product safety. The agency is particularly interested in the experiences of small food firms on all of the above.

D. Evaluation of the HACCP System

FDA believes that implementation of HACCP beyond the seafood industry, whether voluntary or mandatory, will more effectively and efficiently ensure the safety of the American food supply. The agency recognizes, however, that there may be alternatives to the HACCP approach and invites comment on such alternatives and their effectiveness.

The agency also invites comment on whether there are factors that would limit the effectiveness of the HACCP approach. What information is needed in order to judge the effectiveness of a HACCP program? Should HACCP programs be pilot tested before implementation? Should there be a minimum level of certainty that a HACCP plan would be effective in controlling hazards prior to implementation?

What should be the qualifications of individuals responsible for developing HACCP plans? What should be the qualifications of individuals responsible for verification of HACCP plans? Is the current state of knowledge sufficient to make adequate hazard analyses? Is there a need for microbiological criteria in HACCP plans? Will end-product microbiological testing be necessary?

How should the appropriate frequency of monitoring CCP's be determined? Should a processing plant be required to submit a report to FDA each time a process is found to be out of control? What, if any, circumstances should trigger mandatory reporting to FDA? Is it necessary to require that a food processor have a reliable and well-tested method of recall as part of its HACCP plan?

E. Roles of FDA, the States, and the Food Industry

FDA's interest in institutionalizing HACCP for the food industry is based on the agency's recognition of the need to revise the current regulatory approach and make it more effective and comprehensive. This revision must coordinate and maximize the efforts of all levels of Government and the food industry to provide effective coverage of food from farm or fishery to table. The respective roles of industry, State and local authorities, and FDA must be clearly articulated, and they must be integrated and coordinated. FDA's preliminary thinking on the nature of these respective roles follows.

If FDA decides to make HACCP mandatory for some or all segments of the food industry, firms would be required to develop, implement, and maintain an effective HACCP system in their facility, and to verify that the system is adequate to ensure a safe product. The HACCP system developed by the firm would have to include all relevant critical limits (such as tolerances) contained in existing FDA regulations and guidelines, as well as other CCP's judged necessary by the firm to ensure the safety of the food. Firms would also be responsible for taking appropriate corrective actions whenever a CCP deviation has occurred. The system would be considered out of compliance when a critical limit of a CCP has been exceeded and corrective actions are not taken or are ineffective.

Regulated industry segments would also be responsible for providing appropriate training for personnel involved in implementing HACCP in each facility. Each facility would have to maintain an accurate, up-to-date HACCP plan, which would be available for review by FDA investigators during an inspection. Records pertinent to the monitoring of the CCP's in the HACCP plan would also have to be available for review by FDA.

FDA is seeking comment on the appropriateness of imposing these obligations on the food industry under a mandatory HACCP system. The agency is especially interested in receiving comments on records access, including:

(1) What records should be considered HACCP records, and therefore be accessible to FDA (and State and local) investigators? Under FDA's proposed HACCP regulations for seafood, HACCP records include the HACCP plan itself, records of the monitoring of critical control points, and records of corrective actions. In the case of seafood, FDA tentatively concluded that the agency should have access to all records deemed to be HACCP records, because without such access, the regulatory requirements would not be meaningful.

(2) How should consumer complaint files relating to CCP failures be utilized in a HACCP system? In FDA's proposed HACCP regulations for seafood, the agency tentatively concluded that each HACCP system should take advantage of consumer complaints as they relate to the operation of CCP's. The agency proposed that procedures for monitoring CCP's include procedures for monitoring relevant consumer complaints, and that consumer complaints that potentially relate to the performance of critical control points be considered HACCP records. FDA invites comment on this approach for foods generally. Should FDA have access to consumer complaint files relating to CCP failures? What criteria should be used to determine whether a consumer complaint is linked to a CCP failure?

(3) How long should HACCP records be kept? The proposed HACCP regulations for seafood mandate 1 year for fresh products and 2 years for frozen and preserved products.

As an additional matter, FDA is aware that there is substantial public interest in the extent to which industry-generated HACCP records could or should be publicly available. FDA invites comment on the general question of public disclosure of HACCP records and on the agency's preliminary analysis of the availability of such records, which follows.

FDA has long had explicit statutory authority to obtain access to certain industry records during inspections involving infant formula, drugs, and devices (21 U.S.C. 374), and has had access by virtue of agency regulations to certain processing records during inspections of low acid canned food processors and manufacturers of infant formula. The agency has the right to copy and take possession of these records, but does not routinely do so. FDA typically copies and takes possession of records only when they may be needed for regulatory purposes. As a preliminary matter, FDA expects to continue this practice with regard to HACCP records.

The public availability of those HACCP documents that would become part of FDA's official records as a result of copying during an inspection would be governed by section 301(j) of the act and by the Freedom of Information Act (FOIA) and regulations issued under the FOIA by the Department of Health and Human Services (HHS) and by FDA. Section 301(j) of the act expressly prohibits any person from disclosing trade secret information obtained during the course of an inspection. The agency's FOIA regulations also state that FDA will not disclose either trade secret or confidential commercial information. FDA's preliminary view is that HACCP plans and monitoring records fall within these two categories of protected records. As a consequence, FDA may have little discretion to disclose such records. Moreover, under HHS FOIA regulations, processors may be entitled to challenge in court a pending disclosure of records on the ground that the records to be disclosed are confidential commercial or trade secret.

Additionally, there are significant legal and practical questions as to whether FDA has the authority to require disclosure of industry records that are not in FDA's possession.

The agency is also seeking comments on whether there should be a standardized format (structure and organization) for written HACCP plans. If so, how should this standard format be developed and who should develop it?

As is the case today, the overall goal of FDA's inspection program would be to ensure that foods are safely prepared, packed, and held. To achieve this goal under a HACCP system, FDA's inspection would seek to verify that a HACCP plan is adequate to ensure food safety and that it is being implemented and maintained properly. The agency is seeking comments on the appropriate frequency of agency inspections under a mandatory HACCP program to achieve its goal of ensuring food safety.

The agency is also interested in receiving comments on the possible role that FDA could play to assist the food industry in developing and establishing HACCP programs. This assistance could take the form of agency guidelines for developing HACCP plans and generic HACCP plans developed in cooperation with the industry. FDA could also promote and participate in educational programs to encourage the use of HACCP and FDA could continue to represent the United States at international meetings on HACCP. The agency could work with interested groups to identify new food safety hazards and to develop new strategies for their control.

The agency expects that the States would play a major role in enhancing FDA's enforcement coverage. State authorities could participate in HACCP inspections both as part of their own enforcement activities and under FDA contract. State and local authorities could also be involved in actively promoting the use of HACCP at the retail level.

The agency is seeking comments on what its role should be relative to the review, verification, monitoring, and certification of HACCP plans. In the seafood proposal, FDA is not proposing to require that HACCP plans be submitted to FDA in advance, or that preapproval by FDA be a condition of the adoption or implementation of these plans. If FDA proposes to make HACCP mandatory for other portions of the food industry, should it adopt this approach? Should FDA indentify CCP's and establish critical limits in its HACCP regulation, or should it defer to firms to develop these themselves? What role should FDA serve in overseeing the corrective actions taken when a deviation has occurred? Can any HACCP oversight function, including review of plans and monitoring, be performed by certified third parties? If so, how should they be certified and by whom?

For implementation of HACCP for fish and fishery products, FDA is developing guidelines for processors. These guidelines inventory and describe the likely hazards associated with both products and processes, and provide advice on how these hazards can be controlled. These guidelines also include a fill-in-the-blank HACCP plan to serve as an example of how a basic HACCP plan could be developed. Are such guidelines necessary for other commodities and, if so, who should develop them? What specifically should be included? What role should the food industry play in the development of these materials? What other forms of assistance should FDA provide? To what extent, if any, should any of this additional guidance be made mandatory?

F. Training and Education

The agency's experience with low acid canned foods established that appropriate training is critical to the successful implementation of HACCP in the food industry. The industry will need training on how to develop HACCP plans, i.e., how to identify hazards and establish critical limits, control measures, corrective actions, and recordkeeping procedures. Investigators employed by regulatory agencies, including FDA, will need training to understand how to review HACCP plans as well as industry records pertaining to implementation and operation of such plans.

Based upon its low acid canned food experience, FDA believes that employee training is an essential element of an effective HACCP program. Should FDA mandate training for plant personnel responsible for developing and maintaining the HACCP program? In the seafood proposal, FDA is proposing to require that each processor and importer employ at least one individual who has successfully completed a training course on the application of HACCP to fish and fishery products processing. Moreover, the regulations propose to require that those at each establishment who have received training be responsible for reviewing records of CCP monitoring, recognizing critical limit deficiencies, and assessing the need for corrective actions relative to the product in question and the HACCP plan itself. FDA seeks comment on the question of training. Are there reasons why such training should not be mandated? If such training is required, as FDA currently believes it should be, who should conduct these training courses? Who should be required to attend? What role, if any, should FDA have regarding course materials and instructors? Should a third party be certified by FDA to review and approve the training courses? Should one, some, or all responsible plant employees be certified?

G. International Harmonization

As the international community moves toward HACCP, FDA believes an opportunity exists to improve the safety of the U.S. food supply by working toward harmonized approaches that would elevate FDA's confidence that food entering the United States meets U.S. safety standards. Such harmonization would also support U.S. exports. For example, after January 1, 1995, unless seafood products for import into the EU are produced under HACCP, the EU will carry out extensive end-product testing, and the competitiveness of importers will be significantly affected. How should FDA approach any effort to harmonize HACCP standards with those of other countries? What role should the Codex play?

H. Potential Costs and Benefits

The agency is also requesting relevant economic information. In particular, FDA seeks estimates of the following costs: (1) The initial costs of developing a HACCP plan and the frequency and costs of altering the plan; (2) costs of monitoring and recordkeeping by type of process, product, and packaging, and the costs of reviewing records before shipment; (3) costs of necessary training of employees, and rate of turnover of employees; (4) administrative costs to oversee all phases of HACCP implementation and operation; (5) the cost of monitoring equipment and other types of equipment needed to implement a HACCP program; (6) the cost and frequency of corrective actions when critical limits are exceeded; (7) the potential cost to the industry of FDA inspections of HACCP programs; (8) cost of testing for chemical and contaminant residues as a component of HACCP; (9) cost of process redesign; (10) cost of new product design; and (11) the costs of any consultants that might be required under a HACCP approach. FDA also seeks comments about the costs of expanding HACCP to elements of the food industry other than manufacturers and processors, such as retail supermarkets and restaurants, food transporters, and raw material suppliers. FDA is particularly interested in the cost experience of small firms who have implemented HACCP, and how HACCP implementation by these firms is different from that of large firms.

FDA is also announcing its intention to survey the food processing industry (except for seafood) to estimate the costs of complying with mandatory HACCP requirements and requests comments on how such a survey should be designed and implemented.

FDA is also interested in receiving comments on benefits of mandating HACCP for particular products, processes, and packaging. Thus, FDA is seeking information about the existing risk levels presented by various foods, including risk from microorganisms, contaminants, and chemical residues from all interested parties, including State and other Federal agencies. FDA is also interested in receiving information concerning any quantitative reductions in risk that have been documented by firms now using HACCP, or other evidence that would document that illness or other food borne risks have been reduced through use of HACCP. FDA also is interested in receiving information that documents savings in production costs or indirect benefits, such as increased quality, that firms using HACCP have experienced. Because many risks are the result of consumer mishandling, FDA requests comments on the extent of this source of illness or other food borne risks, and how this information should be used to target HACCP efforts. Finally, FDA requests comments on the benefits of extending HACCP to the other areas of the food industry that are mentioned above.

I. Potential Environmental Effects

The agency is also requesting relevant environmental information because, under the National Environmental Policy Act, FDA must consider the environmental impact of its actions. The agency does not currently possess the data that would permit detailed analysis of the environmental impact of the action under consideration by the agency, as described in this document.

Therefore, the agency is requesting information on the potential environmental impact including: (1) Potential for increased energy consumption, (2) potential for increased disposal of defective foods, (3) potential for new or increased disposal of sanitizing products, (4) a description of measures that could be taken to avoid or mitigate adverse environmental impacts that might result from this action, and (5) potential for increased paper consumption.

III. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Bennett, J. V., S. D., Holmberg, M. F., Rogers, and S. L., Solomon, "Infectious and Parasitic Diseases," in "Closing the Gap: The Burden of Unnecessary Illness,"Amlet, R. W. and H. B., Dull, ed., Oxford University Press, pp. 102–114, New York, 1987.

2. Todd, E. C. D., "Preliminary Estimates of the Costs of Food borne Disease in the United States," *Journal of Food Protection*, 52:595–601.

3. Archer, D. L., and J. E., Kvenberg, "Incidence and Cost of Food borne Diarrheal Disease in the United States," *Journal of Food Protection*, 48:887–894.

4. NACMCF, "National Advisory Committee on Microbiological Criteria for Foods, Hazard Analysis and Critical Control Point System Adopted March 20, 1992," "HACCP: Principles and Applications," Van Nostrand Reinhold, 1992.

5. GATT Secretariat, "Final Act Embodying the Results of the Uruguay Round of

Multilateral Trade Negotiations," December 15, 1993.

IV. Comments

Interested persons may, on or before December 2, 1994, submit to the Dockets Management Branch (address above) written comments regarding this document. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This document is issued under sections 402, 404, 701, and 704 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342, 344, 371, and 374).

Dated: July 29, 1994

David A. Kessler,

Commissioner of Food and Drugs.

Donna E. Shalala,

Secretary of Health and Human Services.

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Thursday
August 4, 1994

Part V

Department of Justice

Equal Employment Opportunity Commission

28 CFR Part 37

29 CFR Part 1640

Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 37

[A.G. Order No. 1899-94]

RIN 1190-AA29

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1640

RIN 3046-AA42

Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973

AGENCIES: Department of Justice and Equal Employment Opportunity Commission.

ACTION: Joint final rule.

SUMMARY: Section 107(b) of the Americans with Disabilities Act of 1990 (ADA) requires that the Department of Justice (the Department), the Equal Employment Opportunity Commission (the Commission or the EEOC), and the Department of Labor's Office of Federal Contract Compliance Programs issue regulations setting forth procedures to coordinate the processing of complaints that fall within the overlapping jurisdiction of title I of the ADA and the Rehabilitation Act of 1973, to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. Pursuant to this mandate, the Department of Justice and the EEOC are publishing a joint final rule implementing section 107(b) as it pertains to title I of the ADA and section 504 of the Rehabilitation Act of 1973. In addition, this regulation describes the existing procedures for processing: Employment complaints that fall within the overlapping jurisdiction of title II of the ADA and either title I or section 504 of the Rehabilitation Act, or both; and employment complaints that arise solely under title I or section 504. A joint final rule developed by the EEOC and the Department of Labor implementing section 107(b) as it pertains to title I and section 503 of the Rehabilitation Act has been published separately in the **Federal Register** of January 24, 1992.

EFFECTIVE DATE: August 4, 1994.

FOR FURTHER INFORMATION CONTACT: Merrily A. Friedlander, Acting Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, D.C. 20035-6118. She can also be contacted through the Division's ADA Information Line at (202) 514-0301 or (800) 514-0301 (voice), or (202) 514-0383 or (800) 514-0383 (TDD).

Elizabeth M. Thornton, Deputy Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street NW., Washington, DC 20507, (202) 663-4638 (voice), (202) 663-7026 (TDD). Only the 800 numbers listed above are toll-free numbers.

Copies of this rule are available in the following alternate formats: large print, Braille, electronic file or computer disk, and audio tape. Copies may be obtained by calling (800) 669-3362 (voice) or (800) 800-3302 (TDD).

SUPPLEMENTARY INFORMATION:

Background

Title I of the ADA, 42 U.S.C. 12111-12117, prohibits discrimination against qualified individuals with disabilities in all aspects of employment. Title I of the ADA became effective on July 26, 1992, with respect to employers with 25 or more employees. 42 U.S.C. 12111(5)(A). On July 26, 1994, this coverage will be extended to employers with 15 or more employees. *Id.* The EEOC is authorized to investigate and attempt to resolve charges of employment discrimination under title I.

Subtitle A of title II of the ADA, 42 U.S.C. 12131-12134, prohibits discrimination against qualified individuals with disabilities on the basis of disability by State and local governmental entities in their services, programs, and activities, including employment. As of January 26, 1992, the effective date of title II, all State and local governmental entities, regardless of the number of persons they employ, were prohibited from discriminating on the basis of disability in employment. The Department of Justice has issued a regulation implementing title II, which provides that eight designated Federal agencies shall investigate and attempt to resolve complaints of discrimination under title II. Complaints that arise solely under title II are investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. See 28 CFR part 35 (56 FR 35694, July 26, 1991).

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, prohibits discrimination on the basis of disability (formerly, "handicap") in programs and activities receiving Federal financial assistance or conducted by any Executive agency. The nondiscrimination requirements of section 504 are applicable to employment in Federally-assisted programs. Each Federal agency that extends Federal financial assistance is responsible for compliance with section 504 in the programs it funds. More than twenty-five Federal agencies have issued regulations implementing section 504 for their Federally-assisted programs. These agencies are referred to in this rule as section 504 agencies.

The substantive prohibitions and coverage of title I, title II, and section 504 overlap to a significant extent. There is, therefore, a potential for duplicative efforts by the many Federal agencies responsible for ensuring compliance with these laws in their processing of complaints. Thus, pursuant to section 107(b) of the ADA, the Department and the Commission are promulgating this joint final rule to establish procedures for coordinating the processing of complaints that fall within the overlapping jurisdiction of section 504 and title I of the ADA. For convenience and clarity in processing complaints, this rule also incorporates the provisions established by the Department's title II rule at 28 CFR 35.171(b)(2)-(3) for coordinating the processing of complaints against public entities: (i) that fall within the jurisdiction of title II and title I (but are not covered by section 504); and (ii) that are covered by title II, but not title I (whether or not they are also covered by section 504). This reiteration of title II procedures does not amend or change the title II regulation as previously published. The Commission does not express an opinion on the title II procedures set forth herein, since they merely repeat a previously published regulation over which the Commission has no direct authority. The Commission and the Department of Labor also have published joint rules implementing section 107(b) of the ADA as it pertains to title I and section 503 of the Rehabilitation Act. See 29 CFR part 1641, 41 CFR part 60-742 (57 FR 2960, January 24, 1992).

Analysis of Comments and Revisions

Overview

The Commission received ten comments in response to a notice of proposed rulemaking (NPRM) published jointly with the Department of Justice on April 21, 1992. 57 FR 14630. In addition, the Commission received comments from various affected Federal agencies on both the proposed regulation and on the draft final regulation, pursuant to interagency coordination under Executive Order 12067. The Commission and the Department of Justice have carefully considered all of the comments and made various revisions in response to them. A number of commenters expressed reservations about the feasibility of the procedures set forth in the NPRM and suggested various alternative procedures. Several commenters strongly urged that procedures similar to those set forth in the regulation promulgated to coordinate processing of complaints of employment discrimination filed against recipients of federal financial assistance be adopted. See 28 CFR part 42; 29 CFR part 1691 (hereinafter, the title VI/title VII regulation). The title VI/title VII regulation established procedures for handling complaints of employment discrimination filed against recipients of Federal financial assistance subject to title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and other provisions of Federal law that prohibit discrimination on grounds of race, color, religion, sex, or national origin, in programs or activities receiving Federal financial assistance, when there is overlapping jurisdiction under title VII of the Civil Rights Act of 1964.

Under the NPRM's "first filed approach," the EEOC and any section 504 agency with jurisdiction over a charge or complaint would process those charges or complaints that were actually filed with it, pursuant to title I of the ADA or section 504, respectively. In the case of a charge or complaint that was physically filed with both the EEOC and a section 504 agency with jurisdiction, the agency that first received the complaint or charge would process it, absent special circumstances, while the second agency would defer processing pending the conclusion of the first agency's investigation. Numerous section 504 agencies expressed concern about the practical difficulties inherent in the NPRM's approach, including ascertaining which agency actually received a charge or complaint first in the case of a charge or complaint filed with both the EEOC and a section 504 agency. Accordingly, as suggested by a number of commenters, the final regulation adopts an approach similar to that of the title VI/title VII regulation. Under the final rule, a complaint solely alleging employment discrimination against a single individual (hereinafter, an individual complaint) that is filed with a section 504 agency with jurisdiction over the complaint will ordinarily be transferred to the EEOC for processing, unless the complainant specifically requests processing by the section 504 agency. Section 504 agencies, however, will retain for processing any complaints that allege: (i) a pattern or practice of discrimination in employment; or (ii) discrimination both in employment and in other services or practices of a respondent that are covered by section 504. For a comprehensive analysis of the new procedures, see the discussion of § ____.6, below.

The NPRM presented two options regarding the legal standard to be applied by section 504 agencies, and the preamble to the NPRM discussed the rationale for each option. Although numerous comments on these options were received in response to the NPRM, recent amendments to the Rehabilitation Act have resolved this issue. See section 506 of the Rehabilitation Act Amendments of 1992, Pub. L. 102–569, 106 Stat. 4344. Therefore, as provided in that amendment, the final regulation directs section 504 agencies to apply the standards of title I of the ADA. See the discussion of § ____.12, below.

Commenters also requested that time frames for the processing of complaints be added to the final regulation. Because, in certain cases, individual agencies may have requirements that preclude meeting fixed time frames for certain stages of the complaint investigation process, this suggestion has not been adopted. For example, when disclosure of the complainant's identity is necessary for the investigation of a section 504 or title II complaint, the Department requires receipt of a signed consent form from the complainant prior to notifying a respondent that the Department has received a complaint of discrimination. Therefore, the final regulation retains the more general requirement that agencies act promptly and in accordance with applicable law.

Various commenters also noted the inefficiency of the requirement that a section 504 agency refer a complaint to the Civil Rights Division for a determination of jurisdiction when the agency does not have section 504 jurisdiction, but does have title II jurisdiction. In response, the regulation has been revised to require that a complaint be referred to the Civil Rights Division only when the section 504 agency that initially receives the complaint has neither section 504 nor title II jurisdiction.

Section-by-Section Analysis

Section ____.1 Purpose and Application

Section ____.1 of the final rule, "Purpose and application," explains that the rule establishes the coordination procedures to be followed by the Federal agencies responsible for processing complaints of employment discrimination filed against recipients of Federal financial assistance and arising under section 504 and title I of the ADA. In addition to establishing those new procedures, the rule also restates and integrates into one comprehensive regulation those provisions of the Department's existing title II regulation that established the procedures for coordinating the processing of complaints covered by title II of the ADA and either title I or section 504, or both. The rule does not amend the title II regulation, but simply locates all of the applicable regulations regarding coordination in a single source.

Section ____.2 Definitions

Section ____.2 defines a number of terms used in the rule. A definition of the term "due weight" has been added, supplementing the discussion in the preamble.

The definitions of *Federal financial assistance* and *program or activity*, both of which relate to the determination of whether jurisdiction exists under section 504, have been revised from those contained in the NPRM. The NPRM originally contained a detailed definition of *Federal financial assistance*. However, in recognition of the fact that this definition may vary among section 504 agency regulations due to the nature of financial assistance provided by each agency, the new definition simply refers to the definitions adopted by each section 504 agency in its regulation implementing section 504 for Federally-assisted programs.

The definition of *program or activity* under section 504 was modified by the Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 29, for all section 504 agencies. Therefore, to avoid any inconsistency between this rule and any agency regulations implementing section 504 that may not have been amended to reflect this change to the Rehabilitation Act, the new definition references the statutory definition.

Section ____.3 Exchange of Information

Section ____.3 requires the agencies responsible for enforcing the ADA and section 504 to share information.

Section ____.4 Confidentiality

Section ____.4(a) states that the confidentiality obligations applicable to the EEOC under the ADA also apply to section 504 agencies and designated agencies when information obtained by the EEOC is transmitted to such agencies, except when the agency receives the same information from a source other than the EEOC. Section ____.4(b) states that when the EEOC receives information from section 504 or designated agencies, the EEOC shall comply with any confidentiality requirements applicable to that information.

Section ____.5 Date of Receipt

Section ____.5 states that a complaint or charge of employment discrimination is deemed to be filed, for purposes of determining timeliness, on the date the complaint or charge is first received by a Federal agency with jurisdiction under section 504 or the ADA, regardless of whether it is subsequently transferred to another agency for processing.

Section ____.6 Processing of Complaints of Employment Discrimination Filed With an Agency Other Than the EEOC

Section ____.6 describes the basic procedures that section 504 agencies and the agencies designated to process complaints under the Department's title II regulation will follow in determining whether to process an employment complaint or to refer it to another agency. The primary purpose of the rule is to establish procedures for coordinating the processing of complaints or charges of employment discrimination arising under section 504 and title I of the ADA. However, the procedures for coordinating the processing of complaints or charges of employment discrimination against public entities: (i) that fall under the jurisdiction of title II and title I (but not section 504); and (ii) that fall under the jurisdiction of title II, but not title I (whether or not covered by section 504) established by § 35.171 of the Department's title II regulation, have been restated here and integrated with the section 504 processing procedures for clarity and ease in processing by the affected agencies.

Section ____.6 has been revised to eliminate the requirement that the initial receiving agency, or the Civil Rights Division, when a complaint is forwarded to it for a determination of jurisdiction, provide notice to the affected parties. As previously written, the regulation required notification by any agency that came into contact with a complaint or charge even if the complaint or charge was immediately forwarded to another agency. Instead of multiple notifications, the final rule now provides for a more efficient single notification at such time as the appropriate processing agency receives the complaint or charge, in accordance with agency policy and applicable law.

Paragraph (b) of § ____.6 has been revised to provide that, if an agency determines pursuant to paragraph (a) that it does not have jurisdiction under section 504 or title II, and that the EEOC does not have jurisdiction under title I, the agency shall promptly refer the complaint to the Civil Rights Division. This is a change from the procedure set forth in the NPRM, which required a section 504 agency to refer all title II complaints to the Civil Rights Division. The revision was made in response to various comments pointing out that this was an inefficient procedure when the section 504 agency was certain that it was the designated agency under title II, and that the complaint would be referred back to it by the Civil Rights Division.

Upon receipt of a referred complaint, the Civil Rights Division will determine whether another Federal agency may have jurisdiction over the complaint under section 504 (that is, a Federal agency may be providing financial assistance to the respondent) or under title II (that is, the entity that is the subject of the complaint may be a public entity). When the Civil Rights Division finds such jurisdiction, it shall promptly refer the complaint to the appropriate agency.

Paragraph (c) of § ____.6 sets forth the circumstances under which an agency that is a section 504 agency, a designated agency, or both, will promptly refer a complaint to the EEOC for investigation and processing. In addition to: (i) revising the regulation to reflect the procedures of the title VI/title VII regulation (which generally results in individual complaints being referred for processing to the EEOC); and (ii) incorporating the procedures already established by the title II regulation, paragraph (c) and the balance of § ____.6 more specifically set forth the requirements for either referral or retention applicable to each type of agency. Unlike the procedural scheme set forth in the NPRM, under which a complaint or charge could only be dual filed if it were actually filed with both a section 504 agency and the EEOC, a complaint or charge filed with one agency will now be deemed to be dual filed under both title I and section 504 under certain circumstances, as set forth in this section and in § ____.7.

Paragraph (c)(1) of § ____.6 describes the rule applicable to an agency that receives a complaint of employment discrimination under section 504 or title II and determines that it does not have jurisdiction over the complaint. If the agency determines that the EEOC may have jurisdiction, the agency is required to promptly forward the complaint to the EEOC for processing. In certain instances this may require consultation with the EEOC. This paragraph establishes the requirements for section 504 and other agencies and includes the requirements established by § 35.171(b)(2) of the title II regulation with respect to designated agencies.

Paragraph (c)(2) establishes the referral requirements applicable to section 504 agencies and requires a section 504 agency that otherwise has jurisdiction over a complaint of employment discrimination to refer the complaint to the EEOC when the complaint solely alleges discrimination against an individual, unless the EEOC lacks jurisdiction over the complaint under title I, or the complainant requests that the section 504 agency retain jurisdiction, either independently, or following receipt of the notice letter described in paragraphs (c)(2)(ii)(A) and (c)(2)(ii)(B).

The referral to the EEOC of complaints solely alleging employment discrimination against individuals is a significant change in procedure from the NPRM. The revision was made in response to numerous comments urging this approach, which is consistent with the title VI/title VII regulation. This approach will serve to minimize duplicative efforts because the EEOC, in general, will be the primary agency investigating individual complaints of disability discrimination in employment. An individual's private right of action under title I of the ADA will also be preserved under this approach, since these section 504 complaints also will be deemed to be dual filed under title I. However, in order to preserve an individual's right to have his or her complaint processed by the section 504 agency, paragraph (c)(2)(i)(B) requires the section 504 agency to retain the complaint for investigation if the complainant so requests.

Paragraphs (c)(2)(ii)(A) and (c)(2)(ii)(B) describe the notice letter a section 504 agency is required to send promptly to each complainant before the agency refers a complaint solely alleging employment discrimination against an individual to the EEOC. The purpose of the letter is to inform an individual who has initially filed his or her complaint with the appropriate section 504 agency of the basic implications of a referral of that complaint to the EEOC. It is anticipated that the vast majority of individual complaints will be referred to the EEOC, with the section 504 agency deferring its review and processing until the conclusion of the EEOC's processing. However, because an automatic referral to the EEOC of a complaint filed with a section 504 agency may be contrary to the complainant's expectations, complainants will be given the choice of having the EEOC or the section 504 agency investigate the complaint.

Each agency will develop its own letter informing the complainant that the agency will refer the complaint to the EEOC for investigation and processing, unless the agency receives a written request to the contrary from the complainant within twenty days of the date of the notice letter. The agency notice letter shall explain: (i) that agency's procedures for processing section 504 complaints; and (ii) the EEOC's procedures for processing complaints under title I. The agency notice letter shall also inform individuals of the potential for differing remedies under each statute.

Paragraph (c)(3) describes the procedure for referral by designated agencies, as established by § 35.171(b)(2) of the title II regulation. If a designated agency does not have section 504 jurisdiction, and determines that the EEOC may have title I jurisdiction, it shall promptly refer the complaint to the EEOC.

Paragraph (c)(4)(i) provides that complaints referred to the EEOC by an agency with section 504 jurisdiction will be deemed to be dual filed under both section 504 and title I. As a consequence, the section 504 agency, although required to defer its processing of the complaint, will have an opportunity to review the EEOC's findings and take any further action it deems appropriate, as provided in § ____.10. Paragraph (c)(4)(ii) further provides that a complaint referred to the EEOC by an agency that has jurisdiction over the complaint under title II only (and not under section 504) will be treated as a complaint filed under title I only. See 28 CFR 35.171(b)(2).

The distinction between the treatment of these two types of complaints, those falling within the province of section 504 and those arising only under the ADA, is based on the ADA's statutory mandate to preserve the rights, remedies, and procedures of any Federal law that provides greater or equal protection to individuals with disabilities than are afforded by the ADA. Permitting section 504 agencies to review complaints originally filed with those agencies preserves section 504 remedies, including an agency's prerogative to terminate the federal funding of the respondent. It is anticipated that the fact that fund termination is ultimately available as an administrative remedy will encourage respondents to resolve valid claims through negotiation with the EEOC rather than through litigation. Because § ____.10(c) requires the reviewing section 504 agency to give due weight to the EEOC's findings and conclusions, it is also anticipated that, in most instances, further action by the section 504 agency will not be necessary.

Paragraph (c)(4)(iii) states that any complaint referred to the EEOC shall be processed pursuant to title I procedures. Specifically, the EEOC will notify respondents of its receipt of a complaint in accordance with its usual procedures for notification following receipt of a charge.

Paragraph (d) of § ____.6 describes the circumstances under which an agency shall retain a complaint for investigation (rather than referring it to the EEOC or the Civil Rights Division). The general rule applicable to section 504 agencies, as stated in paragraph (d)(1), is that a section 504 agency shall retain a complaint when it determines that it has section 504 jurisdiction over the complaint and that any one or more of the following are true: (i) the EEOC does not have jurisdiction over the complaint; (ii) the EEOC has jurisdiction over the complaint, but the complainant requests that the complaint be investigated by the agency rather than being referred; (iii) the complaint alleges discrimination in both employment and in other services or practices of the respondent that are covered by section 504; or (iv) the complaint alleges a pattern or practice of discrimination in employment. Such complaints will not be deemed dual filed under title I of the ADA.

This procedure is consistent with the approach taken in the title VI/title VII regulation. For reasons of efficiency, section 504 agencies will ordinarily process complaints that allege disability discrimination in both employment and other practices of a recipient, because the EEOC has no jurisdiction over the latter. Historically, under both section 504 and other civil rights statutes, agencies have also had a particular interest in the enforcement of pattern or practice cases of employment discrimination against recipients of Federal assistance, and agencies shall continue to investigate such complaints. It should be noted that the term "pattern or practice" of discrimination is intended to mean systemic or class complaints generally. Although the term "pattern or practice" of discrimination is sometimes used in a more narrow sense to refer to intentional discrimination or disparate treatment on a classwide level, the term was used in the title VI/title VII rule to refer to both adverse impact cases and cases of intentional discrimination affecting a class of protected individuals.

The provisions described above only apply when a complaint is filed with a section 504 agency. The EEOC will always process all charges, including class charges, that are solely filed with the EEOC.

Paragraph (d)(2) restates the principle established in the title II regulation that an agency shall retain a complaint for investigation when it determines that: (i) it has jurisdiction over the complaint as a designated agency; and (ii) that the EEOC does not have jurisdiction over the complaint under title I. See 28 CFR 35.171(b)(2).

Paragraph (d)(3) states the rule that complaints retained for investigation under paragraphs (d)(1) and (d)(2) will be investigated and processed under section 504, title II, or both, as applicable, and will not be considered to be dual filed under title I.

Section ____.7 Processing of Charges of Employment Discrimination Filed With the EEOC

Section ____.7 outlines the procedures that the EEOC will take in determining whether to process a charge or to refer it to another agency.

Section .7(a)(1) requires the EEOC, as a first step, to determine whether it has jurisdiction over the charge. If the EEOC has jurisdiction, it shall process the charge in accordance with its customary title I procedures, including notification of the respondent.

Paragraph (a)(2) sets forth the procedures that apply when the EEOC determines that it does not have jurisdiction over the charge. Under such circumstances, the charge will be promptly forwarded to the Civil Rights Division for referral to the appropriate agency, or retention by the Department for processing, as applicable.

Paragraph (b)(1) of § ____.7 states the basic rule applicable to charges filed with the EEOC, that is, when the EEOC determines that it has jurisdiction over the charge under title I, it shall retain the charge. Because EEOC processing of a charge filed with the EEOC is consistent with the charging party's expectations when filing the charge, no notice letter to the charging party, similar to the letter required to be sent to complainants under paragraph (c)(2)(ii) of § ____.6, is required.

Paragraph (b)(2) has been newly added to the final rule. It provides that the EEOC shall refer to a section 504 agency for further action, as appropriate, any cause finding against a recipient that has failed conciliation and that the EEOC has declined to litigate. By providing for agency review under these circumstances, paragraph (b)(2) should promote the ADA's statutory goal of preserving section 504 remedies, while the requirement that section 504 agencies give due weight to EEOC findings should eliminate any need for duplicative agency action.

Section ____.8 Processing of Complaints or Charges of Employment Discrimination Filed With Both the EEOC and a Section 504 Agency

Section ____.8 sets forth the procedures that the EEOC and section 504 agencies shall follow in processing complaints or charges of employment discrimination that have been dual filed with both the EEOC and a section 504 agency.

Paragraph (a) of § ____.8 sets forth the procedures applicable to complaints or charges of employment discrimination that are dual filed with both a section 504 agency and the EEOC, both of which have jurisdiction over the complaint or charge.

Under those circumstances, the rule follows the general pattern established by the title VI/title VII regulation, and requires the EEOC to process charges that solely allege employment discrimination against an individual when the individual has not elected section 504 agency processing. Section 504 agencies will process all complaints that allege: (i) discrimination in both employment and other practices or services of the respondent; (ii) a pattern or practice of employment discrimination; or (iii) discrimination solely against an individual, when the individual has elected section 504 agency processing. This allocation of responsibility for complaint processing is the same as the allocation of responsibility for processing complaints originally filed solely with a section 504 agency under § ____.6. However, as discussed below, paragraph (e) of § ____.8 sets forth exceptions to this general scheme for special circumstances.

Paragraph (b) requires complaints or charges to be referred to the Civil Rights Division if both the EEOC and the section 504 agency determine that they do not have jurisdiction over the complaint or charge. The Civil Rights Division is then responsible for making the appropriate referral to a section 504 or designated agency.

Paragraph (c) requires the EEOC and each agency with jurisdiction under section 504 to develop procedures for determining whether complaints or charges of discrimination have been filed with the EEOC and with one or more agencies. It is anticipated that the Department, the Commission, and the section 504 agencies will work together to develop materials, such as a uniform filing form (or uniform portion of a filing form) that will facilitate coordination in processing employment complaints.

Although some commenters requested that these procedures be stated in the final rule, it was decided that this activity is more appropriately conducted at a sub-regulatory level, which will permit more flexibility in developing efficient procedures. In addition, because the rule has been restructured to follow the title VI/title VII regulation rather than the "first-filed" approach, there is less need to determine whether a complaint or charge has been filed with more than one agency. For example, under the title VI/title VII model, the EEOC will become the primary agency processing complaints or charges that solely allege discrimination against an individual. Therefore, there is no need to determine whether these complaints or charges have been dual filed in order to establish responsibility for processing. In addition, the notice letter required to be sent to section 504 complainants prior to such a referral should provide an efficient mechanism for determining whether a charge has also been filed with the EEOC because it could be used to require complainants to reveal whether they had filed a complaint or charge with another agency.

Paragraph (d) requires the agency that will process a dual-filed complaint or charge to notify all concerned parties that the other agencies will be deferring their processing, and of the possibility of further action by such agencies pursuant to §§ ____.10 or ____.11.

Paragraph (e) establishes that, under certain special circumstances where deferral may be inappropriate, the agencies involved may jointly agree to reallocate investigatory responsibilities. For example, if the section 504 agency would normally process the complaint, but the agency does not receive information that another charge has been filed with the EEOC until after an investigation has been started by the EEOC, this exception permits the agencies jointly to decide that the EEOC should continue processing the charge and that the section 504 agency should defer further action. This exception could also be used in connection with subsequent complaints or charges, such as allegations of retaliation, related to the original complaint or charge.

The special circumstances listed in paragraph (e) are illustrative and agencies may agree to reallocate investigatory responsibilities under other appropriate circumstances. In such circumstances a complaint or charge will be treated as a deferred complaint or charge with respect to any right to review under §§ ____.10 and ____.11.

It is not anticipated that most aggrieved individuals will separately file with both a section 504 agency and the EEOC. Since the substantive protections provided by title I and section 504 are now identical, an individual's rights against discrimination on the basis of disability can be vindicated under either statute. However, an individual who files a complaint with a section 504 agency alleging discrimination both in employment and services, a pattern or practice of discrimination, or who requests section 504 processing, will not preserve a private right of action under title I of the ADA, unless the individual also files a charge with the EEOC under title I of the ADA.

Section ____.9 Processing of Complaints or Charges of Employment Discrimination Filed With a Designated Agency and Either a Section 504 Agency, the EEOC, or Both

Section ____.9 adds new procedures to the final rule to address the processing of complaints filed with a designated agency and with either a section 504 agency, the EEOC, or both. Generally, the EEOC and the section 504 agencies have primary responsibility for processing complaints of employment discrimination. Therefore, § ____.9 provides that a designated agency shall investigate and process a complaint only when: (i) it is either the only agency with jurisdiction to process the complaint; or (ii) it also has jurisdiction to process the complaint under section 504. If another agency has sole jurisdiction over the complaint under either section 504 or title I (and the complaint was actually filed with that agency under section 504 or title I), § ____.9 requires the designated agency to forward the complaint to that agency. If a section 504 agency and the EEOC both have jurisdiction over a complaint or charge of employment discrimination, the rule allocates complaint-processing responsibility according to the established pattern of the title VI/title VII rule, that is, individual complaints are forwarded to the EEOC and complaints alleging discrimination in both employment and in other practices or services of the respondent or a pattern or practice of employment discrimination are forwarded to the section 504 agency with jurisdiction.

Section ____.10 Section 504 Agency Review of Deferred Complaints

Section ____.10 describes the steps that shall be taken when the EEOC processes a dual-filed complaint or charge (either an individual complaint that is referred to the EEOC or a dual-filed complaint or charge that the EEOC processes) and a section 504 agency defers its investigation.

Because the rule requires the section 504 agency to defer action until the EEOC resolves the complaint, paragraph (a) outlines the different ways in which any title I charge may be resolved, including litigation by the EEOC. Although the EEOC is the agency primarily responsible for the enforcement of title I, resolution by the Civil Rights Division is also included under paragraphs (a) (3) and (4) because, under title I of the ADA, when there is a cause finding pursuant to 29 CFR 1601.21, the Civil Rights Division has litigation authority for charges against State and local governments, government agencies, and political subdivisions. See 29 CFR 1601.29. The Civil Rights Division is also responsible for issuing right-to-sue letters in such cases. See 29 CFR 1601.28(d).

Paragraph (b) of § ____.10 provides that, upon resolution of the dual-filed complaint or charge, the EEOC or the Civil Rights Division shall inform the section 504 agency of the resolution. Paragraph (d) provides that, upon written request by the section 504 agency, the EEOC or the Civil Rights Division shall provide the section 504 agency with the materials necessary to evaluate its resolution of the case, such as investigative reports.

Paragraph (c) of § ____.10 provides that, upon receipt of notification from the EEOC or the Civil Rights Division, as appropriate, the section 504 agency shall determine what further action is warranted. Because, pursuant to the 1992 amendments to the Rehabilitation Act, the substantive standards to be applied to complaints of employment discrimination are now identical, it is anticipated that, except in rare circumstances, the section 504 agency's findings and conclusions as to whether a violation has occurred will be consistent with those of the EEOC and those of the Civil Rights Division, as applicable. In order to further promote consistency and avoid duplication of effort, the rule requires that the section 504 agency accord due weight to the findings and conclusions of the EEOC and the Civil Rights Division, as applicable. The term "due weight" is adopted from the title VI/title VII regulation, which is referenced in section 107(b) of the ADA. 28 CFR part 42, subpart H; 29 CFR part 1691. In giving due weight to the findings and conclusions of the EEOC or the Civil Rights Division, a section 504 agency shall give such full and careful consideration to the findings and conclusions as is appropriate, taking into account such factors as: (i) the extent to which the underlying investigation is complete and the evidence supports the findings and conclusions; (ii) the nature and results of any subsequent proceedings; (iii) the extent to which the findings, conclusions and any actions taken under title I are consistent with the effective enforcement of section 504; and (iv) the agency's responsibilities under section 504.

Moreover, if the agency proposes to take an action that is inconsistent with such findings and conclusions, the section 504 agency is required to provide written notification of the action that it proposes to take and the basis for that action to the Assistant Attorney General of the Civil Rights Division, the Chairman of the EEOC, and the head of the EEOC office that processed the complaint or charge. This is intended to enable the agencies to identify and resolve any potentially conflicting or inconsistent standards before they are imposed and to prevent duplication of effort.

What further action the section 504 agency will take will depend on the EEOC's (or, as appropriate, the Civil Rights Division's) findings, conclusions, and resolution. This rule contemplates that in most cases the "further action" would be that the section 504 agency would notify the complainant and the respondent that it is closing its file based upon the EEOC's resolution of the charge. For example, closure by the section 504 agency would be the appropriate action when: (i) the EEOC found no cause and issued a right-to-sue letter, and the section 504 agency agreed with the determination that no violation occurred; or (ii) the EEOC found cause and the violation was completely remedied through either a conciliation agreement or litigation, and the section 504 agency agreed that the violation had been remedied.

Section ____.11 EEOC Review of Deferred Charges

Section ____.11 describes the steps that shall be taken when a section 504 agency processes a dual-filed complaint or charge and the EEOC defers its processing of the charge. Paragraph (a) of § ____.11 outlines the different ways in which a section 504 complaint may be resolved. Referral to, and action by, the Civil Rights Division is included in § ____.11(a) because one of the options available to a section 504 agency, when it has found a violation and it has not been able to negotiate a voluntary compliance agreement, is referral to the Civil Rights Division for judicial enforcement.

Paragraphs (b) and (d) of § ____.11 impose the same types of obligations on the section 504 agency to notify the EEOC of its resolution of the complaint and to share with the EEOC any materials related to the resolution of the complaint that would permit the EEOC to evaluate the findings, as paragraphs (b) and (d) of § ____.10 impose on the EEOC.

Paragraph (c) of § ____.11 imposes requirements on the EEOC analogous to those § ____.10(c) imposes on a section 504 agency. This paragraph contemplates that in most cases the appropriate "further action" would be that the EEOC would notify the charging party and the respondent that it is closing its file based upon the resolution of the complaint by the section 504 agency, and, where appropriate, would issue a right-to-sue letter. For example, closure and issuance of a right-to-sue letter by the EEOC would be the appropriate action when the section 504 agency found no violation and the EEOC agreed. Alternatively, closure alone would be appropriate when the section 504 agency found a violation and the EEOC agreed that the violation was completely remedied through either a conciliation agreement, an administrative hearing, or judicial enforcement.

Section ____.12 Standards

In the NPRM, this section addressed the requirement established by section 107(b) of the ADA to "[prevent] imposition of inconsistent or conflicting standards for the same requirements under [title I and section 504]."

As noted earlier, in order to comply with this statutory mandate, the NPRM presented two options for the legal standard to be applied by section 504 agencies in their investigation of complaints that are also subject to title I, and requested comment as to the appropriate standard. However, in the period between the publication of the NPRM and the publication of this final rule, the Rehabilitation Act was specifically amended to provide that the standards of title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA, as such sections relate to employment, shall be the standards applied by section 504 agencies in investigating complaints of employment discrimination. See section

506 of the Rehabilitation Act Amendments of 1992, Public Law 102–569, 106 Stat. 4344, 4428. The final rule tracks the language of the amendment.

Section ____.13 Agency Specific Memoranda of Understanding

This section has been newly added to the final rule, to allow maximum flexibility for the development of agency specific memoranda of understanding (MOU) that would further serve to minimize duplication of effort and fully preserve an aggrieved individual's rights under both statutes. When a section 504 agency amends its regulations to make them consistent with title I of the ADA, the EEOC and the individual section 504 agency may enter into an MOU providing for the investigation and processing by the section 504 agency of complaints or charges dual filed under both section 504 and title I of the ADA by the section 504 agency. Execution of an MOU would be discretionary on the part of both the EEOC and the particular section 504 agency. Section 504 agencies that amend their regulations to make them consistent with title I standards would have, in agreement with the EEOC, the option of acting as the EEOC's agent for investigating and processing under title I all complaints covered by both title I and section 504 that are filed with the section 504 agency. It is contemplated that the terms of the MOU would be similar to the joint rule implementing section 107(b) as it pertains to section 503 of the Rehabilitation Act and title I. 29 CFR part 1641; 41 CFR part 60–742.

Regulatory Process Matters

This rule takes effect immediately, rather than 30 days after publication, because it solely concerns agency procedure and practice.

This final rule has been drafted in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department of Justice and the Equal Employment Opportunity Commission have determined that it is not a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 12875 prohibits executive departments and agencies from promulgating any regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government unless certain conditions are met. Although the procedures for processing complaints or charges of employment discrimination established by this regulation may affect complaints or charges of employment discrimination filed against such entities, the final rule does not create any mandates affecting such entities and may, in fact, reduce any current burden by streamlining the processing of complaints and charges at the Federal level.

The Attorney General and the Chairman of the EEOC have reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and by approving it certify that this regulation will not have a significant economic impact on a substantial number of small entities.

This final rule does not establish reporting or record-keeping requirements that are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR part 1320.

This part will be added to the rules of the Department of Justice at 28 CFR chapter I as a new part 37, and to the rules of the Equal Employment Opportunity Commission at 29 CFR chapter XIV as a new part 1640. Since the parts are identical, the text of the joint final rule is set out only once at the end of the joint preamble. The part heading, list of subjects, table of contents, and authority citation for the parts as they will appear in each CFR title follow the text of the joint rule.

Text of Final Joint Rule

The text of the final joint rule, as adopted by the agencies specified in this document, appears below:

PART ____—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Sec.

§ ____.1 Purpose and application.

(a) This part establishes the procedures to be followed by the Federal agencies responsible for processing and resolving complaints or charges of employment discrimination filed against recipients of Federal financial assistance when jurisdiction exists under both section 504 and title I.

(b) This part also repeats the provisions established by 28 CFR 35.171 for determining which Federal agency shall process and resolve complaints or charges of employment discrimination:

(1) That fall within the overlapping jurisdiction of titles I and II (but are not covered by section 504); and

(2) That are covered by title II, but not title I (whether or not they are also covered by section 504).

(c) This part also describes the procedures to be followed when a complaint or charge arising solely under section 504 or title I is filed with a section 504 agency or the EEOC.

(d) This part does not apply to complaints or charges against Federal contractors under section 503 of the Rehabilitation Act.

(e) This part does not create rights in any person or confer agency jurisdiction not created or conferred by the ADA or section 504 over any complaint or charge.

§ ____.2 Definitions.

As used in this part, the term:

Americans with Disabilities Act of 1990 or *ADA* means the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her designee.

Chairman of the Equal Employment Opportunity Commission refers to the Chairman of the United States Equal Employment Opportunity Commission, or his or her designee.

Civil Rights Division means the Civil Rights Division of the United States Department of Justice.

Designated agency means any one of the eight agencies designated under § 35.190 of 28 CFR part 35 (the Department's title II regulation) to implement and enforce title II of the ADA with respect to the functional areas within their jurisdiction.

Dual-filed complaint or charge means a complaint or charge of employment discrimination that:

(1) Arises under both section 504 and title I;

(2) Has been filed with both a section 504 agency that has jurisdiction under section 504 and with the EEOC, which has jurisdiction under title I; and

(3) Alleges the same facts and raises the same issues in both filings.

Due weight shall mean, with respect to the weight a section 504 agency or the EEOC shall give to the other agency's findings and conclusions, such full and careful consideration as is appropriate, taking into account such factors as:

(1) The extent to which the underlying investigation is complete and the evidence is supportive of the findings and conclusions;

(2) The nature and results of any subsequent proceedings;

(3) The extent to which the findings, conclusions and any actions taken:

(i) Under title I are consistent with the effective enforcement of section 504; or

(ii) Under section 504 are consistent with the effective enforcement of title I; and

(4) The section 504 agency's responsibilities under section 504 or the EEOC's responsibilities under title I.

Equal Employment Opportunity Commission or *EEOC* refers to the United States Equal Employment Opportunity Commission, and, when appropriate, to any of its headquarters, district, area, local, or field offices.

Federal financial assistance shall have the meaning, with respect to each section 504 agency, as defined in such agency's regulations implementing section 504 for Federally- assisted programs.

Program or activity shall have the meaning defined in the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 794), as amended.

Public entity means:

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act, 45 U.S.C. 502(8)).

Recipient means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary under such program.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 794), as amended.

Section 504 agency means any Federal department or agency that extends Federal financial assistance to programs or activities of recipients.

Title I means title I of the ADA.

Title II means subtitle A of title II of the ADA.

§ ____.3 Exchange of information.

The EEOC, section 504 agencies, and designated agencies shall share any information relating to the employment policies and practices of a respondent that may assist each agency in carrying out its responsibilities, to the extent permissible by law. Such information shall include, but is not limited to, complaints, charges, investigative files, compliance review reports and files, affirmative action programs, and annual employment reports.

§ ____.4 Confidentiality.

(a) When a section 504 agency or a designated agency receives information obtained by the EEOC, such agency shall observe the confidentiality requirements of section 706(b) and section 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(b) and 2000e-8(e)), as incorporated by section 107(a) of the ADA, to the same extent as these provisions would bind the EEOC, except when the agency receives the same information from a source independent of the EEOC. Agency questions concerning the confidentiality requirements of title I shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel, the EEOC.

(b) When the EEOC receives information from a section 504 or a designated agency, the EEOC shall observe any confidentiality requirements applicable to that information.

§ ____.5 Date of receipt.

A complaint or charge of employment discrimination is deemed to be filed, for purposes of determining timeliness, on the date the complaint or charge is first received by a Federal agency with section 504 or ADA jurisdiction, regardless of whether it is subsequently transferred to another agency for processing.

§ ____.6 Processing of complaints of employment discrimination filed with an agency other than the EEOC.

(a) *Agency determination of jurisdiction.* Upon receipt of a complaint of employment discrimination, an agency other than the EEOC shall:

(1) Determine whether it has jurisdiction over the complaint under section 504 or under title II of the ADA; and

(2) Determine whether the EEOC may have jurisdiction over the complaint under title I of the ADA.

(b) *Referral to the Civil Rights Division.* If the agency determines that it does not have jurisdiction under section 504 or title II, and determines that the EEOC does not have jurisdiction under title I, the agency shall promptly refer the complaint to the Civil Rights Division. The Civil Rights Division shall determine if another Federal agency may have jurisdiction over the complaint under section 504 or title II, and, if so, shall promptly refer the complaint to a section 504 or a designated agency with jurisdiction over the complaint.

(c) *Referral to the EEOC.—(1) Referral by an agency without jurisdiction.* If an agency determines that it does not have jurisdiction over a complaint of employment discrimination under either section 504 or title II and determines that the EEOC may have jurisdiction under title I, the agency shall promptly refer the complaint to the EEOC for investigation and processing under title I of the ADA.

(2) *Referral by a section 504 agency.* (i) A section 504 agency that otherwise has jurisdiction over a complaint of employment discrimination under section 504 shall promptly refer to the EEOC, for investigation and processing under title I of the ADA, any complaint of employment discrimination that solely alleges discrimination against an individual (and that does not allege discrimination in both employment and in other practices or services of the respondent or a pattern or practice of employment discrimination), unless:

(A) The section 504 agency determines that the EEOC does not have jurisdiction over the complaint under title I; or

(B) The EEOC has jurisdiction over the complaint under title I, but the complainant, either independently, or following receipt of the notification letter required to be sent to the complainant pursuant to paragraph (c)(2)(ii) of this section, specifically requests that the complaint be investigated by the section 504 agency.

(ii) Prior to referring an individual complaint of employment discrimination to the EEOC pursuant to paragraph (c)(2)(i) of this section (but not prior to making such a referral pursuant to paragraph (c)(1) of this section), a section 504 agency that otherwise has jurisdiction over the complaint shall promptly notify the complainant, in writing, of its intention to make such a referral. The notice letter shall:

(A) Inform the complainant that, unless the agency receives a written request from the complainant within twenty days of the date of the notice letter requesting that the agency retain the complaint for investigation, the agency will forward the complaint to the EEOC for investigation and processing; and

(B) Describe the basic procedural differences between an investigation under section 504 and an investigation under title I, and inform the complainant of the potential for differing remedies under each statute.

(3) *Referral by a designated agency.* A designated agency that does not have section 504 jurisdiction over a complaint of employment discrimination and that has determined that the EEOC may have jurisdiction over the complaint under title I shall promptly refer the complaint to the EEOC.

(4) *Processing of complaints referred to the EEOC.* (i) A complaint referred to the EEOC in accordance with this section by an agency with jurisdiction over the complaint under section 504 shall be deemed to be a dual-filed complaint under section 504 and title I. When a section 504 agency with jurisdiction over a complaint refers the complaint to the EEOC, the section 504 agency shall defer its processing of the complaint pursuant to §—.10, pending resolution by the EEOC.

(ii) A complaint referred to the EEOC by an agency that has jurisdiction over the complaint solely under title II (and not under section 504) will be treated as a complaint filed under title I only.

(iii) Any complaint referred to the EEOC pursuant to this section shall be processed by the EEOC under its title I procedures.

(d) *Retention by the agency for investigation*—(1) *Retention by a section 504 agency.* A section 504 agency shall retain a complaint for investigation when the agency determines that it has jurisdiction over the complaint under section 504, and one or more of the following conditions are met:

(i) The EEOC does not have jurisdiction over the complaint under title I; or

(ii) The EEOC has jurisdiction over the complaint, but the complainant elects to have the section 504 agency process the complaint and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of the date of the notice letter required to be sent pursuant to paragraph (c)(2)(ii) of this section; or

(iii) The complaint alleges discrimination in both employment and in other practices or services of the respondent that are covered by section 504; or

(iv) The complaint alleges a pattern or practice of employment discrimination.

(2) *Retention by a designated agency.* A designated agency that does not have jurisdiction over the complaint under section 504 shall retain a complaint for investigation when the agency determines that it has jurisdiction over the complaint under title II of the ADA and that the EEOC does not have jurisdiction over the complaint under title I.

(3) *Processing of complaints retained by an agency.* Any complaint retained for investigation and processing by an agency pursuant to paragraphs (d)(1) and (d)(2) of this section will be investigated and processed under section 504, title II, or both, as applicable, and will not be considered to be dual filed under title I.

§ ____.7 Processing of charges of employment discrimination filed with the EEOC.

(a) *EEOC determination of jurisdiction.* Upon receipt of a charge of employment discrimination, the EEOC shall:

(1) Determine whether it has jurisdiction over the charge under title I of the ADA. If it has jurisdiction, except as provided in paragraph (b)(2) of this section, the EEOC shall process the charge pursuant to title I procedures.

(2) If the EEOC determines that it does not have jurisdiction under title I, the EEOC shall promptly refer the charge to the Civil Rights Division. The Civil Rights Division shall determine if a Federal agency may have jurisdiction over the charge under section 504 or title II, and, if so, shall refer the charge to a section 504 agency or to a designated agency with jurisdiction over the complaint.

(b) *Retention by the EEOC for investigation.* (1) The EEOC shall retain a charge for investigation when it determines that it has jurisdiction over the charge under title I.

(2) *Referral to an agency.* Any charge retained by the EEOC for investigation and processing will be investigated and processed under title I only, and will not be deemed dual filed under section 504, except that ADA cause charges (as defined in 29 CFR 1601.21) that also fall within the jurisdiction of a section 504 agency and that the EEOC (or the Civil Rights Division, if such a charge is against a government, governmental agency, or political subdivision) has declined to litigate shall be referred to the appropriate section 504 agency for review of the file and any administrative or other action deemed appropriate under section 504. Such charges shall be deemed complaints, dual filed under section 504, solely for the purposes of the agency review and action described in this paragraph. The date of such dual filing shall be deemed to be the date the complaint was received by the EEOC.

§ ____.8 Processing of complaints or charges of employment discrimination filed with both the EEOC and a section 504 agency.

(a) *Procedures for handling dual-filed complaints or charges.* As between the EEOC and a section 504 agency, except as provided in paragraph (e) of this section, a complaint or charge of employment discrimination that is dual filed with both the EEOC and a section 504 agency shall be processed as follows:

(1) *EEOC processing.* The EEOC shall investigate and process the charge when the EEOC determines that it has jurisdiction over the charge under title I and the charge solely alleges employment discrimination against an individual, unless the charging party elects to have the section 504 agency process the charge and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of the date of the notice letter required to be sent pursuant to § ____.6(c)(2)(ii).

(2) *Section 504 agency processing.* A section 504 agency shall investigate and process the complaint when the agency determines that it has jurisdiction over the complaint under section 504, and:

(i) The complaint alleges discrimination in both employment and in other practices or services of the respondent; or

(ii) The complaint alleges a pattern or practice of discrimination in employment; or

(iii) In the case of a complaint solely alleging employment discrimination against an individual, the complainant elects to have a section 504 agency process the complaint and the section 504 agency receives a written request from the complainant for section 504 agency processing within twenty days of the date of the notice letter required to be sent pursuant to § ____.6(c)(2)(ii).

(b) *Referral to the Civil Rights Division.* If the EEOC determines that it does not have jurisdiction under title I, and the section 504 agency determines that it does not have jurisdiction under section 504 or title II, the complaint or charge shall be promptly referred to the Civil Rights Division. The Civil Rights Division shall determine if another Federal agency may have jurisdiction over the complaint under section 504 or title II, and, if so, shall promptly refer the complaint to a section 504 or a designated agency with jurisdiction over the complaint.

(c) *Procedures for determining whether a complaint or charge has been dual filed.* The EEOC and each agency with jurisdiction to investigate and process complaints of employment discrimination under section 504 shall jointly develop procedures for determining whether complaints or charges of discrimination have been dual filed with the EEOC and with one or more other agencies.

(d) *Notification of deferral.* The agency required to process a dual-filed complaint or charge under this section shall notify the complainant or charging party and the respondent that the complaint or charge was dual filed with one or more other agencies and that such other agencies have agreed to defer processing and will take no further action except as provided in § ____.10 or § ____.11, as applicable.

(e) *Exceptions.* When special circumstances make deferral as provided in this section inappropriate, the EEOC, and an agency with investigative authority under section 504, may jointly determine to reallocate investigative responsibilities. Special circumstances include, but are not limited to, cases in which the EEOC has already commenced its investigation at the time that the agency discovers that the complaint or charge is a dual-filed complaint or charge in which the complainant has elected section 504 processing, alleged discrimination in both employment and in other practices or services of the respondent, or alleged a pattern or practice of employment discrimination.

§ ____.9 Processing of complaints or charges of employment discrimination filed with a designated agency and either a section 504 agency, the EEOC, or both.

(a) *Designated agency processing.* A designated agency shall investigate and process a complaint that has been filed with it and with the EEOC, a section 504 agency, or both, when either of the following conditions is met:

(1) The designated agency determines that it has jurisdiction over the complaint under title II and that neither the EEOC nor a section 504 agency (other than the designated agency, if the designated agency is also a section 504 agency) has jurisdiction over the complaint; or

(2) The designated agency determines that it has jurisdiction over the complaint under section 504 and the complaint meets the requirements for processing by a section 504 agency set forth in § ____.8(a)(2).

(b) *Referral by a designated agency.* A designated agency that has jurisdiction over a complaint solely under title II (and not under section 504) shall forward a complaint that has been filed with it and with the EEOC, a section 504 agency, or both, to either the EEOC or to a section 504 agency, as follows:

(1) If the designated agency determines that the EEOC is the sole agency, other than the designated agency, with jurisdiction over the complaint, the designated agency shall forward the complaint to the EEOC for processing under title I; or

(2) If the designated agency determines that the section 504 agency is the sole agency, other than the designated agency, with jurisdiction over the complaint, the designated agency shall forward the complaint to the section 504 agency for processing under section 504; or

(3) If the designated agency determines that both the EEOC and a section 504 agency have jurisdiction over the complaint, the designated agency shall forward the complaint to the EEOC if it determines that the complaint solely alleges employment discrimination against an individual, or it shall forward the complaint to the section 504 agency if it determines that the complaint meets the requirements for processing by a section 504 agency set out in § ____.8(a)(2)(i) or (a)(2)(ii).

§ ____.10 Section 504 agency review of deferred complaints.

(a) *Deferral by the section 504 agency.* When a section 504 agency refers a complaint to the EEOC pursuant to § ____.6(c)(2) or when it is determined that, as between the EEOC and a section 504 agency, the EEOC is the agency that shall process a dual-filed complaint or charge under § ____.8(a)(1) or § ____.8(e), the section 504 agency shall defer further action until:

(1) The EEOC issues a no cause finding and a notice of right-to-sue pursuant to 29 CFR 1601.19; or

(2) The EEOC enters into a conciliation agreement; or

(3) The EEOC issues a cause finding and a notice of failure of conciliation pursuant to 29 CFR 1601.21, and:

(i) If the recipient is not a government, governmental agency, or political subdivision, the EEOC completes enforcement proceedings or issues a notice of right-to-sue in accordance with 29 CFR 1601.28; or

(ii) If the recipient is a government, governmental agency, or political subdivision, the EEOC refers the charge to the Civil Rights Division in accordance with 29 CFR 1601.29, and the Civil Rights Division completes enforcement proceedings or issues a notice of right-to-sue in accordance with 29 CFR 1601.28(d); or

(4) The EEOC or, when a case has been referred pursuant to 29 CFR 1601.29, the Civil Rights Division, otherwise resolves the charge.

(b) *Notification of the deferring agency.* The EEOC or the Civil Rights Division, as appropriate, shall notify the agency that has deferred processing of the charge upon resolution of any dual-filed complaint or charge.

(c) *Agency review.* After receipt of notification that the EEOC or the Civil Rights Division, as appropriate, has resolved the complaint or charge, the agency shall promptly determine what further action by the agency is warranted. In reaching that determination, the agency shall give due weight to the findings and conclusions of the EEOC and to those of the Civil Rights Division, as applicable. If the agency proposes to take an action inconsistent with the EEOC's or the Civil Rights Division's findings and conclusions as to whether a violation has occurred, the agency shall notify in writing the Assistant Attorney General, the Chairman of the EEOC, and the head of the EEOC office that processed the complaint. In the written notification, the agency shall state the action that it proposes to take and the basis of its decision to take such action.

(d) *Provision of information.* Upon written request, the EEOC or the Civil Rights Division shall provide the section 504 agency with any materials relating to its resolution of the charge, including its findings and conclusions, investigative reports and files, and any conciliation agreement.

§ ____.11 EEOC review of deferred charges.

(a) *Deferral by the EEOC.* When it is determined that a section 504 agency is the agency that shall process a dual-filed complaint or charge under § ____.8(a)(2) or § ____.8(e), the EEOC shall defer further action until the section 504 agency takes one of the following actions:

(1) Makes a finding that a violation has not occurred;

(2) Enters into a voluntary compliance agreement;

(3) Following a finding that a violation has occurred, refers the complaint to the Civil Rights Division for judicial enforcement and the Civil Rights Division resolves the complaint;

(4) Following a finding that a violation has occurred, resolves the complaint through final administrative enforcement action; or

(5) Otherwise resolves the charge.

(b) *Notification of the EEOC.* The section 504 agency shall notify the EEOC upon resolution of any dual-filed complaint or charge.

(c) *Agency review.* After receipt of notification that the section 504 agency has resolved the complaint, the EEOC shall promptly determine what further action by the EEOC is warranted. In reaching that determination, the EEOC shall give due weight to the section 504 agency's findings and conclusions. If the EEOC proposes to take an action inconsistent with the section 504 agency's findings and conclusions as to whether a violation has occurred, the EEOC shall notify in writing the Assistant Attorney General, the Chairman of the EEOC, and the head of the section 504 agency that processed the complaint. In the written notification, the EEOC shall state the action that it proposes to take and the basis of its decision to take such action.

(d) *Provision of information.* Upon written request, the section 504 agency shall provide the EEOC with any materials relating to its resolution of the complaint, including its conclusions, investigative reports and files, and any voluntary compliance agreement.

§ ____.12 Standards.

In any investigation, compliance review, hearing or other proceeding, the standards used to determine whether section 504 has been violated in a complaint alleging employment discrimination shall be the standards applied under title I of the ADA and the provisions of sections 501 through 504, and 510, of the ADA, as such sections relate to employment. Section 504 agencies shall consider the regulations and appendix implementing title I of the ADA, set forth at 29 CFR part 1630, and case law arising under such regulations, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.

§ ____.13 Agency specific memoranda of understanding.

When a section 504 agency amends its regulations to make them consistent with title I of the ADA, the EEOC and the individual section 504 agency may elect to enter into a memorandum of understanding providing for the investigation and processing of complaints dual filed under both section 504 and title I of the ADA by the section 504 agency.

Adoption of the Joint Final Rule

The agency-specific adoption of the joint final rule, which appears at the end of the joint preamble, appears below:

Title 28—Judicial Administration Department of Justice

28 CFR Part 37

List of Subjects in 28 CFR Part 37

Administrative practice and procedure, Individuals with disabilities, Equal employment opportunity, Intergovernmental relations.

Accordingly, title 28, chapter I of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, D.C. this 26th day of July, 1994.

For the Department:

Janet Reno,

Attorney General.

Part 37 is added to 28 CFR chapter I to read as set forth at the end of the joint preamble.

PART 37—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 29 U.S.C. 794 (d); 42 U.S.C. 12117(b); 28 CFR 0.50(l).

Title 29—Labor

Equal Employment Opportunity Commission

29 CFR Part 1640

List of Subjects in 29 CFR Part 1640

Administrative practice and procedure, Individuals with disabilities, Equal employment opportunity, Intergovernmental relations.

Accordingly, title 29, chapter XIV of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, DC this 27th day of June, 1994.

For the Commission:

Tony E. Gallegos,

Chairman.

Part 1640 is added to 29 CFR chapter XIV to read as set forth at the end of the joint preamble.

PART 1640—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

Authority: 5 U.S.C. 301; 29 U.S.C. 794(d); 42 U.S.C. 12117(b).

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August 4, 1994

Part VI

Department of Justice

28 CFR Part 77

Communications With Represented Persons; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 77

[AG Order No. 1903–94]

Communications With Represented Persons

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule governs the circumstances under which attorneys employed by the Department of Justice ("Department") may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.

The purpose of this rule is to impose a comprehensive, clear, and uniform set of regulations on the conduct of government attorneys during criminal and civil investigations and enforcement proceedings. The rule is intended to ensure that government attorneys adhere to the highest ethical standards, while eliminating the uncertainty and confusion arising from the variety of interpretations of state rules, some of which have been incorporated as local court rules in a number of federal district courts.

The rule establishes, prospectively, a general prohibition, subject to limited enumerated exceptions, against contacts with "represented parties" without the consent of counsel. This prohibition derives from the American Bar Association ("ABA") Code of Professional Responsibility and its successor, the ABA Model Rules of Professional Conduct. The rule, on the other hand, generally permits investigative contacts with "represented persons": that is, individuals or organizations that are represented by counsel but that have not yet been named as defendants in a civil or criminal enforcement proceeding or arrested as part of a criminal proceeding. However, the rule does not permit contacts with represented persons without the consent of counsel for the purpose of negotiating plea agreements, settlements, or other similar legal arrangements.

In addition, the Department intends to issue substantial additions to the United States Attorneys' Manual ("Manual") to provide additional direction to Department attorneys when they deal with represented individuals and organizations, in order to accommodate more fully the principles and purposes underlying the state bar rules. Those provisions will further restrict government attorneys when they contact targets of criminal or civil law enforcement investigations who are known to be represented by counsel, and when they communicate with other represented persons.

EFFECTIVE DATE: September 6, 1994.

FOR FURTHER INFORMATION CONTACT: F. Mark Terison, Senior Attorney, Legal Counsel, Executive Office for United States Attorneys, United States Department of Justice, (202) 514-4024. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule on the subject of communications with represented persons culminates a lengthy rulemaking process in which a proposed rule on the same subject was issued three separate times for comment. *See* 59 FR 10086 (Mar. 3, 1994); 58 FR 39976 (July 26, 1993); and 57 FR 54737 (Nov. 20, 1992). Comments received after the publication in November 1992 and in July 1993 of earlier versions of the rule resulted in major substantive changes being made to the rule. As a result, a new proposal reflecting these changes was published on March 3, 1994. During the most recent comment period, the Department received many thoughtful comments from private attorneys, local bar organizations, state courts, federal prosecutors, and others. The Department closely scrutinized all of these comments. After considering those comments, the Department made several relatively minor amendments to the proposed rule. Therefore, the final rule remains in substantially the same form as the proposed rule issued in March 1994.

The final rule reflects the Department's commitment to fostering ethical behavior consistent with the principles informing DR 7–104(A)(1) of the ABA Code of Professional Responsibility and Rule 4.2 of the Model Rules of Professional Conduct, while setting forth clear and uniform national guidelines upon which government attorneys can rely in carrying out their responsibilities to enforce federal laws. (The term "attorney for the government" is defined in paragraph 77.2(a), and where this phrase, or a variant of it, such as "government attorney," is used elsewhere in this commentary, it has the meaning set forth in paragraph 77.2(a), unless the context clearly indicates otherwise, and it is typically used interchangeably with "Department attorney."). In essence, this regulation permits federal prosecutors and agents to continue to conduct legitimate criminal and civil investigations against all individuals, whether or not those persons are represented by counsel. It allows government attorneys to continue to make or direct undercover or overt contacts with individuals and organizations represented by counsel for the purpose of developing factual information up until the point at which they are arrested or charged with a crime or named as defendants in a civil law enforcement action. However, the regulation generally does not permit federal prosecutors to attempt to negotiate plea agreements, settlements, or similar arrangements with individuals represented by counsel without the consent of their attorneys. This regulation also precludes, with certain narrow exceptions, any contacts with represented parties after an arrest, indictment, or the filing of a complaint on the subject matter of the representation.

Additionally, the Department plans to add provisions to the United States Attorneys' Manual that will set forth further guidance. The Department intends to prohibit overt approaches by federal attorneys to represented targets of criminal or civil enforcement proceedings without the consent of counsel, unless certain enumerated exceptions are met. The planned provisions also will generally require that government attorneys receive approval from their supervisors before communicating with any represented party or represented target.

Since early in this century, the rules of professional conduct that govern attorneys have required that lawyers for one party in a dispute communicate only through an adverse party's lawyer, rather than directly. DR 7–104(A)(1) of the ABA Model Code of Professional Responsibility provides:

> A. During the course of his representation of a client a lawyer shall not:
>
> 1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2 of the ABA Model Rules states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Disciplinary authorities in all 50 states and in the District of Columbia have adopted one of these rules, or a similar prohibition. Underlying these rules is the recognition that when two parties in a legal proceeding are represented, it is generally unfair for an attorney to circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party.

At the same time, the courts have long recognized that government law enforcement agents must be allowed broad powers, within constitutional limits, to investigate crime and civil violations of police and regulatory laws. These powers properly include the authority to conduct undercover operations and to interview witnesses, potential suspects, targets, and even those defendants who waive their right to remain silent. Although the Fifth and Sixth Amendments significantly restrict contacts with defendants after their initial appearance before a judge or after indictment, these constraints generally do not apply before a person has been taken into custody or charged in an adversary proceeding. Sound policies support this substantial power of police to investigate. The general public, victims of crime, and even potential suspects have a strong interest in vigorous inquiry by law enforcement officers before arrest or the filing of charges.

As long as investigations were treated as within the province of the police alone, the traditional rule forbidding counsel from directly contacting represented persons did not come into conflict with legitimate law enforcement activities. In recent years, however, the Department of Justice has encouraged federal prosecutors to play a larger role in preindictment, prearrest investigations. Some of this increased involvement stems from the wider use of law enforcement techniques, such as electronic surveillance, which require the preparation of legal filings. Also, complex white collar and organized crime investigations necessitate more intensive engagement of lawyers, who present such cases to grand juries. Most important, greater participation of lawyers at the preindictment stage of law enforcement has been regarded as helpful in assuring that police investigations comply with legal and ethical standards.

This extension of the traditional prosecutor's responsibility has been a salutary development. One by-product, however, has been uncertainty about whether the traditional professional limitation on attorney contacts with represented parties should be viewed as a restriction upon prosecutors engaged in investigations and, by extension, the agents with whom they work. The overwhelming preponderance of federal appellate courts have held that the restriction on contacts with represented persons does not apply at the preindictment investigation stage. *See, e.g., United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990); *United States* v. *Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981); *United States* v. *Weiss*, 599 F.2d 730, 739 (5th Cir. 1979); and *United States* v. *Lemonakis*, 485 F.2d 941, 955–56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). Only the Second Circuit has suggested otherwise. *See United States* v. *Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). However, that suggestion was muted significantly in a revised opinion by the Second Circuit that "urge[d] restraint in applying the rule to criminal investigations," 858 F.2d at 838, and ultimately concluded that "a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations * * * " *Id.* at 839. By contrast, state courts and state bar organizations have varied widely in their interpretation of the scope of the prohibition on contacts embodied in DR 7–104, Model Rule 4.2, and their analogs. Some examples of the varying interpretations are detailed below.

Uncertainty about the scope and applicability of DR 7–104, Model Rule 4.2, and their state counterparts has directly affected the investigative activities of agents, including Federal Bureau of Investigation and Drug Enforcement Administration personnel, who work with prosecutors. The expansive application of these rules in some jurisdictions may have the effect of blocking preindictment interviews or undercover operations that most courts have held permissible under federal constitutional and statutory law. Additionally, the heightened threat of disciplinary action that accompanies the expansive application of these rules has created a chilling effect on prosecutors responsible for directing these legitimate investigative activities.

These problems are compounded when federal attorneys assigned to the same case are members of different state bars. Under federal law, a Department attorney must be a member in good standing of a state bar, but he or she need not belong to the bar in each state in which he or she is practicing for the government. Therefore, prosecution teams often comprise attorneys admitted to different bars. The application of different state disciplinary rules to these individuals creates uncertainty, confusion, and the possibility of unfairness. Indeed, one member of a two-member federal prosecution team could receive a commendation for effective law enforcement while the other member, licensed in a different state, might be subject to state discipline for the same conduct.

In light of these circumstances, the Department has concluded that a compelling need exists that warrants a uniform federal rule to reconcile the traditional rule against contacts with a represented party with the obligation of the Department of Justice to enforce the law vigorously. Indeed, absent a uniform federal rule, prosecutors have been moved on occasion to reduce their participation in the investigative phase of law enforcement so as to leave federal agents unfettered by state disciplinary rules that were never intended to govern police behavior. Such a retreat from the field by prosecutors serves neither efficiency nor the interest in elevating legal compliance and ethical standards in all phases of law enforcement.

Furthermore, the disciplinary rules themselves invite promulgation of a regulation such as this one. Nearly all the states have adopted rules that include an "authorized by law" exception. This final rule, a duly promulgated regulation, is intended to constitute "law" within the meaning of those exceptions.

Finally, the Department has long maintained, and continues to maintain, that it has the authority to exempt its attorneys from the application of DR 7–104 and Model Rule 4.2 and their state counterparts. Furthermore, the Department maintains that whether, and to what extent, such prohibitions should apply to Department attorneys is a policy question. *See* Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. O.L.C. 576, 577 (1980). In light of the fact that all 50 states and the District of Columbia have adopted some form of a prohibition on contacts with represented parties, and in view of the long history of those rules, the Department believes that its attorneys should adhere to the principles underlying those rules to the maximum extent possible, consistent with the Department's law enforcement responsibilities. Therefore, even though the Department has the authority to exempt its attorneys from the reach of these rules, the Department has decided not to implement a wholesale exemption.

Rather, this regulation attempts to reconcile the purposes underlying DR 7–104 and Model Rule 4.2 with effective law enforcement. Recognizing the importance of the attorney-client relationship and the desirability that an individual who is represented by counsel be fully advised by counsel before negotiating legal agreements, this regulation provides that federal attorneys may not negotiate plea bargains, settlement agreements, immunity agreements, or similar arrangements without the consent of the individual's attorney. There is a heightened risk in this context of the prosecutor's superior legal training and specialized knowledge being used to the detriment of the untutored layperson. Thus, the regulations comport with the principal purpose of DR 7–104 and Model Rule 4.2 by insisting that the individual's attorney participate in these types of negotiations. Further, even when contacts are allowed, the regulation is designed to minimize any intrusion into the attorney-client relationship. At the same time, this regulation does permit direct contacts at the preindictment, prearrest investigative stage with any individual, whether or not he or she is represented by counsel. The regulation is drafted to conform to the approach of most federal appellate courts that have considered the matter. *See, e.g., United States* v. *Ryans*, 903 F.2d 731 (10th Cir.) (discussing cases), *cert. denied*, 498 U.S. 855 (1990), and other cases cited previously in connection with the discussion of preindictment contacts. The Department believes that public policy and effective law enforcement would not be served if the simple act of retaining an attorney could serve to exempt a person from lawful, court-approved investigative techniques. The Department believes that it is inappropriate to alter investigative techniques based upon an individual's financial ability to retain counsel before the point at which an indigent would be afforded court-appointed counsel.

This regulation and the planned changes to the United States Attorneys' Manual also will give effect to other important aspects of the bar rules against contacts with represented parties. For example, the regulation precludes federal attorneys from disparaging an individual's counsel or from attempting to gain access to attorney-client confidences or lawful defense strategy. The guidelines that the Department intends to add to the Manual also will make clear that once an individual is in a likely adversarial situation with the government and has retained an attorney to represent himself or herself with respect to the particular subject matter under investigation, the government attorney must take greater care before making any *ex parte* contacts. While the regulation authorizes most communications before arrest, the planned Manual changes provide that, as a matter of internal policy guidance, federal prosecutors generally should not make overt contacts with represented targets of investigations. However, the planned Manual provisions permit overt contacts with a represented target when initiated by the target; when necessary to prevent death or physical injury; when the relevant investigation involves ongoing or additional crimes, or different crimes from that to which the representation relates; or when a United States Attorney or an Assistant Attorney General expressly concludes, under all of the circumstances, that the contact is needed for effective law enforcement.

Finally, the regulation and planned Manual provisions also address when a government attorney may communicate with an employee, officer, or director of a represented corporation or organization without the consent of counsel. The regulation generally prohibits a government attorney from communicating with a current, high-level employee of a represented organization who participates as a "decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter" once the organization has been named as a defendant in a criminal or civil law enforcement proceeding. Further, the contemplated Manual provisions would generally prohibit contacts without the consent of counsel with controlling individuals of organizations that have not yet been named as defendants but are targets of federal criminal or civil law enforcement investigations.

This final rule recognizes that state courts and disciplinary bodies generally play the primary role in regulating the conduct of all attorneys, including those who work for the federal government. The Department also recognizes that with respect to most matters, Department attorneys are subject to the bar rules and disciplinary proceedings of the states in which they are licensed. However, the Department believes it must be the final arbiter of the scope of policing with respect to *ex parte* contacts involving federal prosecutors, subject to the Constitution and the laws of the United States. As noted above, because of the expanded participation of federal prosecutors in preindictment investigations, and the trend of state courts increasingly to apply DR 7–104 and Model Rule 4.2 expansively against federal prosecutors, these rules have affected and circumscribed the power of federal officials to carry out their legally mandated responsibilities. This regulation provides that the Attorney General shall have exclusive authority to determine these rules. Further, the Department's rules are intended fully to preempt and supersede the application of state and local court rules relating to contacts by Department of Justice attorneys when carrying out their federal law enforcement functions. Only if the Attorney General finds that a Department attorney has willfully violated these new rules would that attorney continue to be subject to the full measure of state disciplinary jurisdiction.

The Department is confident that, taken together, this regulation, the planned Manual amendments, and this supplemental information will promote the public interest in effective law enforcement in a manner that also conforms to the highest standards of legal ethics.

The procedures established by this rule apply to conduct occurring after the rule's publication.

II. Rulemaking History

On November 22, 1992, the Department of Justice published in the **Federal Register** a proposed rule regarding communications with represented persons. 57 FR 54737. By December 21, 1992, the close of the comment period, the Department had received comments from 20 sources.

The Department was concerned that not all interested parties had received sufficient opportunity to respond during the initial comment period. Noting "the complex and important nature of the rule to the criminal and civil justice systems and the licenses and livelihoods of its attorneys," on July 26, 1993, the Department reissued the proposed rule for an additional 30-day comment period. 58 FR 39976. The Department received 219 comments following this second publication of the proposed rule.

On March 3, 1994, the Department issued a new proposed rule governing the same subject matter for an additional 30-day comment period. 59 FR 10086. In response to concerns raised by bar organizations, bar counsel, state and federal judges, and others, that proposal reflected substantial changes from the earlier proposals. This publication of the proposed rule was accompanied by the issuance of companion provisions that the Department intends to include in the United States Attorneys' Manual, which set forth certain more restrictive policies with regard to overt investigatory communications. The discussion that follows summarizes the issues that were raised in response to the Department's latest publication of the proposed rule.

III. Summary of Comments Received

During the most recent comment period, which closed on April 4, 1994, timely comments were received from 31 sources, including nine individuals, nine organizations, four state court judges, one federal court judge, five U.S. Attorney's Offices, two Department of Justice components, and one other federal agency. Of the 31 comments received, nine comments supported promulgation of the proposed rule, 20 comments opposed the rule, and two other comments failed to take any definitive position on the proposed rule as a whole. As with previous versions of this rule, many writing in opposition to the Department's proposal argued that it unfairly permits the Department to hold its attorneys to ethical rules different from those that apply to all other attorneys. Other opponents of the proposed rule—most notably the ABA and a special committee of the Conference of State Supreme Court Chief Justices—challenged the proposed rule on constitutional and statutory grounds, arguing that the Department lacks authority to preempt state ethics rules or to supersede local federal district court rules. Those writing in support of the proposal generally praised it for bringing certainty and clear guidance to an area that previously has been unclear and disruptive of law enforcement functions.

The Department has considered carefully each comment and appreciates the thoughtfulness reflected in them. The Department's responses to those comments are discussed below, either in the "General Comments" section or in the context of the particular section or paragraph to which they pertain as part of the "Section-by-Section" analysis. All revisions adopted in the final rule are indicated.

IV. General Comments

Comments were received on the following three general issues: (1) the need for the rule; (2) the constitutional and statutory authority for the rule; and (3) the sufficiency of the rule's internal enforcement mechanisms. These general comments essentially repeated comments received in response to previous versions of the proposed rule. After careful reconsideration of these recurring issues, the Department's position on many of these subjects—in particular, the constitutional and statutory basis for this rule and the need for and advisability of such a rule—remains the same. Therefore, the Department's response in this section builds upon responses published in previous commentaries.

A. *The Need for the Rule.* One state court judge, one federal judge, five individuals, and six organizations criticized the proposed rule as holding government attorneys to lower ethical standards than those that apply to all other attorneys. This comment was formulated in a variety of ways, with the following as illustrative examples: "[t]he rules apply to everyone, and it should especially apply to attorneys in Government service;" "I do not know why it is that the department somehow thinks [it] can exempt [its] attorneys from the rules of conduct that all of the lawyers must abide by;" "[Department] lawyers should be treated as subject to the same rule of law that applies to the conduct of all other lawyers;" and "[f]airness simply will not tolerate exalting the role of one adversary's advocate above the other."

In response to these comments, the Department finds it important, first, to make clear that this rule is not designed to diminish the ethical responsibilities of government attorneys; it is intended to clarify those responsibilities. The current situation, in which state contact rules purport to govern the substantive conduct of federal law enforcement attorneys, has proven unsatisfactory because the standards of ethical conduct are uncertain and subject to unpredictable and varying interpretations. This uncertainty as to what constitutes appropriate conduct by Department attorneys has interfered with the responsible exercise of the law enforcement duties of Department attorneys. The basic purpose of this regulation is to provide a uniform rule of ethics regarding contacts with represented persons that can be consistently and predictably applied. By doing so, the regulation will allow all Department attorneys involved in a federal law enforcement proceeding to understand and abide by applicable standards. There is simply no basis for believing that there will be a reduction in compliance with ethical standards by federal prosecutors.

Many commenters opposing the proposed rule dismissed as unnecessary the creation of a uniform set of rules for Department attorneys. Some commented that the *ex parte* contact rules currently in place do not vary significantly, given that virtually every jurisdiction has adopted some version of the ABA's anti-contact rule. Other commenters argued that, in any event, state and local ethics rules do not interfere substantially with federal law enforcement activities because only in rare instances have federal prosecutors actually been investigated by a state disciplinary authority.

Although an anti-contact rule is in effect in nearly all jurisdictions, it is not interpreted uniformly. Among other things, jurisdictions differ as to whether the anti-contact rule applies in the investigatory stage, *compare United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990) *with United States* v. *Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990); whether the rule applies to prosecutors, *compare Matter of Doe*, 801 F. Supp. 478 (D.N.M. 1992) *with* District of Columbia Rules of Professional Conduct Rule 4.2 cmt. ¶ 8; whether the rule applies to former employees of a represented corporate party, *compare Public Serv. Elec. & Gas* v. *Associated Elec. & Gas*, 745 F. Supp. 1037, 1042 (D.N.J. 1990) *with Polycast Technology Corp.* v. *Uniroyal, Inc.*, 129 F.R.D. 621, 628 (S.D.N.Y. 1990); and whether the rule applies to all corporate employees who could make admissions on behalf of the corporation or only to employees who belong to a so-called "control group." *Compare* Model Rules of Professional Conduct Rule 4.2 cmt. (1983) *with Wright by. Wright* v. *Group Health Hosp.*, 691 P.2d 564 (Wash. 1984). The lack of uniformity in interpreting existing anti-contact rules has created concern among government attorneys of inadvertently running afoul of state court or federal district court rules. The threat of disciplinary proceedings (and the possible resulting loss of license and livelihood) against a government attorney engaged in legitimate law enforcement activities has had a chilling effect on the responsible exercise of law enforcement duties. Many federal prosecutors who submitted comments in connection with the earlier versions of this rule stated that they feel compelled to refrain from authorizing or participating in legitimate and ethical law enforcement activities because of the current uncertainty as to the acceptability of various *ex parte* contacts.

To add to the confusion inherent in the current situation, the Department's attorney staff consists of members of many different state bars who commonly appear in multiple jurisdictions. Under the Model Rule's approach, an attorney practicing in a jurisdiction in which he or she is not a member of the bar remains subject to the jurisdiction of the bar of which he or she is a member, but if the rules in the two places differ, principles of conflict of laws may apply. Model Rules of Professional Conduct Rule 8.5 and cmt. (1983). As a result, when state anti-contact rules purport to govern the conduct of federal attorneys, the question of which rule governs the conduct of Department lawyers may often be complicated. Indeed, as was noted in the "Background" section of this commentary, government attorneys may be subject to substantially different rules when they are working alongside one another on the same case. One commenter proposed that instead of issuing a uniform contacts rule for Department attorneys, the Department should encourage its attorneys to practice only in a given jurisdiction and to obtain bar membership in that jurisdiction. However, Congress has made clear that Department attorneys should be able to practice in different jurisdictions so long as they are a member of some state bar, and there is a significant federal interest in preserving the Department's ability to assign its attorneys wherever there are law enforcement needs to be met. This uniform rule regarding contacts with represented persons achieves consistency and high ethical standards without hampering federal law enforcement activity.

In formulating this uniform rule, the Department has not disregarded existing state ethics rules, as a number of comments imply. As set forth in section 77.12, this regulation is specifically intended to fit within the structure of DR 7–104 and Model Rule 4.2, as well as analogous state and local district court disciplinary rules. Both DR 7–104 and Model Rule 4.2 provide that communications that are "authorized by law" are exempted from the general prohibition of the rule and, according to the Reporter for the commission that developed the Model Rules, Yale Law School ethics professor Geoffrey Hazard, this exception was drafted with the "government lawyer" problem in mind. *See* Letter of January 19, 1994 from Professor Geoffrey C. Hazard, Jr. to Chief Justice E. Norman Veasey, at 2 ("I can state from first-hand knowledge that this [authorized by law] qualification was drafted mindful of the government lawyer problem, among others. In my opinion it is within the authority of the federal government, particularly the Justice Department, to promulgate such regulations.") (This letter and all comments are on file with the Office of the Associate Attorney General, United States Department of Justice). As explained later in this commentary, the Department's position is that communications with represented persons undertaken pursuant to this duly promulgated regulation clearly constitute communications "authorized by law." Therefore, in nearly all jurisdictions, communications approved under the Department's rules will be appropriate under existing ethical rules as well.

Furthermore, the content of this rule derives largely from DR 7–104 and Model Rule 4.2 and is wholly consistent with the principles underlying these rules. This regulation grants greater latitude for lawyer communications with a represented "person" during the investigative phase of law enforcement than with a represented "party" after adversarial proceedings have commenced. This distinction appears in the texts of DR 7–104 and Model Rule 4.2, which prohibit only communications with "a party" the lawyer knows to be represented by another lawyer in the matter. This distinction also accords with the great weight of federal court interpretations of the state ethics rules. *See Ryans*, 903 F.2d at 739 ("We are not convinced that the language of [the anti-contact rule] calls for its application to the investigative phase of law enforcement" because "the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting"); *United States* v. *Sutton*, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986) (anti-contact rule "was never meant to apply to [pre-indictment, non-custodial] situations such as this one"); *United States* v. *Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983) (agent's "noncustodial interview of [suspect] prior to the initiation of judicial proceedings against the appellant did not constitute an ethical breach"); *United States* v. *Fitterer*, 710 F.2d 1328, 1333 (8th Cir.) (anti-contact rule does not prohibit prosecutors from using undercover informants to communicate with represented persons prior to indictment), *cert. denied*, 464 U.S. 852 (1983); *United States* v. *Jamil*, 707 F.2d 638 (2d Cir. 1983) (prosecutor's use of undercover informant in pre-indictment, non-custodial setting to communicate with represented person does not violate DR 7–104); *United States* v. *Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982) (anti-contact rule was not intended to prohibit use of undercover informants prior to indictment); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.) ("the government's use of such investigative techniques at this stage of a criminal matter does not implicate the sorts of ethical problems addressed by the Code"), *cert. denied*, 452 U.S. 920 (1981); *United States* v. *Weiss*, 599 F.2d 730, 739–40 (5th Cir. 1979) (prosecutor's investigatory communications upheld against challenge under anti-contact rule); *United States* v. *Lemonakis*, 485 F.2d 941, 953–56 (D.C. Cir. 1973) (anti-contact rule does not apply prior to indictment, and use of undercover informant did not violate rule in any event), *cert. denied*, 415 U.S. 989 (1974); *In re U.S. Dept. of Justice Antitrust Investigation*, 1992–2 Trade Cases (CCH) ¶ 69,933, at 68,469 (D. Minn. 1992) (Minnesota's Rule 4.2 held inapplicable because "[t]he word 'parties' in Rule 4.2 indicates the presence of a lawsuit" and "[t]he present controversy relates to an investigation, not a lawsuit"); *United States* v. *Infelise*, 773 F. Supp. 93, 95 n.3 (N.D. Ill. 1991) (DR 7–104(A)(1) "speaks in terms of communications with a 'party', suggesting that the rule is to be applied only when adversarial proceedings have been initiated"); *United States* v. *Western Electric Co.*, 1990–2 Trade Cases (CCH) ¶ 69,148, at 64,314 & n.6 (D.D.C. 1990); *United States* v. *Buda*, 718 F. Supp. 1094, 1096 (W.D.N.Y. 1989); *United States* v. *Chestman*, 704 F. Supp. 451, 454 (S.D.N.Y. 1989), *rev'd on other grounds*, 903 F.2d 75 (2d Cir. 1990), *aff'd in part*, 947 F.2d 551 (2d Cir. 1991) (en banc); *United States* v. *Galanis*, 685 F. Supp. 901, 903–04 (S.D.N.Y. 1988); *United States* v. *Guerrerio*, 675 F. Supp. 1430, 1438 (S.D.N.Y. 1987). *But see United States* v. *Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (pre-indictment communications may be improper if accompanied by "misconduct" on the part of the government), *cert. denied*, 498 U.S. 871 (1990); *United States* v. *Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States* v. *Sam Goody, Inc.*, 518 F. Supp. 1223, 1224–25 n.3 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982); *see also* Comment to ABA Model Rule 4.2 (notwithstanding use of the term "party," the rule does not require that a person be "a party to a formal legal proceeding").

The courts have readily recognized that Department attorneys engaged in criminal and civil law enforcement matters perform distinctly different functions from attorneys engaged in the private practice of law. The courts have further recognized that the rules governing communications with represented persons should take account of these differences. To disregard these differences would therefore impose substantial and deleterious restrictions on the legitimate law enforcement duties of Department attorneys that do not presently exist.

For much the same reasons, the Department believes that there is a basis for distinguishing for purposes of this regulation between Department attorneys engaged in law enforcement activities (who are covered by this regulation) and Department attorneys engaged in civil suits in which the United States is not acting under its police or regulatory powers (who are not covered). One commenter proposed extending these rules to cover also the latter activities of Department attorneys; however, because government attorneys engaged in other, ordinary civil litigation are not engaged in distinctly different functions from private attorneys involved in civil cases, they are not brought under this regulation.

Two organizations further criticized the Department for holding government attorneys to ethical standards no higher than what the Constitution provides. The Department agrees that the constitutional baseline does not provide the proper measure of government attorneys' ethical obligations. But this regulation does not purport to equate the two standards. On the contrary, the Department's final rule imposes a range of restrictions that go beyond those that are constitutionally compelled. For example, the regulation prohibits government attorneys generally from engaging in negotiations of certain specified legal agreements with any represented individual without the consent of that individual's counsel, even if that individual is not in custody and not formally charged. Such communications are not constitutionally proscribed. *See Brewer* v. *Williams*, 430 U.S. 387, 398 (1979); *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Additionally, the Department plans to issue United States Attorneys' Manual provisions that will place significant limits on the ability of government attorneys to engage in noncustodial communications with a represented "target" of a federal criminal or civil law enforcement investigation, even though narrowing an investigation to focus on a particular suspect does not trigger the suspect's right to counsel. *See Hoffa* v. *United States*, 385 U.S. 293 (1966). Therefore, in constructing these standards to guide the ethical conduct of its attorneys, the Department has imposed ethical restrictions on Department attorneys that extend significantly beyond what the Constitution requires.

B. *The Constitutional and Statutory Authority for the Rule.* 1. *The Department's Authority To Promulgate the Rule.* A number of commenters argued that the Attorney General lacks delegated authority to promulgate this regulation. Comments stressed that "[n]o act of Congress purports to authorize the Department to adopt regulations to override state ethics rules governing lawyers," and that the proposed regulation in fact is "contrary to . . . the explicit mandate of Congress" that every Department attorney must get a license from a State and maintain that license.

Rules governing the conduct of Department attorneys, or any other officials of the Executive Branch, may be promulgated only pursuant to constitutional or statutory authority. Congress's delegation of authority need not be specific or explicit. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 307–08 (1979). The Department believes that it possesses appropriate statutory authority to promulgate this regulation pursuant to two distinct sources: 5 U.S.C. 301 ("commonly referred to as the 'housekeeping statute,'" *Chrysler Corp.*, 441 U.S. at 309 (citation omitted)), and title 28 of the United States Code, which in a variety of provisions authorizes the Attorney General and the Department to enforce federal law and to regulate the conduct of Department attorneys.

Section 301 of title 5, United States Code, authorizes the Attorney General to "prescribe regulations for the government of [her] department," "the conduct of its employees," and "the distribution and performance of its business." 5 U.S.C. 301. The Supreme Court has held that this provision authorizes the Attorney General to issue regulations with extra-departmental effect. *See, e.g., Georgia* v. *United States*, 411 U.S. 526, 536 (1973) (holding that section 301 provided the Attorney General with "ample legislative authority" to issue regulations that established procedural and substantive standards binding on state and local governments); *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951) (federal government attorney could not be held in contempt for following an Attorney General regulation promulgated pursuant to a predecessor to section 301).

Title 28 of the United States Code grants the Attorney General and the Department a variety of law enforcement powers including the power (through intermediary officials) to conduct grand jury proceedings or any other kind of civil or criminal legal proceeding; to conduct litigation, and to "secur[e] evidence" therefor; to detect and prosecute crimes; and to prosecute "civil actions, suits, and proceedings in which the United States is concerned." 28 U.S.C. 515(a), 516, 533, 547; *see* 28 U.S.C. 509, 510. The Attorney General is also authorized to "supervise all litigation" to which the United States is a party and to direct United States Attorneys and other subordinate attorneys in the "discharge of their respective duties." 28 U.S.C. 519. These provisions grant the Attorney General extremely broad authority to supervise the enforcement of federal law.

In order for a Department regulation to have the force and effect of law, it must rest on a reasonable construction of the statutes delegating the authority to promulgate it and must not in substance contradict any act of Congress. *See, e.g., NLRB* v. *United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699–700 (1989). These rules represent the reasoned judgment of the Attorney General and of the Department about the lawful authority of federal lawyers effectively to investigate and prosecute crimes.

One individual and a number of organizations, including the Conference of Chief Justices, posited that the Department is acting outside the scope of its congressionally delegated authority because this regulation assertedly contravenes the Department of Justice Appropriation Authorization Act of 1979, which requires all Department attorneys to be "duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." Pub. Law No. 96–132, § 3(a), 93 Stat. 1040, 1044 (Nov. 30, 1979), as carried forward by Pub. Law No. 103–121, 107 Stat. 1153, 1163 (Oct. 27, 1993) (reenacting provisions of Pub. Law No. 96–132). These commenters suggested that when Congress required Department attorneys to be licensed by a state bar, Congress implied that Department attorneys should be subject to all the rules and regulations of state authorities, regardless of their impact on officials carrying out federal law enforcement. Therefore, this regulation, by shielding Department attorneys from state disciplinary proceedings for violations of state rules interfering with effective federal law enforcement, is alleged to violate Congress's clear intent in enacting the Department's appropriation statute.

The Department believes that these comments mistake the purpose and effect of the congressional requirement that federal attorneys have state licenses. That requirement, which is satisfied by admission to the state's bar and maintenance of bar membership, simply serves to ensure that the professional qualifications of all Department lawyers have in fact been examined. No comment received by the Department demonstrates that Congress intended the requirement to have the further effect of interfering with the Attorney General's ability to ensure effective federal law enforcement or of compelling federal attorneys to comply with state bar ethical standards that contradict federal rules.

2. *The Department's Power to Preempt State Ethics Rules.* One individual, one state court judge, and five organizations, including the Special Committee of the Conference of Chief Justices, commented that the Department does not have the constitutional power to preempt state regulation of its attorneys.

It should first be noted that in most instances the force and effect of these rules should not depend on whether they preempt state ethics rules under the Supremacy Clause. As already noted, communications within the scope of the regulation are intended to constitute communications that are "authorized by law" within the meaning of DR 7–104, Model Rule 4.2, and analogous disciplinary rules. Therefore, if the relevant state rule contains an authorized-by-law exception, this regulation should be seen as constituting such authorization, thereby bringing any attorney communication permissible under these rules in conformity with that state law and eliminating the Supremacy Clause issue.

The Committee of Chief Justices commented that it is the exclusive province of the state supreme courts to construe state disciplinary rules and to determine whether this regulation falls within the "authorized by law" exception to these rules. The Department has simply expressed its *intention* to fit communications made pursuant to these rules within the "authorized by law" exception to state and local federal court rules, and its *belief* that this regulation indeed constitutes legal authorization for such communications. The Department notes that it would seem to require a very strained reading to conclude that a regulation duly promulgated after notice and comment and within the scope of its delegated authority does not also constitute "law." *Cf. Chrysler Corp.*, 441 U.S. at 295–96 (1979) ("It has been established in a variety of contexts that properly promulgated substantive agency regulations have the 'force and effect of law.'. . . It would therefore take a clear showing of contrary legislative intent before the phrase 'authorized by law' in [18 U.S.C.] § 1905 could be held to have a narrower ambit than the traditional understanding." (citation omitted)).

However, the Department recognizes that situations may arise in which the power of this regulation to displace state rules will depend on its preemptive force under the Supremacy Clause. Such situations may arise in several forms: where the applicable ethics rule has no "authorized by law" exception; where this regulation is deemed not to constitute "law" for purposes of such exception; or where a communication is held to violate the applicable ethics rule and not be "authorized" by this regulation. Therefore, an important feature of this regulation is its express intention to preempt and supersede the operation of state and local federal court rules as they relate to contacts by Department attorneys, regardless of whether such rules are inconsistent or consistent with this regulation, absent a finding of a willful violation of these rules by the Attorney General.

The preemption of state regulation of contacts with represented persons, except when the Attorney General has found a willful violation of the federal regulation, was an integral feature of this rule as proposed earlier. The proposed rule reflected the Department's belief that preemption of state and local rules, which have been unevenly applied, is necessary to ensure that government attorneys' conduct respecting *ex parte* contacts is subject to uniform and predictable standards. The Department has made minor revisions to section 77.12 to clarify that the Department's intent is to displace even purportedly consistent state regulation in this area (or, as it is commonly phrased, to "occupy the field" of reviewing *ex parte* contacts by Department attorneys). The rules and this commentary now state in more express terms the Department's intention to preclude any state regulation of government attorneys respecting the subject matter of these rules, unless the Attorney General first finds a willful violation of these rules.

Several comments suggested that the Attorney General lacks the authority to preempt state disciplinary rules, absent an explicit Congressional authorization to do so. These comments misconceive the power of a federal agency or department to preempt state regulation. Congress may, of course, expressly preempt all state regulation in a particular field, *see Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 247, 255 (1947); *accord Jones* v. *Rath Packing Co.*, 430 U.S. 519, 536–37 (1977), and, in proper circumstances, a federal agency similarly "may determine that its authority is exclusive and preempts any state efforts to regulate in the forbidden area." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988). *See generally Fidelity Federal Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153–54 (1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes" under the Supremacy Clause); *Hillsborough County, Fla.* v. *Automated Med. Labs*, 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."). A federal agency may preempt state regulation whenever the agency, in doing so, is acting within the proper scope of its congressionally delegated authority. *Louisiana Public Serv. Comm'n* v. *FCC*, 476 U.S. 355, 368–69 (1986). *Accord City of New York*, 486 U.S. at 64 ("if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned'" (citation omitted)). Thus, contrary to the commenters' suggestion, "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law . . . ." *Fidelity Federal Sav. & Loan Ass'n*, 458 U.S. at 154.

In promulgating this regulation, the Department is acting within the scope of its discretionary authority. The ample consideration given to this regulation and its earlier versions reflects the Department's effort reasonably to accommodate the relevant policies concerning law enforcement and professional conduct, and, as discussed in the previous section, there is no basis for concluding that the Department has exceeded its statutory authority. Moreover, the purpose of these rules, as defined in section 77.1, is to "ensure the Department's ability to enforce federal law effectively and ethically" and so fulfill the Department's statutory responsibilities. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984) (authority to regulate extends to all regulatory actions necessary to ensure the achievement of statutory responsibilities).

The "presumption against finding preemption of state law in areas traditionally regulated by the States," *California* v. *ARC America Corp.*, 490 U.S. 93, 101 (1989), and the traditional state regulation of legal practice and lawyers' ethics, *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979), does not foreclose the Attorney General from concluding that it is appropriate here to displace those state rules that regulate the conduct of federal officials in the performance of their law enforcement duties. Here, the presumption against preemption is overcome by this regulation's express preemption provision, which is fully effective even in matters traditionally occupied by the states.

Furthermore, under the intergovernmental immunity doctrine, states may not directly regulate or punish federal officials for acts undertaken in their official capacities, or otherwise substantially interfere with the lawful functions of federal officials. *See, e.g., Hancock* v. *Train*, 426 U.S. 167, 178–79 (1976); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 437 (1819); Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. O.L.C. 576, 601–02 (1980). "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any further than such laws have been adopted and sanctioned by the legislative authority of the United States." *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 63 (1825). Contacts covered by this regulation fall within the scope of federal attorneys' duties to carry out the law enforcement activities of the United States. The application to those attorneys of state ethics laws prohibiting such conduct therefore would constitute interference with the activities of the federal government forbidden by the intergovernmental immunity doctrine.

For the foregoing and other reasons, the Department believes that this regulation effectively preempts state ethical rules regarding contacts with represented persons.

3. *The Department's Authority to Supersede Federal District Court Rules.* Most federal district courts have adopted as local federal district court rules one of the two sets of ABA rules or a similar anti-contact rule of the state in which the district court sits. *See Rand* v. *Monsanto Co.*, 926 F.2d 596, 601–603 (7th Cir. 1991). Such adoption gives the state rules the force of federal law. *See United States* v. *Hvass*, 355 U.S. 570, 575 (1958). One individual and two organizations commented that this regulation, if promulgated, would abrogate the primary authority of federal courts to regulate the conduct of attorneys arising out of federal law enforcement proceedings.

The Department views this concern as significant but essentially theoretical, because the regulation has been crafted so that it will not operate in a way that puts it into conflict with local district court rules. However, in response to these comments, it should be noted that through this regulation the Department does intend not only to preempt the application by state courts of state rules relating to contacts by attorneys for the government, but also to supersede the application by federal courts of the local federal district court rules relating to contacts by government attorneys in civil and criminal law enforcement investigations and proceedings. *See* § 77.12 and accompanying commentary.

There are two reasons why the promulgation and operation of this regulation is unlikely to present the issue of abrogation of federal court authority identified by these commenters. The first is that the regulation adopts the line of analysis adopted by the great weight of authority interpreting local district court rules governing contacts with represented persons. *See United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.) (discussing cases), *cert. denied*, 498 U.S. 855 (1990). The Department has not sought in this regulation to validate conduct that would otherwise be invalid under most local district court rules.

In addition, nearly all district courts that have adopted local rules governing contacts with represented persons have incorporated the "authorized by law" exception in the Model Rules or in the corresponding state rule. *See generally Rand*, 926 F.2d at 601–603. As explained above, this regulation constitutes "law" within the meaning of any such exception. Thus, the conduct this regulation authorizes is for that reason equally authorized by these local district court rules.

Thus, this regulation in practice should not present any tension between the federal executive and judicial powers. In response to the commenters' suggestion that any tension would have to be resolved in favor of the judicial power, however, the Department disagrees. Were the issue to arise, it would be properly considered, as an initial matter, as a question of the proper exercise of delegated legislative authority. Congress, not the courts, has the primary power to prescribe rules for the federal courts. *See Palermo* v. *United States*, 360 U.S. 343, 353 n. 11 (1959); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10 (1941). *See generally Hanna* v. *Plumer*, 380 U.S. 460, 472–73 (1965). In the case of this regulation, Congress has delegated that authority by statute to the Attorney General. This regulation therefore has no less legal force than, for example, the Federal Rules, which derive their ultimate authority from legislation. *See* 28 U.S.C. §§ 2071 *et seq.* Local district court rules, even those dealing with attorney discipline, may not displace legislatively-authorized national rules of procedure. *Rand*, 926 F.2d at 600 (Rules of Civil Procedure). *Accord, Baylson* v. *Disciplinary Bd. of Supreme Court of Pa.*, 975 F.2d 102, 107 (3d Cir. 1992) (Rules of Criminal Procedure). A local rule inconsistent with a regulation lawfully issued under statutory authority is, as a matter of law, inconsistent with the underlying statute, and must yield to Congress's paramount authority as delegated to the department or agency issuing the regulation. Thus, the conclusion that the Attorney General has the statutory authority to promulgate the proposed regulation entails the further conclusion that the regulation displaces inconsistent local federal court rules.

Furthermore, the regulation has been carefully drawn in such a way so that once a person has been brought before a court, in general no substantive communication can occur without the consent of counsel unless: the court finds a knowing, intelligent, and voluntary waiver; the communication is made pursuant to court-approved discovery procedures; or the communication concerns a criminal or civil offense different from the offense before the court. The regulation thus accords substantial and appropriate deference to the court's supervisory authority over the parties and proceedings before it. Moreover, this regulation does not purport to disturb the authority of federal courts to fashion appropriate remedies when an *ex parte* contact violates the Constitution. *See* § 77.11(b) and accompanying commentary. Therefore, federal courts will retain significant powers under the Constitution to respond to or sanction improper *ex parte* contacts by government attorneys with represented parties.

The balance of the regulation regulates contacts with persons who are not before the court, and as to whom the supervisory authority of a federal court is, at best, attenuated. *See, e.g., United States* v. *Payner*, 447 U.S. 727, 735 n. 7 (1980) ("The supervisory power merely permits federal courts to supervise the administration of criminal justice among the parties before the bar."); *United States* v. *Williams*, 112 S. Ct. 1735, 1742 (1992) (federal court has no "supervisory" judicial authority to prescribe standards of prosecutorial conduct before the grand jury in the first instance). It would raise significant separation of powers concerns for a district court to assert supervisory authority to regulate and sanction the conduct of executive branch attorneys when the Attorney General has adjudged such conduct legitimate and necessary for law enforcement purposes, when that judgment has been embodied in a duly promulgated regulation, and when the conduct concerns persons who have not yet come before the court.

C. *Sufficiency of Internal Enforcement Mechanisms.* Four organizations and two individuals commented that these rules, as proposed, lacked enforcement mechanisms sufficient to deter prohibited communications. These comments took two forms: (1) a general suggestion that the Department could not be trusted to police itself (or as, one commenter put it, it would be a case of "the fox maintain[ing] . . . guard over the hen-house"); and (2) a specific concern that the restrictions to be placed in the United States Attorneys' Manual would not in fact be enforced against Department attorneys who violated them.

The Attorney General has exclusive authority over any violations of these rules. As a general matter, violations of these rules will be addressed as matters of attorney discipline by the Department, rather than by any external disciplinary authority. Only if the Attorney General finds a willful violation of these rules may sanctions for the violations be imposed by a state disciplinary authority. This disciplinary structure reflects the Department's belief that allowing sanctions to be issued independent of the Department's internal review process would frustrate the Department's efforts to eliminate the current uncertainty arising from the differing interpretations of the various anti-contact rules by federal courts, state courts, and state disciplinary authorities. The Department intends fully to enforce these rules and to issue appropriate and strong sanctions for any violation of these rules.

The Department also disagrees with those comments that suggest that the provisions the Department currently intends to add to the United States Attorneys' Manual will not be enforced. The Manual contains a great number of significant Department of Justice policies, many of which impose substantial restrictions on Department attorneys. There is no evidence that such policies are routinely overlooked by Department attorneys or that violations of policies set forth in the Manual are not regarded by the Department as serious breaches of professional duties. On the contrary, the failure to follow such policies is taken very seriously. The Department expects its attorneys involved in criminal or civil law enforcement to follow all provisions in the Manual amendments that it intends to issue regarding *ex parte* contacts. Failure to follow such rules will result in appropriate discipline by the Department.

V. Section-by-Section Analysis

Section 77.1: Purpose and Authority

Comments relating to this section are addressed in the "General Comments" section above. No changes have been made to this section.

Section 77.2: Definitions

The following terms are defined in section 77.2 of this part. In the final rule, unlike in the proposed rule, these terms are arranged alphabetically for the reader's ease.

a. *"Attorney for the government."* The term "attorney for the government" includes virtually all Department of Justice attorneys with investigative, litigative, or management responsibilities, regardless of title. It does not, however, include law enforcement agents employed by the Department of Justice who are also members of state bars, if they are employed as, and are performing the function of, agents rather than attorneys. The Federal Bureau of Investigation, Drug Enforcement Agency and other investigative agencies have long recruited individuals with advanced degrees—including, for example, engineering, business, and law degrees—to serve as agents. The Department strongly encourages the recruitment of educated and specially-trained individuals for positions as agents. An agent's bar membership should not adversely affect his or her ability to conduct comprehensive investigations and otherwise to fulfill his or her law enforcement functions. Therefore, the rule specifically exempts attorney-agents from its scope if they are employed by the government as investigative agents and not as attorneys.

The term also does not include attorneys for departments or agencies outside the Department of Justice, regardless of their litigative authority, except to the extent such persons have been specially appointed pursuant to 28 U.S.C. 515 or 543.

Two Department of Justice components commented that the definition of "attorney for the government," which explicitly covers attorneys employed in the six main divisions of the Department, should be amended to cover all attorneys working in the legal offices of the various Department agencies, such as the Drug Enforcement Administration and the Federal Bureau of Investigation. The Department agrees that the definition of "attorney for the government" should not distinguish between attorneys employed in the Department's divisions and attorneys employed in the Department's agencies, given that both sets of attorneys exercise similar functions and responsibilities with respect to criminal investigations and prosecutions. Accordingly, the definition of "attorney for the government" has been modified to include explicitly "the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of Justice agency."

b. *"Civil Law Enforcement Investigation."* This term includes any investigation of potential civil violations of, or claims under, federal law that may form the basis of a civil law enforcement proceeding, as defined in paragraph 77.2(c).

c. *"Civil Law Enforcement Proceeding."* The term "civil law enforcement proceeding" encompasses a variety of activities beyond the particular areas identified in the definition, which are intended only to be illustrative.

The exclusion of proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand (CID) is intended to ensure that the filing of such a proceeding does not trigger the limitations of section 77.5, which generally prohibits *ex parte* communications once adversary proceedings have commenced against a represented "party." Thus, the filing by the United States of a proceeding to enforce a subpoena, summons, or CID will not prohibit further investigatory communications regarding the underlying substantive violations.

The final sentence of paragraph 77.2(c)(2) ensures that the United States need not be the plaintiff in order for a civil action to be "brought by the United States," but may be a counterclaimant or cross-claimant if the counterclaim or cross-claim otherwise fits within the description of civil law enforcement.

d. *"Cooperating witness or individual."* A "cooperating witness or individual" is defined to include informants, witnesses, and other persons who are not law enforcement agents, but only to the extent that such a person is acting "to assist the government in an undercover or confidential capacity."

e. *"Employee."* The term "employee" is not limited to its literal meaning, but also includes officers, directors, partners, members, and trustees. *See* § 77.10 (communications involving organizations). An independent contractor would not be considered an "employee" for purposes of these rules.

f. *"Organization."* The term "organization" includes any corporation, partnership, association, joint-stock company, union, trust, pension fund, unincorporated organization, state or local government or political subdivision thereof, or non-profit organization. It does not, of course, include groups of individuals "associated in fact" within the meaning of the racketeering statutes. *See* 18 U.S.C. 1961(4).

Communications with organizations and their employees are governed generally by section 77.10.

g. "*Person.*" The term "person" includes individuals and organizations as defined in paragraph 77.2(f).

h. "*Undercover investigation.*" Under this definition, the hallmark of an "undercover operation" is an investigation in which an individual "whose identity as an official of the government or a person acting at the behest thereof is concealed or is intended to be concealed." This definition is intended to be read broadly to include every type of law enforcement investigation in which the identity of a government employee, or the fact that an individual is cooperating with the government, is concealed.

Section 77.3: Represented Party; Represented Person

This section differentiates between a represented "party" and a represented "person." This distinction is fully consistent with the language of and principles underlying DR 7–104(a)(1) and Model Rule 4.2, which establish general prohibitions against *ex parte* contacts with a represented "party." Section 77.5 of this part generally prohibits government attorneys from initiating *ex parte* contacts with represented parties, but does not prohibit *ex parte* contacts with represented persons. (However, sections 77.8 and 77.9 also prohibit certain contacts with represented persons).

An individual is considered to be a "represented party" under paragraph 77.3(a) if: (1) the person is represented by counsel; (2) the representation is current *and* concerns the subject matter in question; *and* (3) the person has either been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation. If the person is currently represented in fact regarding the subject matter in question, but has not been charged or arrested, that person is considered a "represented person." Thus, witnesses, suspects, and targets of investigations who have not been indicted or arrested, but are represented regarding the subject matter in question, are considered represented persons under this rule.

Several commenters argued that this section's basic distinction between represented "persons" and represented "parties" runs counter to the policy considerations underlying DR 7–104(A)(1) and Model Rule 4.2. However, as discussed in the "General Comments" section, this distinction is consistent with the vast majority of federal court opinions interpreting DR 7–104(A)(1) and Model Rule 4.2., as well as the text of those rules. Furthermore, this distinction is grounded in logic and common sense, given the legitimate necessity for attorneys for the government to be able to direct agents and cooperating witnesses to contact represented persons during undercover investigations.

One organization commented that prosecutors will hold back on filing formal charges in order to maximize their ability to communicate with represented "persons." The Department does not agree that prosecutors are likely to engage in this kind of systematic manipulation. The capacity to do so exists under the Sixth Amendment (given that the Sixth Amendment right to counsel attaches only once formal charges are filed, *see Brewer* v. *Williams*, 430 U.S. 387, 398 (1979)), but there is no evidence of systematic prosecutorial abuse of the charging process under the Sixth Amendment. Furthermore, the Department intends to add a new provision to the United States Attorneys' Manual that will prohibit a Department attorney from communicating overtly with a "target" of an investigation before he or she is formally charged or named as a civil defendant, except in specifically enumerated circumstances.

Section 77.4: Constitutional and Other Limitations.

This section makes clear that this regulation does not purport to authorize any communication prohibited by the Constitution or any federal statute or Federal Rule of Criminal or Civil Procedure. Although these rules do not supersede the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, this limitation does not extend to other rules regarding procedure in federal courts. Thus, rules of procedure adopted by individual courts as local rules, many of which incorporate state bar rules, are not included in this limitation; and, in fact, this regulation is explicitly intended to supersede local federal court rules regarding *ex parte* contacts by attorneys for the government. *See* § 77.12 and accompanying commentary.

No specific comments were received regarding this section, and it has not been changed.

Section 77.5: General Rule for Civil and Criminal Enforcement; Represented Parties

This section closely tracks the language of DR 7–104(A)(1) and Model Rule 4.2 and applies similar prohibitions to attorneys for the government. The section prohibits an attorney for the government from communicating with a represented party, as defined in section 77.3, about the subject matter of the representation without the consent of that individual's attorney. As with DR 7–104(A)(1) and Model Rule 4.2, the prohibition applies only if the attorney for the government knows that the represented party is, in fact, represented by counsel. Therefore, communications by an attorney for the government with a represented party will not violate this rule if the attorney for the government is unaware of the fact of representation.

This section also prohibits an attorney for the government from causing another individual to communicate with a represented party. Accordingly, this rule proscribes an attorney from directing a government investigator to do what the attorney himself or herself is prohibited from doing. Conversely, a government attorney will not be personally responsible for the actions of agents in communicating with represented persons unless, in doing so, the agents were acting as the attorney's "alter ego." *See United States* v. *Heinz*, 983 F.2d 609, 612–14 (5th Cir. 1993).

It also should be noted that this provision is violated (and thus, a basis for departmental discipline exists) when an inappropriate communication takes place, regardless of whether or not the communication results in eliciting an inculpatory statement or is otherwise prejudicial to the represented party.

No specific comments were received regarding this section, and it has not been changed.

Section 77.6: Exceptions; Represented Parties

This section describes the circumstances under which Department attorneys may communicate, or cause others to communicate, with a represented party whom the Department attorney knows is represented concerning the subject matter of the representation, without first obtaining the consent of the represented party's counsel.

Paragraph (a): Determination if representation exists.

This exception recognizes the fact that there is no reason to prohibit a limited inquiry about whether an individual is, in fact, represented by counsel regarding the relevant subject matter. Such an inquiry does not involve the kind of communication about which courts have expressed concern and has little potential for undermining the attorney-client relationship. It is also consistent with DR 7–104(A)(1) and Model Rule 4.2.

There may be uncertainty about the existence of representation with respect to whether it has been established, whether it may have been terminated, and whether a particular subject falls within the scope of the representation. The first issue typically arises before a judicial or other appearance, when the government attorney has some information suggesting that the person may be represented. It also may arise when an attorney purports to represent a group of persons, such as all the employees of a corporation. Uncertainty about the termination of the representation may arise when substantial time has passed since it was made known that the person was represented by counsel or when the attorney for the government has reason to believe that the representation has ceased. It is unlikely, however, that such uncertainty will arise when there are pending judicial proceedings, because in such circumstances the court in most jurisdictions must approve termination of representation.

In response to one comment, it is worth clarifying that that representation is presumed to cease to be current for purposes of these rules when the matter in question has reached a final judgment (i.e., once the direct appeals process, including any petition for certiorari, has run its full course), unless there is reason to believe that representation is continuing.

When inquiring about the status of representation, government attorneys and agents generally must refrain from stating whether it is necessary or desirable to be represented by counsel. After the right to counsel has attached, a statement or implication suggesting that counsel is not providing proper or effective representation could violate the Sixth Amendment right to effective assistance of counsel. *See United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

One organization commented that the right to inquire whether a party is represented by counsel is an invitation to a more substantive conversation with a represented party with respect to the matter underlying the representation, which would violate these rules. The Department does not agree that this paragraph creates a significant potential for abuse. This exception, which is clear in its terms, allows Department attorneys to do no more than determine whether a person is in fact represented by counsel. The Department expects that all Department attorneys will understand the limited parameters and purpose of this exception, and any attempt to use this paragraph to gather additional information about the subject matter of the representation would be a clear violation of these rules and would constitute sanctionable conduct.

Paragraph (b): Discovery or judicial or administrative process.

Any communication that is authorized by discovery procedures, such as a deposition of a party-opponent, or by judicial or administrative process, such as a grand jury, deposition, or trial subpoena or an administrative summons, obviously should not be prohibited by any rule. *See United States* v. *Schwimmer*, 882 F.2d 22, 28 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (prosecutor's questioning of represented person before the grand jury outside the presence of counsel is "authorized by law" under DR 7–104). Among other reasons for this exception, a person who is served with process has an opportunity to consult with counsel prior to his or her appearance at the proceeding, and may have counsel present if desired during the proceeding (except, of course, while testifying before a grand jury). More generally, communications authorized by discovery procedures already have in place appropriate mechanisms for protection of the attorney-client relationship. This provision ensures that this regulation does not prevent such communications from continuing to be allowed.

This exception does not purport to authorize any communications not otherwise available pursuant to approved discovery procedures or legal process. However, one individual commented that the text of paragraph (b), as proposed in March 1994, might be construed to authorize certain discovery procedures—such as the taking of a party's deposition testimony in the absence of the party's attorney and without the attorney's prior agreement—even where such practice was not in accordance with the rules of the applicable tribunal. To clarify that this paragraph's intent is to authorize only approved discovery procedures or legal process, this paragraph has been amended in the final rule to exempt only those communications made pursuant to discovery procedures or legal process "in accordance with the orders or rules of the court or other tribunal where the matter is pending."

Paragraph (c): Initiation of communication by represented party.

This paragraph sets out the circumstances under which it is proper for a government attorney to communicate with a represented party who has initiated contact, without the consent of that party's counsel.

A defendant may wish to communicate with the government outside the presence of counsel for many valid reasons. For instance, a defendant may wish to cooperate with the government but not want his or her attorney to know for fear that the attorney will disclose the defendant's intentions to others. This situation may arise, for example, when the defendant's attorney is being paid by another individual involved in a criminal enterprise, and the defendant questions whether he or she has the attorney's undivided loyalty. The same problem may arise when a single attorney represents multiple parties who are part of the same criminal enterprise.

When the desire of a defendant or arrestee to speak with the attorney for the government outside the presence of his or her counsel is "voluntary, knowing, and informed," there is no valid reason to prohibit the government from engaging in such communications. In fact, the Department believes that it would be a dereliction of its obligation vigorously to enforce federal law if it promulgated a rule that would prohibit such communications.

It is well established that an individual who is entitled to counsel under the Fifth Amendment or the Sixth Amendment may waive that right and choose to communicate with the government outside the presence of his or her attorney, "provided the waiver is made voluntarily, knowingly and intelligently." *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (internal quotations omitted); *Patterson* v. *Illinois*, 487 U.S. 285, 292 (1988); *Brewer* v. *Williams*, 430 U.S. 387, 404–06 (1977). In such a situation, the defendant should not be prohibited from engaging in communications that are allowed by the Constitution by a disciplinary rule that was intended to protect that individual in the first place. Neither common sense nor the principles underlying DR 7–104 and Rule 4.2 requires such a result.

This paragraph includes procedural protections designed to ensure that such waivers are in fact voluntary, knowing, and informed. After a represented individual has been arrested or charged in a criminal proceeding or is named as a defendant in a civil law enforcement proceeding, this paragraph requires that several steps be taken before a government attorney may engage in a substantive discussion with the represented party. First, the government attorney must inform the individual of his or her right to speak through his or her attorney and to have that attorney present for any communications with the government attorney. Second, the represented party must manifest his or her desire to waive the right to counsel in a voluntary, knowing, and informed way. If at all possible, the attorney for the government should obtain a signed written waiver. Third, the attorney for the government must bring the matter before the appropriate district court judge, magistrate judge, or other tribunal of competent jurisdiction. Then, it is up to the court to determine that the waiver satisfies the provisions of this rule or that substitute counsel is in place (including counsel appointed at that time by the court) who has consented to the communication.

This paragraph does not require, however, that the waiver must always take place before the judge or magistrate judge. In exceptional circumstances, it may be impractical or unsafe to bring the defendant before a judge or magistrate judge to secure the waiver. In such circumstances, the government attorney may secure a waiver from the defendant outside the court, and, before any substantive discussion between the defendant and the government takes place, bring evidence of the waiver to the court so that the court can determine whether the waiver was made knowingly, intelligently, and voluntarily.

One United States Attorney's Office commented that paragraph (c), as proposed, appeared to require an attorney first to obtain an informed waiver and only after receiving such a waiver to bring the matter before the appropriate tribunal. The Department does not intend to require (and does not understand the text of paragraph (c) to require) an attorney for the government, when contacted by a represented party, necessarily to attempt to secure a waiver himself or herself before bringing the matter to the attention of the court. A government attorney who is contacted by a represented party may, consistent with this paragraph, choose to bring the matter directly to the attention of the court, assuming the represented party has manifested his or her desire to waive the right to counsel. The court then would determine whether the party wishes to waive the presence of counsel for the communication. In general, however, the usual practice is for the government attorney to obtain from the represented party a waiver before bringing the matter before the court.

As noted above, the initiation of *ex parte* contacts by represented parties frequently occurs in the context of the "fearful defendant" whose attorney has been chosen by a third party, often an individual above the defendant in the criminal hierarchy. Such a defendant may wish to cooperate with the government but may fear that his life or safety will be endangered if his attorney learns of the cooperation. Although the need for a mechanism by which a represented party can initiate contacts with the government is particularly acute in this context, paragraph (c) is not limited to this setting. Rather, the proper inquiry is whether the represented party's waiver of the right to counsel is voluntary, knowing, and informed, not whether the represented party has established some overriding justification for his or her decision.

One organization objected to the extension of this exception to anyone other than a "fearful defendant," suggesting that any other client will have no better reason to initiate communication than "a misguided belief that he can help himself by talking to the prosecutor." The Department believes that it would be overly paternalistic to refuse to permit any but fearful represented parties to initiate direct contact with the government. Given that a criminal defendant has a constitutional right to decline legal representation entirely, *see Faretta* v. *California*, 422 U.S. 806 (1975), government attorneys should not be ethically bound to refuse to listen to a criminal defendant who chooses to decline the presence of counsel for purposes of a particular communication with appropriate court approval.

Additionally, it would be neither workable nor proper to require a Department attorney or judicial officer to probe the client about his or her relationship with counsel in order to ascertain whether the client is genuinely fearful, or fearful enough, of his or her attorney's involvement to justify a conversation outside the presence of counsel. Such an inquiry would tend to enhance, not minimize, intrusion into the attorney-client relationship. A more reliable protection of the client's interest and of the attorney-client relationship is this paragraph's careful process of testing the client's desire (as opposed to the client's reasons) for waiving the presence of counsel. This is the same analysis the courts undertake in assessing waivers of the constitutional rights to counsel or against self-incrimination. The proper issue in such a setting, as here, is whether the waiver is knowing, intelligent, and voluntary.

Another commenter opined that paragraph (c), by allowing represented parties to waive the presence of counsel and speak directly to a government attorney, would authorize a violation of the represented party's constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny. Cases following *Miranda* provide that custodial interrogation must cease whenever the person in custody invokes his or her right to have counsel present. *See, e.g., Edwards* v. *Arizona*, 451 U.S. 477 (1981). However, the prohibition against further interrogation does not apply when the accused himself or herself initiates further communication, *see id.* at 484–86, which would need to be the case for this paragraph to apply.

Paragraph (d): Waivers at the time of arrest.

The previous paragraph (paragraph (c)) provides the general guidelines regarding how a represented party may waive protections otherwise provided under this regulation. This paragraph provides for a different rule dealing specifically with a waiver at the time of arrest.

This paragraph provides that a government attorney may communicate directly with a represented party "at the time of arrest of the represented party" without the consent of that party's counsel, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. The government attorney need not comply with any of the additional requirements of paragraph (c) in such a situation.

A substantial body of law has developed regarding waiver of constitutional rights in the immediate post-arrest setting. The Department believes that the constitutional protections established in that decisional law adequately protect represented individuals following arrest. Furthermore, the effectiveness of post-arrest interviews would be significantly curtailed if the procedural requirements of paragraph (c) applied. Accordingly, this paragraph is intended to preserve this investigative tool without adding any additional procedural requirements.

The Department received two comments regarding this paragraph: one relating to the timing of the waiver, and the other relating to the terms of the waiver.

A Department component commented that it would clarify the meaning of a communication "at the time of the arrest of the represented person" to add to the text that such communication must be made "at the time of the arrest of the represented party before he or she is presented to a judicial officer with respect to that arrest . . . ." The Department has decided against adopting the proposed additional language, because it would unadvisedly extend this exception beyond its proper and intended narrow limits. This exception to the general rule against post-arrest communications is designed to preserve the ability of government attorneys to interview individuals immediately (i.e., within hours) following arrest as an effective and important law enforcement tool. *See, e.g.*, 18 U.S.C. 3501(c). It is not intended to allow government attorneys to attempt to initiate communications with an arrested person any time before the person is presented to a judicial officer, which can extend days beyond the "time of arrest." The Department believes that such an extension of this limited exception could put excessive pressure on clients and unduly intrude upon the attorney-client relationship.

A United States Attorney's Office commented that proposed paragraph (d), under which the represented party must be advised of and waive "his or her constitutional rights," could be construed to require the represented party to be explicitly told that he or she has a right to *his* or *her* attorney, and not just that he or she has a right to *an* attorney (as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). This paragraph is intended to apply whenever an arrested person is read his or her *Miranda* rights and waives those rights; it is not intended to require the represented party to be apprised of his right to counsel in any different or more specific terms than *Miranda* and its progeny require. To make clear that the usual *Miranda* warnings and waiver suffice for purposes of this section, paragraph 77.6(d) has been amended in the final rule to read as follows: "The communication is made at the time of the arrest of the represented party and he or she is advised of his or her rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them."

Paragraph (e): Investigation of additional, different, or ongoing crimes or civil violations.

The Sixth Amendment right to counsel is "offense-specific." *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2207 (1991). Thus, a defendant whose Sixth Amendment rights have attached as to one offense remains subject to questioning, whether direct or covert, regarding uncharged crimes. *Id.*; *Maine* v. *Moulton*, 474 U.S. 159, 180 n.16 (1985); *United States* v. *Mitcheltree*, 940 F.2d 1329, 1342 (10th Cir. 1991); *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1111–12 (11th Cir. 1990); *United States* v. *Chu*, 779 F.2d 356, 368 (7th Cir. 1985); *United States* v. *Grego*, 724 F.2d 701, 703 (8th Cir. 1984). The proposed rule employs an analogous approach, permitting *ex parte* contacts with a represented party if the contacts involve the investigation of offenses as to which the represented party has been neither arrested nor charged in a criminal or civil law enforcement proceeding. The Department believes this approach is wholly consistent with DR 7–104 and Model Rule 4.2 and the cases interpreting those rules.

Accordingly, this section provides that communications may be made in the course of investigations of additional, different, or ongoing criminal or unlawful activity, even though the individual is represented by counsel with respect to conduct for which he or she has already been arrested or charged. Such additional criminal or unlawful conduct is typically one of three varieties: (1) conduct that is separate from the original wrongful conduct; (2) crimes or unlawful conduct that are intended to impede the administration of justice or the trial of the charged crime, such as subornation of perjury, obstruction of justice, jury tampering, or murder, assault, or intimidation of witnesses; and (3) conduct that is a continuation of the charged crime, such as a conspiracy or a scheme to defraud that continues past the time of indictment. The new or additional criminal or wrongful activity may have occurred in the past or may be ongoing at the time of the investigation.

One organization objected to this section's coverage of criminal or wrongful activity that has already been completed at the time of the communication, as distinct from activity that is ongoing. However, the Department sees no basis in the policies underlying the Sixth Amendment and the Model Rules for basing the propriety of investigation into additional or different uncharged crimes on whether such activity is complete or ongoing.

One individual expressed concern that Department attorneys would exploit this exception by making gratuitous allusions to other offenses in the course of an otherwise illicit contact with a represented party. As noted above, prevailing case law interpreting the Sixth Amendment and the Model Rules permit an attorney to question a defendant as to uncharged offenses, and there is no evidence of systemic prosecutorial abuse of this type of interrogation. Accordingly, there is no reason to suspect that prosecutorial practice under these rules will be different.

Paragraph (f): Threat to safety or life.

The Supreme Court has recognized that, in certain limited situations, the need to guard against threats to public safety can justify noncompliance with otherwise applicable constitutional safeguards. *See Warden* v. *Hayden*, 387 U.S. 294, 298–99 (1967) (warrantless search permissible when delay would endanger lives of officers and citizens); *New York* v. *Quarles*, 467 U.S. 649, 657 (1984) ("the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the [*Miranda*] prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"). This paragraph recognizes an analogous exception to the general prohibition against communications with represented parties in the absence of their counsel. It is the Department's intention that this exception be invoked only in rare circumstances and only for the purpose of protecting human life or safety.

The exception has three requirements: (1) the attorney for the government must have a good faith belief that the safety or life of any person is threatened; (2) the purpose of the communication must be to obtain information to protect against the risk of injury or death; and (3) the attorney for the government must, in good faith, believe that the communication is reasonably necessary to protect against such risk. These requirements are imposed to ensure that the exception is invoked only to protect human life or safety, and not as a routine matter in violent crime prosecutions. For example, the fact that potentially dangerous firearms have not been recovered would not in and of itself be sufficient under ordinary circumstances to constitute a threat to safety under this exception. Furthermore, the communication must be for the purpose of protecting human life or safety, and may not be designed to elicit testimonial evidence. However, information thus obtained may be used for any purpose consistent with constitutional limitations.

No specific comments were received regarding this paragraph, and it has not been changed.

Section 77.7: Represented Persons; Investigations

As noted in the discussion of section 77.3, individuals and organizations who are neither defendants nor arrestees are not "parties" within the meaning of this rule, and the general prohibition on *ex* *parte* contacts therefore does not apply. This section makes clear that attorneys for the government are authorized to communicate, directly or indirectly, with a represented person unless the contact is prohibited by some other provision of federal law. These communications are subject, however, to the restrictions set forth in sections 77.8 and 77.9 regarding certain categories of negotiations and respect for attorney-client relationships.

Two individuals commented that this section, even as limited by sections 77.8 and 77.9, allows a broader range of contact with persons under investigation than is necessary to meet the Department's legitimate investigative needs. These individuals agreed that the government must be free to conduct undercover operations and investigations, even when field investigators coming into contact with potential criminal or civil respondents are directed by government attorneys. They argued, however, that overt communications with persons during the investigative stage are not similarly justified.

The Department agrees that overt communications between a government attorney and a represented person during the investigative stage raise different considerations from covert communications and should be subject to greater restrictions. For this reason, the Department plans to make revisions to the United States Attorneys' Manual providing that government attorneys should engage in overt communications only after carefully considering whether the communication is more appropriately handled by others, and should generally not communicate overtly, or cause another to communicate overtly, with a target of a federal criminal or civil investigation, who is known by the Department attorney to be represented by counsel, concerning the subject matter of the representation. Nevertheless, the Department believes that overt contacts by federal attorneys and agents with witnesses and subjects of investigations are often necessary for effective law enforcement and hence should be permitted.

Section 77.8: Represented Persons and Represented Parties; Plea Negotiations and Other Legal Agreements

This section prohibits government attorneys from initiating or engaging in negotiations of certain specified legal agreements with any individual whom the government attorney knows is represented by counsel, without the counsel's consent. Even when the regulation otherwise permits substantive discussions with a represented party or represented person, it ordinarily would be improper for a government attorney to initiate or negotiate a plea agreement, settlement, immunity agreement or any other disposition of a claim or charge without the consent of the individual's counsel. The one exception to this prohibition occurs when the communication is initiated by the represented person or represented party and the procedural safeguards provided for in paragraph 77.6(c) are satisfied.

The Department believes that this section is important for the preservation of the attorney-client relationship. One of the primary purposes of DR 7–104 and Model Rule 4.2 is to protect an individual represented by counsel from overreaching by an attorney for an adversary. The Department believes the risk and the consequences of such overreaching are at their greatest during negotiations over plea agreements, settlements, and other key legal agreements. The training, experience, and knowledge of the law possessed by an attorney is particularly valuable in such situations.

The prohibition contained in this section includes all negotiations of the terms of a particular plea agreement, settlement agreement, or other agreement covered by the section. However, this section does not prohibit an attorney for the government from responding to questions regarding the nature of such agreements, potential charges, potential penalties, or other subjects related to such agreements during an otherwise permissible discussion. Nevertheless, an attorney for the government should take care in such situations not to go beyond providing information on these and similar subjects and should generally refer the represented person to his or her counsel for further discussion of these issues. The government attorney should also make it clear that he or she will not negotiate any agreement with respect to the disposition of criminal charges, civil claims or potential charges, or immunity agreements without the consent of counsel.

No specific comments were received regarding this section, and it has not been changed.

Section 77.9: Represented Persons and Represented Parties; Respect for Attorney-Client Relationships

When an attorney for the government communicates with a represented party pursuant to one or more of the exceptions listed in section 77.6, or with a represented person pursuant to section 77.7, the communication is nevertheless subject to the restrictions of this section.

Paragraph (a): Deference to Attorney-Client Relationship

Federal courts have recognized that it is improper for an attorney for the government to disparage counsel for the represented party or otherwise to seek to disrupt the relationship between that party and his attorney. *See, e.g., United States* v. *Morrison*, 449 U.S. 361, 362, 367 (1981); *United States* v. *Weiss*, 599 F.2d 730, 740 (5th Cir. 1979); *id.* at 740–41 (Godbold, J., specially concurring). This paragraph codifies those basic principles by prohibiting communications that: (1) attempt to elicit information regarding lawful defense strategies; (2) disparage the represented party's counsel; or (3) otherwise improperly seek to disrupt the attorney-client relationship. These prohibitions apply in every phase of criminal and civil enforcement investigations and proceedings.

However, the paragraph also accommodates an important exception to this prohibition. Courts have held that a government attorney may not permit legal proceedings to go forward if he or she is aware of a conflict of interest between a represented party and his or her lawyer. *See United States* v. *Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986). Under this circumstance, the attorney for the government ordinarily should move to disqualify the lawyer involved, if legal proceedings have already commenced. If it is not feasible to move for disqualification or otherwise challenge the representation, this paragraph allows an attorney for the government to communicate with the represented individual for the limited purpose of apprising the represented individual of the perceived conflict. However, any substantive discussion of the subject matter of the representation is permissible only insofar as it is authorized by some other provision of this rule.

In order to ensure that this provision is used only in rare circumstances, the rule requires prior authorization for such communications from the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney. The authorization should be in writing if at all possible. Furthermore, before providing approval, the authorizing officer must find: (1) a substantial likelihood of a conflict; and (2) that it is not feasible to obtain a court order on the matter.

One organization commented that judicial approval, or at least approval by a designated Assistant Attorney General (rather than by a United States Attorney), should be required before an attorney for the government may apprise a represented party or person of any perceived conflict of interest. Another organization and an individual commented that attorneys for the government should never be allowed to inform a represented individual of a perceived conflict of interest, and, instead, should be required to move to disqualify counsel and leave it to the court to adjudicate any conflicts of interest. The Department believes that there will be circumstances in which it will not be feasible to obtain a judicial order challenging the representation (especially prior to the filing of charges), or when the exigencies of the situation may make it impracticable to obtain prior authorization of a judicial officer or an Assistant Attorney General. In such circumstances, and when a high-level Department official, such as a United States Attorney, determines that there is a significant likelihood of a conflict of interest between a represented individual and his or her attorney, it is better that the represented person or party be apprised of the potential conflict of interest than be left uninformed. Accordingly, the Department has decided to leave this paragraph unchanged in the final rule.

Paragraph (b): Attorney-Client Meetings

The attendance of an undercover agent or a cooperating witness at lawful meetings of an individual and his or her attorneys is ordinarily an improper intrusion into the attorney-client relationship. The courts have recognized, however, that such attendance occasionally will be required when the operative is invited to participate and his or her refusal to do so would effectively reveal his or her connection to the government. *See, e.g.*, *Weatherford* v. *Bursey*, 429 U.S. 545, 557 (1977); *United States* v. *Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States* v. *Mastroianni*, 749 F.2d 900, 906 (1st Cir. 1984). As the First Circuit has noted, a contrary rule "would provide the defense with a quick and easy alarm system to detect the presence of any informants, simply by inviting all known associates of defendants to a supposed defense strategy meeting." *Mastroianni*, 749 F.2d at 906.

Attendance at such meetings, however, intrudes into the attorney-client relationship and impairs the right of the defendant to a fair trial. Accordingly, this section provides that undercover agents or cooperating witnesses may participate in such meetings, but only when requested to do so by the defense and when reasonably necessary to protect their safety or life or the confidentiality of an undercover operation. *See Weatherford*, 429 U.S. at 557.

However, even when an undercover operative's attendance at such a lawful meeting is authorized to protect his or her cover and safety, any information acquired regarding lawful defense strategy or trial preparation may not be communicated to government attorneys or otherwise used to the substantial detriment of the represented party. *See Weatherford*, 429 U.S. at 558; *Ginsberg*, 758 F.2d at 833; *Mastroianni*, 749 F.2d at 906. As a safeguard, this rule provides that such information should not be communicated to the attorneys for the government or law enforcement agents who are participating in the trial of the pending criminal charges.

When there is reasonable cause to believe that the purpose of the meeting is not the lawful defense of the underlying charges, but the commission of a new or additional crime (such as bribery of a witness or subordination of perjury), attendance by informants or undercover agents at attorney-client meetings is permissible pursuant to paragraph 77.6(e). The belief, however, must be based on reasonable cause, not mere suspicion or conjecture. *See Mastroianni*, 749 F.2d at 906. Furthermore, the prohibition against communication of lawful defense strategy to the prosecution should be observed if, in fact, such strategy is imparted to the informant or agent.

Government attorneys should give serious consideration to the extreme sensitivity of permitting agent and informant attendance at defense meetings. Agents and informants should be instructed to avoid participating in such meetings, and to minimize their participation when attendance is required, if it is possible to do so without arousing suspicion. Agents or witnesses who attend defense meetings should also be instructed to make every attempt to avoid taking any role in the shaping of defense strategy or trial preparations. Additionally, agents and informants should be instructed to avoid imparting lawful defense strategy or trial preparation information to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges.

Finally, this restriction applies only to law enforcement officials and cooperating witnesses who are acting as "agents for the government" at the time of the communication. If one of several co-defendants who attended an attorney-client defense strategy meeting later testifies for the government at trial, no violation will have occurred as long as the co-defendant was not a government agent at the time of the meeting. *United States* v. *Brugman*, 655 F.2d 540, 545–46 (4th Cir. 1981).

A Department component commented that an undercover agent's attendance at a meeting at which legal strategy is not discussed does not intrude on the attorney-client relationship; therefore, the component proposed limiting this paragraph's prohibition against government agents participating in an attorney-client meeting or communication to situations where there is a "reasonable basis" to believe that the meeting or communication will concern legal advice or strategy. The Department believes that it is unwise and unworkable to encourage government attorneys and undercover agents to guess whether legal issues will come up in an attorney-client meeting or communication. It would also be disruptive of the attorney-client relationship for government attorneys and undercover agents to gather the information that might make such a determination even remotely reliable. Therefore, this paragraph has not been changed.

Section 77.10: Organizations and Employees

This section addresses the difficult issue of when a communication with an employee or member of a represented organization should be considered a communication with the organization itself. Important interests depend on this determination. On the one hand, organizations should not be shielded from effective criminal or civil law enforcement prosecution simply by retaining counsel. It is not uncommon for federal prosecutors to encounter attorneys who assert that they represent every individual in a large corporation or organization. If such attorneys were able to prevent government investigators from gaining informal access to any employee of the organization by withholding consent, information relevant to claims against the organization might never come to light because such information is often in the exclusive possession of the organization and its employees. *See, e.g., Suggs* v. *Capital Cities/ABC Inc.*, 54 Empl. Prac. Dec. (CCH) ¶ 40,195 at 63,910 (S.D.N.Y. Apr. 24, 1990). On the other hand, organizations are entitled to the effective assistance of counsel, and the relationship between an organization and its counsel deserves respect.

The Department believes that this section, and particularly the definition of "controlling individual" in paragraph

(a) of this section, strikes an appropriate balance, one that ensures government attorneys the ability to enforce federal law, while preserving the opportunity for corporations and other organizations to secure effective assistance of counsel.

Paragraph (a): Communications with current employees; organizational representation.

This paragraph states that a communication with a current employee of an organizational party or person should be treated as a communication with the organization for purposes of this part only if the employee is a "controlling individual." If a communication with a current employee is properly characterized under this regulation as a communication with a represented organization (that is, if the communication is with a controlling individual), then that communication is subject generally to the same limitations that would apply if the communication were with a represented person or represented party.

In accord with the basic structure of this regulation, which distinguishes between represented parties and represented persons, this paragraph effectively provides that when an organization is a represented party, an attorney for the government shall not communicate, or cause another to communicate, with any controlling individual of the organization without the consent of the organization's attorney, subject to the exceptions enumerated in § 77.6. In contrast, when an organization qualifies as a represented person, an attorney for the government may communicate, or cause another to communicate, with any controlling individual, provided the communication does not violate the provisions of §§ 77.8 or 77.9.

The definition of "controlling individual" is intended to encompass those individuals who typically are part of the organization's control group. A controlling individual under this definition must: (1) be a current employee or member of the organization; (2) hold a high-level position with the organization; (3) participate "as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter;" and (4) be known by the government to be engaged in such activities. This definition attempts to identify those limited number of individuals affiliated with the organization who actually are involved in determining the organization's position with regard to the legal proceeding or investigation.

One individual and one organization questioned limiting the class of employees who should be considered "controlling individuals" for purposes of this subsection to those who participate in framing the organization's legal position in the matter. They argued that the proposed "controlling individual" test authorizes contacts with employees who, while not directing the organization's counsel, nonetheless have extensive authority to act on behalf of the organization. The underlying concern of these comments appears to be that this paragraph, as proposed, authorizes contacts with many employees who are likely to possess information relevant to claims asserted against the corporation and who have the capacity to make statements that a court will deem admissible at trial as evidentiary admissions against the corporation. This is certainly true. However, the Department believes that its anti-contact rule should not be designed with the goal of protecting corporations from disclosure of prejudicial facts. *See, e.g., Action Air Freight* v. *Pilot Air Freight,* 769 F. Supp. 899, 903 (E.D. Pa. 1991) (anti-contact rule "should not necessarily chill the flow of harmful information"); *Hanntz* v. *Shiley, Inc.,* 766 F. Supp. 258, 267 (D.N.J. 1991) ("the policies of Rule 4.2 do not justify a wholesale restriction on discovery of factual information, damaging or not").

Anti-contact rules such as DR 7–104 and Model Rule 4.2 are intended to protect the attorney-client relationship from unnecessary interference and to protect represented parties from overreaching by opposing counsel. Damage to the attorney-client relationship inheres particularly in communications with high-level corporate employees who have contact with the corporation's attorneys in the course of making ultimate decisions regarding choice of counsel, implementing counsel's advice, and determining settlement and other litigation strategies. Therefore, communications with those high-level individuals affiliated with or employed by an organization who are responsible for employing and directing the organization's counsel and for determining legal positions taken by the organization are the type of communications prohibited by DR 7–104.

Accordingly, this paragraph defines "controlling individual" consistently with the principles underlying the disciplinary rules on *ex parte* contacts. The Department also believes that the alternative approaches urged by commenters would impose unacceptable constraints on federal law enforcement. Therefore, this paragraph has not been changed.

Paragraph (b): Communications with former employees; organizational representation.

This paragraph authorizes communications with former employees of represented organizations. Because former employees do not direct the affairs of the organization and therefore cannot be considered members of the "control group" or any other controlling entity of an organization, communications with them are not considered communications with the organization for purposes of the rule. This reasoning is consistent with the conclusion of the majority of federal courts that have held that DR 7–104(A)(1) does not bar communications with former employees of a represented corporate party. *See, e.g., Hanntz* v. *Shiley, Inc.,* 766 F. Supp. 258, 267 & n.8 (D.N.J. 1991); *Action Air Freight, Inc.* v. *Pilot Air Freight Corp.,* 769 F. Supp. 899, 904 (E.D. Pa. 1991); *Shearson Lehman Bros., Inc.* v. *Wasatch Bank,* 139 F.R.D. 412, 417–18 (D. Utah 1991); *Sherrod* v. *Furniture Center,* 769 F. Supp. 1021, 1022 (W.D. Tenn. 1991); *Dubois* v. *Gradco Systems, Inc.,* 136 F.R.D. 341, 345 n.4 (D. Conn. 1991); *Polycast Technology Corp.* v. *Uniroyal, Inc.,* 129 F.R.D. 621, 628 (S.D.N.Y. 1990). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991) ("Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer."). *But see PPG Industries, Inc.* v. *BASF Corp.,* 134 F.R.D. 118, 121 (W.D. Pa. 1990); *Public Serv. Elec. & Gas* v. *Associated Elec. & Gas,* 745 F. Supp. 1037, 1042 (D.N.J. 1990).

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (c): Communications With Former or Current Employees; Individual Representation

This paragraph provides that if a former or current employee or a member of an organization retains his or her own counsel, the government shall provide the same protection to him or her that would be provided under this part to any other represented person or represented party. Communications with that individual are subject to the limitations set forth in this part. Although this paragraph provides the general rule for such communications, paragraph (d) addresses the specific situation in which a controlling individual of a represented organization retains separate counsel.

This paragraph also provides that the government will not accept, for purposes of this rule, blanket claims by counsel that he or she represents all or a large number of employees of the organization. It is important to note that this provision is only relevant when the attorney for the government would be prohibited by some other provision of this regulation from contacting an individual falling under the broad claims of representation under question. For example, an attorney for the government may contact a low-level employee of a corporation, without consent of that employee's counsel or the corporation's counsel, regarding a matter for which the corporation has already been indicted as part of an undercover or overt factual investigation, if that individual has not been arrested or named as a defendant in a related criminal or civil law enforcement proceeding. Therefore, the fact that an attorney has stated that he or she represents that individual will have no bearing on whether the communication is proper.

However, if a particular communication with an individual employee included in such a claim of representation would be improper under these rules if he or she were in fact represented by counsel (for example, communications to negotiate a plea agreement), then this paragraph provides that a government attorney must first inquire whether the employee is in fact represented before undertaking substantive communications with the employee. As part of this inquiry, the government attorney is not required to disclose to the employee the fact that counsel has asserted that he or she represents the employee. If the employee indicates that he or she is not represented by counsel, it is proper for the government attorney to treat the employee as unrepresented. If the employee indicates that he or she is represented by counsel with regard to the relevant subject matter, the attorney for the government shall treat that employee as a represented person or represented party, and any further communications with that individual shall be governed by this regulation.

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (d): Communications with separately represented controlling individuals.

This paragraph applies only when a controlling individual of a represented organizational party has retained separate counsel. In such circumstances, a government attorney may not communicate with the controlling individual without the consent of that individual's separate counsel unless the communication satisfies one of the exceptions contained in §§ 77.6 or 77.9 of this part. The paragraph also allows such communications if the individual does not qualify as a represented party, initiates the communication, and waives the presence of counsel. Thus, the same rules apply to contacts with controlling individuals of represented organizational parties who retain separate counsel as apply to controlling individuals of represented organizational parties who are not separately represented.

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (e): Initiation of communication by unrepresented controlling individuals.

This paragraph addresses a relatively narrow circumstance: when a controlling individual who is not individually represented by counsel initiates a communication with the government outside the presence of counsel for the organization. An attorney for the government may participate in such communications if: (1) the controlling individual indicates that he or she is speaking exclusively in his or her personal capacity and not as a representative of the organizational party; and (2) he or she indicates that the waiver of counsel is voluntary, knowing, and informed and, if willing, signs a statement to that effect. The fact that the controlling individual indicates that he or she is speaking in his or her personal capacity does not mean, however, that incriminating testimony received from the controlling individual cannot be used against the represented organization.

If the controlling individual is also a named defendant in a civil enforcement proceeding or has been arrested or charged in a criminal action, the requirements set forth in paragraph 77.6(c) must be satisfied before any substantive communications are made.

No specific comments were received regarding this paragraph, and it has not been changed.

Paragraph (f): Multiple representation.

This paragraph makes clear that these rules should not be construed as altering existing legal and ethical rules regarding the propriety of multiple representation.

No specific comments were received regarding this paragraph, and it has not been changed.

Section 77.11: Enforcement of This Part

Paragraph (a): Exclusive enforcement by Attorney General.

In order to ensure consistency and uniformity in the interpretation of the final rule, this paragraph provides that the Attorney General shall have exclusive authority to enforce these regulations. Thus, state courts, state disciplinary boards, and federal courts may not impose sanctions on or otherwise regulate a Department attorney engaged in federal law enforcement activities for violations of an anti-contact rule or subject a Department attorney to regulation under state or local federal court rules governing communications with represented parties, except as provided in § 77.12. This paragraph further provides the framework for investigating allegations that a Department attorney has violated this regulation. It provides that the Department's Office of Professional Responsibility ("OPR") shall have sole original jurisdiction to investigate such allegations and that violations will be treated as matters of attorney discipline. *See* 28 CFR § 0.39 (establishing and defining duties of OPR). It also makes clear that the Attorney General's determination as to whether a violation has occurred shall be final and conclusive except to the extent that the Department attorney enjoys a right of review provided by other laws.

One individual and one organization objected to placing investigative responsibility in OPR, suggesting that OPR had, in the past, been reluctant to share the results of its investigations. The Department recently adopted a policy under which the results of OPR investigations are disclosed to the public if, *inter alia*, there is a finding of intentional and knowing professional misconduct by a Department attorney in the course of an investigation or litigation and the public interest in disclosure outweighs the privacy interest of the attorney and any law enforcement interest. Therefore, there will be meaningful disclosure of findings of violations of these rules.

Moreover, allegations of professional misconduct by Department attorneys concerning violations of these rules may be reported directly to OPR by any person. Complaints filed by members of the public will be fully and thoroughly reviewed by OPR.

Therefore, this paragraph has not been changed.

Paragraph (b): No private remedies.

This paragraph provides that the rule is not intended to and does not create any substantive rights for any person other than an attorney for the government. In particular, a violation of the regulation will not provide a basis for the dismissal of civil or criminal charges or for the suppression of evidence that is otherwise admissible. This provision accords with existing law. Traditionally, matters relating to communications with represented persons have been treated as matters of attorney discipline without granting substantive rights to defendants or any other persons. *See, e.g.*, ABA Code of Professional Responsibility, Preliminary Statement; ABA Model Rules of Professional Conduct, Scope. Of course, when the communication with a represented person or represented party violates the Constitution, the federal courts retain the power to fashion appropriate remedies.

No specific comments were received regarding this paragraph, and it has not been changed.

Section 77.12: Relationship to State and Local Regulation

Both DR 7–104 and Model Rule 4.2 provide that communications that are "authorized by law" are not prohibited by the rule. Virtually all the states have adopted some version of DR 7–104 or Model Rule 4.2 that includes an "authorized by law" exception. As discussed in the "General Comments" section, these rules, as substantive regulations duly promulgated by the Attorney General pursuant to statutory authority, have the force and effect of law. Accordingly, communications with represented persons that are undertaken pursuant to these rules should be considered "authorized by law" within the meaning of rules adopted by the various states. Such communications should therefore be consistent with state rules wherever state bar authorities have adopted a rule containing the "authorized by law" exception. Thus, no conflict will arise between state and federal law in those jurisdictions with regard to communications with represented persons. Similarly, no conflict should arise between this regulation and the federal district court rules that have adopted an anti-contact rule containing the "authorized by law" exception. This regulation therefore need not give rise to any tension with any provision of state or federal law.

The Department nonetheless recognizes the likelihood that government attorneys' conduct with respect to contact with represented persons may continue to be viewed by some as inconsistent with state or local district court rules. To effectuate fully the provisions of this regulation, it therefore is important that the regulation include a plain statement by the Department of its intention to preempt and supersede regulation by state courts, state disciplinary authorities, or federal district courts of *ex parte* communications by government attorneys in civil or criminal law enforcement investigations or proceedings. *See Hillsborough County, Fla.* v. *Automated Med. Labs*, 471 U.S. 707, 718 (1985) ("because agencies normally express problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretative statements and responses to comments, we can expect that they will make their intention clear if they intend for their regulations to be exclusive").

There is no indication from any of the comments received of any confusion regarding the breadth of the Department's intention to displace state and federal law; on the contrary, the comments in this area generally both fully grasped and took issue with the Department's stated intention to occupy the field. Given the integral importance of the exclusive enforcement authority to the overall regulatory scheme, however, some revisions have been made to this section to leave no doubt that it is the express intention of these rules to completely preempt and supersede the operation of state and local laws or rules as they relate to contacts by government attorneys in civil or criminal law enforcement investigations or proceedings. Such occupation of the field is necessary to ensure that government attorneys' conduct respecting contacts with represented persons be subject to uniform regulation and predictable standards, as against potential variations in individual state and local rules and in interpretations of those rules.

Accordingly, this regulation completely preempts state or federal court regulation of *ex parte* contacts in law enforcement matters by government attorneys and those acting at their direction, with one important exception. If the Attorney General finds that a Department attorney has committed a "willful violation" of any of these rules, preemption will not apply, and that attorney will be subject to disciplinary proceedings both by the Department and by the appropriate state disciplinary authorities.

Several commenters argued that it is inappropriate to preclude an otherwise appropriate state or federal court disciplinary proceeding when the Department's own rules have been violated. The Department respectfully disagrees. A primary purpose for this regulation is to remove the substantial burden on federal law enforcement caused by uncertainty as to what constitutes appropriate conduct by Department attorneys. This uncertainty would not be removed were it left to the various state and federal district courts to interpret these rules and determine on their own whether they had been violated in any particular case. For this reason, the Department believes that it is necessary that it retain exclusive authority to determine whether one of its lawyers has breached these rules, with the important proviso that, when there is a finding of a willful violation, a state disciplinary authority may also impose sanctions.

One United States Attorney's Office commented that the meaning of a "willful violation" had not been clearly explained in the previous commentary. In response to this comment, the Department here clarifies that a "willful violation" means an intentional and deliberate violation of these rules, as determined by the Attorney General.

United States Attorneys' Manual

In addition to the promulgation of the rules discussed above, the Department intends to add several new provisions to the United States Attorneys' Manual to provide additional guidance to Department attorneys when they deal with represented individuals during criminal or civil law enforcement investigations and proceedings.

The Department has deliberately chosen to include certain baseline restrictions in the regulation and impose broader restrictions through provisions in the Manual. In the process of determining what the appropriate Departmental policy should be, it became clear that any regulation would have to apply to a variety of circumstances, including: white collar and organized crime investigations, complex conspiracy investigations, individuals whose counsel are paid by a third party, and individuals fearful of their counsel for various reasons. Accordingly, the Department determined that the regulation should be broad in scope and should provide unambiguous guidance that would not adversely affect federal law enforcement efforts. Thus, part 77 distinguishes between the investigative period (before indictment, arrest, or the filing of a complaint) and the prosecutive period (after arrest or the commencement of formal proceedings). It also distinguishes between communications that are part of a factual investigation and communications that occur during negotiations of plea agreements, settlements, and similar legal arrangements.

The planned Manual provisions will require that government attorneys consider the principles underlying the basic prohibitions in a much wider variety of circumstances. The Department expects all Department attorneys involved in criminal or civil law enforcement proceedings to adhere to all applicable provisions in the Manual. Failure to do so will result in appropriate departmental action.

The planned changes to the Manual were included in the earlier publications simply for reference and were not subject to the requirements of notice and comment that applied to the provisions in the proposed regulation itself. The Department nonetheless received several comments regarding the draft Manual provisions. The Department has carefully considered those comments and has decided that it is appropriate (though not required) to respond to them briefly in this commentary. However, none of the comments received has prompted the Department to conclude that it should alter the planned Manual provisions. The Department anticipates that the Manual provisions will be substantially similar to the draft published in March 1994. The Department envisions publishing the Manual provisions soon and integrating them in the Manual with the final rules adopted here.

Comments were directed mainly to a draft Manual provision that would prohibit a government attorney from communicating overtly about the subject matter of a representation with a person who the government attorney knows is a "target" of a federal criminal or civil enforcement investigation and who the government attorney knows is represented by counsel, without the consent of the target's attorney. (The provisions, as published in March 1994, would also provide several exceptions to this general prohibition against overt contacts with targets, including the following: when the communication is initiated by the target; when the communication occurs at the time of arrest and the represented person has waived his or her *Miranda* rights; when the government attorney believes the contact is necessary to protect against a risk to human life or safety; or when a senior Department official determines that exigent circumstances exist, making the communication necessary for effective law enforcement).

Two United States Attorney's Offices urged reconsideration of the guideline generally prohibiting Department attorneys from directly communicating with known "targets." These commenters expressed a number of concerns about the "target" provision—most significantly, that the determination of "target" status would be subjective and variable and that the proposed limitation on overt contacts with represented targets would interfere with the investigative process.

The Department does not agree that the term "target" would make application of this planned restriction particularly troublesome. While determinations of "target" status surely are not scientifically precise, neither are a range of other similar determinations (e.g., "probable cause" determinations) that prosecutors are expected routinely to make. In its enforcement of the planned provision, the Department intends to give substantial deference to a federal attorney's good faith judgment regarding the likelihood that a particular person will ultimately become a defendant. Even if the attorney for the government believes that an individual probably will be named as a defendant, that individual would not be considered a target until the government has actually obtained substantial evidence linking that individual to the commission of a crime or to unlawful conduct. The government attorney's uncorroborated belief that an individual will ultimately be named as a defendant would not be enough. Thus, an individual will not be considered a target under the Manual guidelines until both the attorney for the government believes that he or she will probably be named as a defendant *and* substantial evidence has been obtained.

The Department also does not believe that the contemplated restriction on overt communications with represented targets would significantly impede legitimate law enforcement activities. It is true that in certain types of cases and under certain exceptional circumstances, target interviews may be necessary for effective investigation; for that reason, the planned Manual provisions would allow that in such situations target interviews may be approved by a high-ranking Department official. However, as a general matter and in more routine circumstances, overt communications with targets have a more limited value to the investigative process, which is outweighed by the risk that they will interfere with the attorney-client relationship and place undue pressure on the target. Because an individual who is a target of a federal investigation is typically in a clearly adversarial relationship with the federal government, the Department believes that the principles underlying DR 7–104 and Rule 4.2 are implicated and that the planned restrictions on overt communications with represented targets are appropriate.

Certifications

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule was not reviewed by the Office of Management and Budget pursuant to Executive Order No. 12866.

List of Subjects in 28 CFR Part 77

Government employees, Investigations, Law enforcement, Lawyers.

Accordingly, chapter I of title 28 of the Code of Federal Regulations is amended by adding a new part 77 to read as follows:

PART 77—COMMUNICATIONS WITH REPRESENTED PERSONS

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515(a), 516, 519, 533, 547.

§ 77.1 Purpose and authority.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, while eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state and federal courts and by bar association organizations and committees. (Copies of the Bar rules are on file in most law libraries, and through on-line legal research services).

(b) This part is issued under the authority of the Attorney General to prescribe regulations for the government of the Department of Justice, the conduct of its employees, and the performance of its business, pursuant to 5 U.S.C. 301; to direct officers of the Department of Justice to secure evidence and conduct litigation, pursuant to 28 U.S.C. 516; to direct officers of the Department to conduct grand jury proceedings and other civil and criminal legal proceedings, pursuant to 28 U.S.C. 515(a); to supervise litigation and to direct Department officers in the discharge of their duties, pursuant to 28 U.S.C. 519; and otherwise to direct Department officers to detect and prosecute crimes, to prosecute offenses against the United States, to prosecute civil actions, suits, and proceedings in which the United States is concerned, and to perform such other functions in an appropriate and ethical manner as may be provided by law, pursuant to 28 U.S.C. 509, 510, 533, and 547.

§ 77.2 Definitions.

As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) *Attorney for the government* means the Attorney General; the Deputy Attorney General; the Associate Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, or Tax Division; the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; or any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The term *attorney for the government* does not include any attorney employed by the Department of Justice as an investigator or other law enforcement agent who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

(b) *Civil law enforcement investigation* means an investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

(c) (1) *Civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the police or regulatory powers of the United States to enforce federal laws, including, but not limited to, civil actions or proceedings brought to enforce the laws relating to:

(i) Antitrust;

(ii) Banking and financial institution regulation;

(iii) Bribery, kickbacks, and corruption;

(iv) Civil rights;

(v) Consumer protection;

(vi) Environment and natural resource protection;

(vii) False claims against the United States;

(viii) Food, drugs, and cosmetics regulation;

(ix) Forfeiture of property;

(x) Fraud;

(xi) Internal revenue;

(xii) Occupational safety and health;

(xiii) Racketeering; or

(xiv) Money-laundering.

(2) The term *civil law enforcement proceeding* shall not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand. An action or proceeding shall be considered "brought by the United States" only if it involves a claim asserted by the Department of Justice on behalf of the United States, whether the claim is asserted by complaint, counterclaim, cross-claim, or otherwise.

(d) *Cooperating witness or individual* means any person, other than a law enforcement agent, who is acting to assist the government in an undercover or confidential capacity.

(e) *Employee* means any employee, officer, director, partner, member, or trustee.

(f) *Organization* means any corporation, partnership, association, joint-stock company, union, trust, pension fund, unincorporated association, state or local government or political subdivision thereof, or non-profit organization.

(g) *Person* means any individual or organization.

(h) *Undercover investigation* means any investigation undertaken in good faith to fulfill law enforcement objectives, in which a person communicates with a federal, state or local law enforcement agent or a cooperating witness or individual whose identity as an official of the government or a person acting at the behest thereof is concealed or is intended to be concealed.

§ 77.3 Represented party; represented person.

(a) A person shall be considered a "represented party" within the meaning of this part only if all three of the following circumstances exist:

(1) The person has retained counsel or accepted counsel by appointment or otherwise;

(2) The representation is ongoing and concerns the subject matter in question;

(3) The person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.

(b) A person shall be considered a "represented person" within the meaning of this part if circumstances set forth in paragraphs (a) (1) and (2) of this section exist, but the circumstance set forth in paragraph (a)(3) does not exist.

§ 77.4 Constitutional and other limitations.

Notwithstanding any other provision of this part, any communication that is prohibited by the Sixth Amendment right to counsel, by any other provision of the United States Constitution, by any federal statute, by the Federal Rules of Criminal Procedure (18 U.S.C. App.) or by the Federal Rules of Civil Procedure (28 U.S.C. App.) shall be likewise prohibited under this part.

§ 77.5 General rule for civil and criminal enforcement; represented parties.

Except as provided in this part or as otherwise authorized by law, an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such party.

§ 77.6 Exceptions; represented parties.

An attorney for the government may communicate, or cause another to communicate, with a represented party without the consent of the lawyer representing such party concerning the subject matter of the representation if one or more of the following circumstances exist:

(a) *Determination if representation exists.* The communication is to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

(b) *Discovery or judicial or administrative process.* The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including, but not limited to testimony before a grand jury, the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena or civil investigative demand.

(c) *Initiation of communication by represented party.* The represented party initiates the communication directly with the attorney for the government or through an intermediary and:

(1) Prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the client's right to speak through his or her attorney and/or to have the client's attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed and, if willing to do so, signs a written statement to this effect; and

(2) A federal district judge, magistrate judge or other court of competent jurisdiction has concluded that the represented party has:

(i) Waived the presence of counsel and that such waiver is voluntary, knowing, and informed; or

(ii) Obtained substitute counsel or has received substitute counsel by court appointment, and substitute counsel has consented to the communication.

(d) *Waivers at the time of arrest.* The communication is made at the time of the arrest of the represented party and he or she is advised of his or her rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) *Investigation of additional, different or ongoing crimes or civil violations.* The communication is made in the course of an investigation, whether undercover or overt, of additional, different or ongoing criminal activity or other unlawful conduct. Such additional, different or ongoing criminal activity or other unlawful conduct may include, but is not limited to, the following:

(1) Additional, different or ongoing criminal activity or other unlawful conduct that is separate from or committed after the criminal activity for which the represented party has been arrested or charged or for which the represented party is a defendant in a civil law enforcement proceeding; or

(2) Criminal activity that is intended to impede or evade the administration of justice including, but not limited to, the administration of justice in the proceeding in which the represented party is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution.

(f) *Threat to safety or life.* The attorney for the government in good faith believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of injury or death; and the attorney for the government in good faith believes that the communication is necessary to protect against such risk.

§ 77.7 Represented persons; investigations.

Except as otherwise provided in this part, an attorney for the government may communicate, or cause another to communicate, with a represented person in the process of conducting an investigation, including, but not limited to, an undercover investigation.

§ 77.8 Represented persons and represented parties; plea negotiations and other legal agreements.

An attorney for the government may not initiate or engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney representing such person or party; provided, however, that this restriction will not apply if the communication satisfies § 77.6(c).

§ 77.9 Represented persons and represented parties; respect for attorney-client relationships.

When an attorney for the government communicates, or causes a law enforcement agent or cooperating witness to communicate, with a represented person or represented party pursuant to any provision of these regulations without the consent of counsel, the following restrictions must be observed:

(a) *Deference to attorney-client relationship.* (1) An attorney for the government, or anyone acting at his or her direction may not, when communicating with a represented person or represented party:

(i) Inquire about information regarding lawful defense strategy or legal arguments of counsel;

(ii) Disparage counsel for a represented person or represented party or otherwise seek to induce the person to forego representation or to disregard the advice of the person's attorney; or

(iii) Otherwise improperly seek to disrupt the relationship between the represented person or represented party and counsel.

(2) Notwithstanding paragraph (a)(1) of this section, if the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney finds that there is a substantial likelihood that there exists a significant conflict of interest between a represented person or party and his or her attorney; and that it is not feasible to obtain a judicial order challenging the representation, then an attorney for the government with prior written authorization from an official identified above may apprise the person of the nature of the perceived conflict of interest, unless the exigencies of the situation permit only prior oral authorization, in which case such oral authorization shall be memorialized in writing as soon thereafter as possible.

(b) *Attorney-client meetings.* An attorney for the government may not direct or cause an undercover law enforcement agent or cooperating witness to attend or participate in lawful attorney-client meetings or communications, except when the agent or witness is requested to do so by the represented person or party, defense counsel, or another person affiliated or associated with the defense, and when reasonably necessary to protect the safety of the agent or witness or the confidentiality of an undercover operation. If the agent or witness attends or participates in such meetings, any information regarding lawful defense strategy or trial preparation imparted to the agent or witness shall not be communicated to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges, or used in any other way to the substantial detriment of the client.

§ 77.10 Organizations and employees.

This section applies when the communication involves a former or current employee of an organization that qualifies as a represented party or represented person, and the subject matter of the communication relates to the business or other affairs of the organization.

(a) *Communications with current employees; organizational representation.* A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

(b) *Communications with former employees; organizational representation.* A communication with a former employee of an organization that is represented by counsel shall not be considered to be a communication with the organization for purposes of this part.

(c) *Communications with former or current employees; individual representation.* A communication with a former or current employee of an organization who is individually represented by counsel may occur only to the extent otherwise permitted by this part. However, a claim by an attorney that he or she represents all or a large number of individual current and/or former employees of an organization does not suffice to establish that those employees are represented persons or represented parties under this part. In such circumstances, prior to engaging in communications that would be prohibited under this part as a result of the individual representation, the attorney for the government shall communicate with the individual current or former employee to determine if in fact that employee is represented by counsel concerning the subject matter of the investigation or proceeding.

(d) *Communications with separately represented controlling individuals.* When this part would preclude discussions with a controlling individual as defined in § 77.10(a) and the controlling individual has retained separate counsel on the relevant subject matter, an attorney for the government may communicate with such individual in the following circumstances:

(1) If the controlling individual's separate counsel consents;

(2) If the communication falls within one of the exceptions set forth in §§ 77.6 or 77.9; or

(3) In the case in which the individual does not qualify as a represented party, if the individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed, and, if willing to do so, signs a written statement to this effect.

(e) *Initiation of communication with unrepresented controlling individuals.* Notwithstanding any other provision of this part, an attorney for the government may communicate with a controlling individual who is not individually represented as to the subject matter of the communication when the controlling individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing, and informed, and, if willing to do so, signs a written statement to this effect.

(f) *Multiple representation.* Nothing in this section is intended or shall be construed to affect the requirements of Rule 44(c) of the Federal Rules of Criminal Procedure, or to permit the multiple representation of an organization and any of its employees, or the multiple representation of more than one such employee, if such representation is prohibited by any applicable law or rule of attorney ethics.

§ 77.11 Enforcement of this part.

(a) *Exclusive enforcement by Attorney General.* The Attorney General shall have exclusive authority over this part and any violations of it, except as provided in § 77.12. Allegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice and shall be addressed when appropriate as matters of attorney discipline by the Department. The Office of Professional Responsibility shall review any complaint alleging a violation of this part made by a state or federal judge, bar disciplinary board, official, or ethics committee, or by any other person or entity. The findings of the Attorney General or her designee as to an attorney's compliance or non-compliance with this part shall be final and conclusive except insofar as the attorney for the government is afforded a right of review by other provisions of law.

(b) *No private remedies.* This part is not intended to and does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States.

§ 77.12 Relationship to state and local regulation.

Communications with represented parties and represented persons pursuant to this part are intended to constitute communications that are "authorized by law" within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7–104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and local federal court rules. In addition, this part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts. When the Attorney General finds a willful violation of any of the rules in this part, however, sanctions for the conduct that constituted a willful violation of this part may be applied, if warranted, by the appropriate state disciplinary authority.

Dated: July 30, 1994.

Janet Reno,

Attorney General.

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federal register

Thursday
August 4, 1994

Part VII

The President

Proclamation 6712—National Neighborhood Crime Watch Day, 1994

Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 6712 of August 2, 1994

National Neighborhood Crime Watch Day, 1994

By the President of the United States of America

A Proclamation

Crime, in one way or another, affects every individual in every community in America. The loss of one parent touches all of our families. The death of one child breaks all of our hearts. But by reaching out to each other in a gesture of courage and cooperation, law enforcement officers and the citizens they serve forge a shield of safety—our greatest weapon in the fight against crime.

Robert Kennedy once said that each time one of us "stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope." Tonight, millions of Americans across the country will join their neighbors in turning on lights from 9:00 to 10:00 o'clock p.m. in front of their homes. "National Night Out" provides communities the opportunity to heighten crime and drug prevention awareness, to encourage participation in anti-crime programs, and to strengthen the relationship between local police and private citizens. Already, we have seen how important these simple steps can be in avoiding tragedy. In big cities and small towns throughout our Nation, police rely on the active involvement of community members to help identify potential problems before they explode into violence. As we resolve tonight to end the violence, the message of this event is clear: Crime in America will not be tolerated.

One of the primary duties of any government is to work to keep its citizens safe from harm. I welcome this responsibility, and I am determined to fulfill it. But no government program will be truly successful without the help of each American. I hope that the lights coming on across America this evening will serve as a signal of both warning and hope. With shared responsibility and a willingness to change, we can turn the tide on the wave of crime in America. Working together, we can build a brighter, more secure future for all of our people.

The Congress, by House Joint Resolution 374, has authorized and requested the President to issue a proclamation observing August 2, 1994, as "National Neighborhood Crime Watch Day."

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, do hereby proclaim August 2, 1994, as National Neighborhood Crime Watch Day. I call upon the people of the United States to observe this day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of August, in the year of our Lord nineteen hundred and ninety-four, and of the Independence of the United States of America the two hundred and nineteenth.

William J. Clinton

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