SUBCHAPTER D—CLAIMS AND STOLEN PROPERTY

PART 33—FISHERMEN'S PROTECTIVE ACT GUARANTY FUND PROCEDURES UNDER SECTION 7

AUTHORITY: 22 U.S.C. 1977.

SOURCE: 61 FR 49967, Sept. 24, 1996, unless otherwise noted.

§ 33.1 Purpose.

These rules clarify procedures for the administration of Section 7 of the Fishermen's Protective Act of 1967. Section 7 of the Act establishes a Fishermen's Guaranty Fund to reimburse owners and charterers of United States commercial fishing vessels for certain losses and costs caused by the seizure and detention of their vessels by foreign countries under certain claims to jurisdiction not recognized by the United States.

§ 33.2 Definitions.

For the purpose of this part, the following terms mean:

Act. The Fishermen's Protective Act of 1967 (22 U.S.C. 1971 *et seq*.).

Capital equipment. Equipment or other property which may be depreciated for income tax purposes.

Depreciated replacement costs. The present replacement cost of capital equipment after being depreciated on a straight line basis over the equipment's depreciable life, which is standardized at ten years.

Downtime. The time a vessel normally would be in port or transiting to and from the fishing grounds.

Expendable items. Any property, excluding that which may be depreciated for income tax purposes, which is maintained in inventory or expensed for tax purposes.

Fund. The Fishermen's Guaranty Fund established in the U.S. Treasury under section 7(c) of the Act (22 U.S.C. 1977(c)).

Market value. The price property would command in a market, at the time of property loss, assuming a seller willing to sell and buyer willing to buy.

Other direct charge. Any levy which is imposed in addition to, or in lieu of any fine, license fee, registration fee, or other charge.

Owner. The owner or charterer of a commercial fishing vessel.

Secretary. The Secretary of State or the designee of the Secretary of State.

Seizure. Arrest of a fishing vessel by a foreign country for allegedly illegal fishing.

U.S. fishing vessel. Any private vessel documented or certified under the laws of the United States as a commercial fishing vessel.

§ 33.3 Eligibility.

Any owner or charterer of a U.S. fishing vessel is eligible to apply for an agreement with the Secretary providing for a guarantee in accordance with section 7 of the Act.

§ 33.4 Applications.

(a) *Applicant*. An eligible applicant for a guaranty agreement must:

(1) Own or charter a U.S. fishing vessel; and

(2) Submit with his application the fee specified in § 33.6 below.

(b) *Application forms*. Application forms may be obtained by contacting the Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Room 7820, U.S. Department of State, Washington, DC 20520–7818; Telephone 202–647–3941.

(c) *Where to apply*. Applications must be submitted to the Director, Office of marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Room 7820, U.S. Department of State, Washington, DC 20520–7818.

(d) *Application approval.* Application approval will be by execution of the guaranty agreement by the Secretary or by the Secretary's designee.

§ 33.5 Guaranty agreements.

(a) *Period in effect.* Agreements are effective for a Fiscal Year beginning October 1 and ending on the next September 30. Applications submitted after October 1 are effective from the date the application and fee are mailed (determined by the postmark) through September 30.

(b) *Guaranty agreement transfer.* A guaranty agreement may, with the Secretary's prior consent, be transferred when a vessel which is the subject of a guaranty agreement is transferred to a new owner if the transfer occurs during the agreement period.

(c) *Guaranty agreement renewal.* A guaranty agreement may be renewed for the next agreement year by submitting an application form with the appropriate fee for the next year in accordance with the Secretary's annually published requirements regarding fees. Renewals are subject to the Secretary's approval.

(d) *Provisions of the agreement.* The agreement will provide for reimbursement for certain losses caused by foreign countries' seizure and detention of U.S. fishing vessels on the basis of claims to jurisdiction which are not recognized by the United States. Recent amendments to the Magnuson Fishery Conservation and Management Act (16 U.S.C. (1801 *et seq.*) assert U.S. jurisdiction over highly migratory species of tuna in the U.S. exclusive economic zone (EEZ). Accordingly, as a matter of international law, the United States now recognizes other coastal states' claims to jurisdiction over tuna in their EEZ'S. This change directly affect certification of claims filed under the Fishermen's Protective Act. Participants are advised that this means that the Department will no longer certify for payment claims resulting from the seizure of a U.S. vessel while such vessel was fishing for tuna within the exclusive economic zone of another country in violation of that country's laws. Claims for detentions or seizures based on other claims to jurisdiction not recognized by the United States, or on the basis of claims to jurisdiction recognized by the United States but exercised in a manner inconsistent with international law as recognized by the United states, may still be certified by the Department.

§ 33.6 Fees.

(a) *General.* Fees provide for administrative costs and payment of claims. Fees are set annually on the basis of past and anticipated claim experience. The annual agreement year for which fees are payable starts on October 1 and ends on September 30 of the following year.

(b) *Amount and payment.* The amount of each annual fee or adjusted fee will be established by the Office Director of the Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, by publication of a notice in the FEDERAL REGISTER. Each notice will establish the amount of the fee, when the fee is due, when the fee is payable, and any special conditions surrounding extension of prior agreements or execution of new agreements. Unless otherwise specified in such notices, agreement coverage will commence with the postmarked date of the fee payment and application.

(c) *Adjustment and refund.* Fees may be adjusted at any time to reflect actual seizure and detention experience for which claims are anticipated. Failure to submit adjusted fees will result in agreement termination as of the date the adjusted fee is payable. No fees will be refunded after an agreement is executed by the Secretary.

(d) *Disposition.* All fees will be deposited in the Fishermen's Guaranty Fund. They will remain available without fiscal year limitation to carry out section 7 of the Act. Claims will be paid from fees and from appropriated funds, if any. Fees not required to pay administrative costs or claims may be invested in U.S. obligations. All earnings will be credited to the Fishermen's Guaranty Fund.

§ 33.7 Conditions for claims.

(a) Unless there is clear and convincing credible evidence that the seizure did not meet the requirements of

the Act, payment of claims will be made when:

(1) A covered vessel is seized by a foreign country under conditions specified in the Act and the guaranty agreement; and

(2) The incident occurred during the period the guaranty agreement was in force for the vessel involved.

(b) Payments will be made to the owner for:

(1) All actual costs (except those covered by section 3 of the Act or reimbursable from some other source) incurred by the owner during the seizure or detention period as a direct result thereof, including:

(i) Damage to, or destruction of, the vessel or its equipment; or

(ii) Loss or confiscation of the vessel or its equipment; and

(iii) Dockage fees or utilities;

(2) The market value of fish or shellfish caught before seizure of the vessel and confiscated or spoiled during the period of detention; and

(3) Up to 50 percent of the vessel's gross income lost as a direct result of the seizure and detention.

(c) The exceptions are that no payment will be made from the Fund for a seizure which is:

(1) Covered by any other provision of law (for example, fines, license fees, registration fees, or other direct charges payable under section 3 of the Act);

(2) Made by a country at war with the United States;

(3) In accordance with any applicable convention or treaty, if that treaty or convention was made with the advice and consent of the Senate and was in force and effect for the United States and the seizing country at the time of the seizure;

(4) Which occurs before the guaranty agreement's effective date or after its termination;

(5) For which other sources of alternative reimbursement have not first been fully pursued (for example, the insurance coverage required by the agreement and valid claims under any law);

(6) For which material requirements of the guaranty agreement, the Act, or the program regulations have not been fully fulfilled; or

(7) In the view of the Department of State occurred because the seized vessel was undermining or diminishing the effectiveness of international conservation and management measures recognized by the United States, or otherwise contributing to stock conservation problems pending the establishment of such measures.

§ 33.8 Claim procedures.

(a) *Where and when to apply.* Claims must be submitted to the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Room 7820, U.S. Department of State, Washington, DC 20520–7818. Claims must be submitted within ninety (90) days after the vessel's release. Requests for extension of the filing deadline must be in writing and approved by the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs.

(b) *Contents of claim.* All material allegations of a claim must be supported by documentary evidence. Foreign language documents must be accompanied by an authenticated English translation. Claims must include:

(1) The captain's sworn statement about the exact location and activity of the vessel when seized;

(2) Certified copies of charges, hearings, and findings by the government seizing the vessel;

(3) A detailed computation of all actual costs directly resulting from the seizure and detention, supported by receipts, affidavits, or other documentation acceptable to the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs;

(4) A detailed computation of lost income claimed, including:

(i) The date and time seized and released;

(ii) The number of miles and running time from the point of seizure to the point of detention;

(iii) The total fishing time lost (explain in detail if lost fishing time claimed is any greater than the elapsed time from seizure to the time required after release to return to the point of seizure);

(iv) The tonnage of catch on board at the time of seizure;

(v) The vessel's average catch-per-day's fishing for the three calendar years preceding the seizure;

(vi) The vessel's average downtime between fishing trips for the three calendar years preceding the seizure; and

(vii) The price-per-pound for the catch on the first day the vessel returns to port after the seizure and detention unless there is a pre-negotiated price-per-pound with a processor, in which case the pre-negotiated price must be documented; and

(5) Documentation for confiscated, damaged, destroyed, or stolen equipment, including:

(i) The date and cost of acquisition supported by invoices or other acceptable proof of ownership; and

(ii) An estimate from a commercial source of the replacement or repair cost.

(c) *Burden of proof*. The claimant has the burden of proving all aspects of the claim, except in cases of dispute over the facts of the seizure where the claimant shall have the presumption that the seizure was eligible unless there is clear and convincing credible evidence that the seizure did not meet the eligibility standards of the Act.

§ 33.9 Amount of award.

(a) *Lost fishing time*. Compensation is limited to 50 percent of the gross income lost as a direct result of the seizure and detention, based on the value of the average catch-per-day's fishing during the three most recent calendar years immediately preceding the seizure as determined by the Secretary, based on catch rates on comparable vessels in comparable fisheries. The compensable period for cases of seizure and detention not resulting in vessels confiscation is limited to the elapsed time from seizure to the time after release when the vessel could reasonably be expected to return to the point of seizure. The compensable period in cases where the vessel is confiscated is limited to the elapsed time from seizure through the date of confiscation, plus an additional period to purchase a replacement vessel and return to the point of seizure. In no case can the additional period exceed 120 days.

(1) Compensation for confiscation of vessels, where no buy-back has occurred, will be based on market value which will be determined by averaging estimates of market value obtained from as many vessel surveyors or brokers as the Secretary deems practicable;

(2) Compensation for capital equipment other than vessel, will be based on depreciated replacement cost;

(3) Compensation for expendable items and crew's belongings will be 50 percent of their replacement costs; and

(4) Compensation for confiscated catch will be for full value, based on the price-per-pound.

(b) *Fuel expense*. Compensation for fuel expenses will be based on the purchase price, the time required to run to and from the fishing grounds, the detention time in port, and the documented fuel consumption of the vessel.

(c) *Stolen or confiscated property*. If the claimant was required to buy back confiscated property from the foreign country, the claimant may apply for reimbursement of such charges under section 3 of the Act. Any other property confiscated is reimbursable from this Guaranty Fund. Confiscated property is divided into the following categories:

(1) Compensation for confiscation of vessels, where no buy-back has occurred, will be based on market value which will be determined by averaging estimates of market value obtained from as many vessel surveyors or brokers as the Secretary deems practicable;

(2) Compensation for capital equipment other than a vessel, will be based on depreciated replacement cost;

(3) Compensation for expendable items and crew's belongings will be 50 percent of their replacement cost; and

(4) Compensation for confiscated catch will be for full value, based on the price-per-pound.

(d) *Insurance proceeds*. No payments will be made from the Fund for losses covered by any policy of insurance or other provisions of law.

(e) [Reserved]

(f) *Appeals*. All determinations under this section are final and are not subject to arbitration or appeal.

§ 33.10 Payments.

The Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, will pay the claimant the amount calculated under § 33.9. Payment will be made as promptly as practicable, but may be delayed pending the appropriation of sufficient funds, should fee collections not be adequate to sustain the operation of the Fund. The Director shall notify the claimant of the amount approved for payment as promptly as practicable and the same shall thereafter constitute a valid, but non-interest bearing obligation of the Government. Delays in payments are not a direct consequence of seizure and detention and cannot therefore be construed as increasing the compensable period for lost fishing time. If there is a question about distribution of the proceeds of the claim, the Director may request proof of interest from all parties, and will settle this issue.

§ 33.11 Records.

The Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs will have the right to inspect claimants' books and records as a precondition to approving claims. All claims must contain written authorization of the guaranteed party for any international, federal, state, or local governmental Agencies to provide the Office Director, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs any data or information pertinent to a claim.

§ 33.12 Penalties.

Persons who willfully make any false or misleading statement or representation to obtain compensation from the Fund are subject to criminal prosecution under 22 U.S.C. 1980(g). This provides penalties up to $25,000 or imprisonment for up to one year, or both. Any evidence of criminal conduct will be promptly forwarded to the United States Department of Justice for action. Additionally, misrepresentation, concealment, or fraud, or acts intentionally designed to result in seizure, may void the guaranty agreement.

PART 34—DEBT COLLECTION

Subpart A—General Provision

Subpart B—Collection Actions

Subpart C—Salary Offset

Subpart D—Collection Adjustments

AUTHORITY: 31 U.S.C. 3701–3719; 5 U.S.C. 5514; 31 C.F.R. part 285; 31 CFR parts 900–904; 5 CFR 550 subpart K.

SOURCE: 71 FR 16482, Apr. 3, 2006, unless otherwise noted.

Subpart A—General Provisions

§ 34.1 Purpose.

These regulations prescribe the procedures to be used by the United States Department of State (STATE) in the collection of debts owed to STATE and to the United States.

§ 34.2 Scope.

(a) Except as set forth in this part or otherwise provided by law, STATE will conduct administrative actions to collect debts (including offset, compromise, suspension, termination, disclosure and referral) in accordance

with the Federal Claims Collection Standards (FCCS) of the Department of the Treasury and Department of Justice, 31 CFR parts 900–904.

(b) This part is not applicable to STATE claims against another Federal agency, any foreign country or any political subdivision thereof, or any public international organization.

§ 34.3 Exceptions.

(a) Debts arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated, or settled in accordance with the regulations published at 41 CFR part 102–118.

(b) Debts arising out of acquisition contracts subject to the Federal Acquisition Regulation (FAR) shall be determined, collected, compromised, terminated, or settled in accordance with those regulations (see 48 CFR part 32).

(c) Debts based in whole or in part on conduct in violation of the antitrust laws, or in regard to which there is an indication of fraud, presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be referred to the Department of Justice for compromise, suspension, or termination of collection action.

(d) Tax debts are excluded from the coverage of this regulation.

§ 34.4 Definitions.

For purposes of the section:

(a) *Administrative offset* means withholding funds payable by the United States to, or held by the United States for, a person to satisfy a debt owed by the person to the United States.

(b) *Administrative wage garnishment* means the process by which a Federal agency orders a non-Federal employer to withhold amounts from a debtor's wages to satisfy a debt owed to the United States.

(c) *Compromise* means that the creditor agency accepts less than the full amount of an outstanding debt in full satisfaction of the entire amount of the debt.

(d) *Creditor agency* means the Federal agency to which a debt is owed.

(e) *Debt* or *claim* means an amount of money which has been determined to be owed to the United States from any person. A debtor's liability arising from a particular contract or transaction shall be considered a single claim for purposes of the monetary ceilings of the FCCS.

(f) *Debtor* means a person who owes the Federal government money.

(g) *Delinquent debt* means a debt that has not been paid by the date specified in STATE's written notification or applicable contractual agreement, unless other satisfactory arrangements have been made by that date, or that has not been paid in accordance with a payment agreement with STATE.

(h) *Discharge* means the release of a debtor from personal liability for a debt. Further collection action is prohibited.

(i) *Disposable pay* means the amount that remains from an employee's current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after required deductions for Federal, State and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; normal premiums for life and health insurance benefits and such other deductions that are required by law to be withheld, excluding garnishments.

(j) *FCCS* means the Federal Claims Collection Standards published jointly by the Departments of the Treasury and Justice and codified at 31 CFR parts 900–904.

(k) *Person* means an individual, corporation, partnership, association, organization, State or local government, or any other type of entity other than a Federal agency, Foreign Government, or public international organization.

(l) *Salary offset* means the withholding of amounts from the current pay account of a Federal employee to satisfy a debt owed by that employee to the United States.

(m) *Suspension* means the temporary cessation of active debt collection pending the occurrence of an anticipated event.

(n) *Termination* means the cessation of all active debt collection action for the foreseeable future.

(o) *Waiver* means a decision to forgo collection of a debt owed to the United

States, as provided for by a specific statute and according to the standards set out under that statute.

§ 34.5 Other procedures or actions.

(a) Nothing contained in this regulation is intended to require STATE to duplicate administrative proceedings required by contract or other laws or regulations.

(b) Nothing in this regulation is intended to preclude utilization of informal administrative actions or remedies which may be available.

(c) Nothing contained in this regulation is intended to deter STATE from demanding the return of specific property or from demanding the return of the property or the payment of its value.

(d) The failure of STATE to comply with any provision in this regulation shall not serve as defense to the debt.

§ 34.6 Interest, penalties, and administrative costs.

Except as otherwise provided by statute, contract or excluded in accordance with the FCCS, STATE will assess:

(a) Interest on delinquent debts in accordance with 31 CFR 901.9.

(b) Penalties at the rate of 6 percent a year or such other rate as authorized by law on any portion of a debt that is delinquent for more than 90 days.

(c) Administrative costs to cover the costs of processing and calculating delinquent debts.

(d) Late payment charges under paragraphs (a) and (b) of this section shall be computed from the date of delinquency.

(e) When a debt is paid in partial or installment payments, amounts received shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and then to outstanding principal.

(f) STATE shall consider waiver of interest, penalties and/or administrative costs in accordance with the FCCS, 31 CFR 901.9(g).

§ 34.7 Collection in installments.

Whenever feasible, and except as required otherwise by law, debts owed to the United States, together with interest, penalties, and administrative costs as required by this regulation, should be collected in one lump sum. This is true whether the debt is being collected under administrative offset, including salary offset, or by another method, including voluntary payment. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments. If STATE agrees to accept payment in installments, it may require a legally enforceable written agreement from the debtor that specifies all of the terms of the arrangement and which contains a provision accelerating the debt in the event the debtor defaults. The size and frequency of the payments should bear a reasonable relation to the size of the debt and ability of the debtor to pay. If possible, the installment payments should be sufficient in size and frequency to liquidate the Government's claim within 3 years.

Subpart B—Collection Actions

§ 34.8 Notice and demand for payment.

(a) STATE shall promptly hand deliver or send by first-class mail to the debtor at the debtor's most current address in the records of STATE at least one written notice. Written demand under this subpart may be preceded by other appropriate actions under this part and or the FCCS, including but not limited to actions taken under the procedures applicable to administrative offset, including salary offset.

(b) The written notice shall inform the debtor of:

(1) The basis of the debt;

(2) The amount of the debt;

(3) The date by which payment should be made to avoid the imposition of interest, penalties and administrative costs, and the enforced collection actions described in paragraph (b)(7) of this section;

(4) The applicable standards for imposing of interest, penalties and administrative costs to delinquent debts;

(5) STATE's readiness to discuss alternative payment arrangements and how the debtor may offer to enter into a written agreement to repay the debt under terms acceptable to STATE;

(6) The name, address and telephone number of a contact person or office within STATE;

(7) STATE's intention to enforce collection by taking one or more of the following actions if the debtor fails to pay or otherwise resolve the debt:

(i) Offset from Federal payments otherwise due to the debtor, including income tax refunds, salary, certain benefit payments, retirement, vendor payments, travel reimbursement and advances, and other Federal payments due from STATE, other Federal agencies, or through centralized disbursing from the Department of the Treasury;

(ii) Referral to private collection agency

(iii) Report to credit bureaus

(iv) Administrative Wage Garnishment

(v) Litigation by the Department of Justice

(vi) Referral to the Financial Management Service of the Department of the Treasury for collection

(vii) Liquidation of collateral

(viii) Other actions as permitted by the FCCS and applicable law;

(8) The debtor's right to inspect and copy records related to the debt;

(9) The debtor's right to an internal review of STATE's determination that the debtor owes a debt or the amount of the debt;

(10) The debtor's right, if any, to request waiver of collection of certain debts, as applicable (see §34.18);

(11) Requirement that the debtor advise STATE of any bankruptcy proceeding of the debtor; and

(12) Provision for refund of amounts collected if later decision finds that the amount of the debt is not owed or is waived.

(c) *Exceptions to notice requirements.* STATE may omit from a notice to a debtor one or more of the provisions contained in paragraphs (b)(7) through (b)(12) of this section if STATE determines that any provision is not legally required given the collection remedies to be applied to a particular debt, or which have already been provided by prior notice, applicable agreement, or contract.

§34.9 Requests for internal administrative review.

(a) For all collection methods for debts owed to STATE, the debtor may request a review within State of the existence or the amount of the debt. For offset of current Federal salary under 5 U.S.C. 5514 for certain debts, debtors may also request an outside hearing. See subpart C of this part. This subpart rather than subpart C applies to collections by salary offset for debts arising under 5 U.S.C. 5705 (travel advances), 5 U.S.C. 4108 (training expenses), and other statutes specifically providing for collection by salary offset.

(b) A debtor requesting an internal review shall do so in writing to the contact office by the payment due date stated within the initial notice sent under 34.8(b) or other applicable provision. The debtor's written request shall state the basis for the dispute and include any relevant documentation in support.

(1) STATE will provide for an internal review of the debt by an appropriate official. The review may include examination of documents, internal discussions with relevant officials and discussion by letter or orally with the debtor, at STATE's discretion. An oral hearing may be provided when the matter cannot be decided on the documentary record because it involves issues of credibility or veracity. Unless otherwise required by law, such oral hearing shall not be a formal evidentiary hearing. If an oral hearing is appropriate, the time and location of the hearing shall be established by STATE. An oral hearing may be conducted, at the debtor's option, either in-person or by telephone conference. All travel expenses incurred by the debtor in connection with an in-person hearing will be borne by the debtor. All telephonic charges incurred during the hearing will be the responsibility of STATE. During the period of review, STATE may suspend collection activity, including the accrual of interest and penalties, on any disputed portion of the debt if STATE determines that suspension is in the Department's best interest or would serve equity and good conscience.

(2) If after review STATE either sustains or amends its determination, it shall notify the debtor of its intent to collect the sustained or amended debt. If previously suspended, collection actions will be re-instituted unless payment of the sustained or amended amount is received or the debtor has

made a proposal for a payment plan to which STATE agrees, by the date specified in the notification of STATE's decision.

§ 34.10 Collection methods.

Upon completion of notice and provision of all due process rights as listed in 34.8(b) of this section and upon final determination of the existence and amount of a debt, unless other acceptable payment arrangements have been made or procedures under a specific statute apply, STATE shall collect the debt by one or more of the following methods:

(a) *Administrative offset.* (1) Payments otherwise due the debtor from the United States shall be offset from the debt in accordance with 31 CFR 901.3. These may be funds under the control of the Department of State or other Federal agencies. Collection may be made through centralized offset by the Financial Management Service (''FMS'') of the Department of the Treasury.

(2) Such payments include but are not limited to vendor payments, salary, retirement, lump sum payments due upon Federal employment separation, travel reimbursements, tax refunds, loans or other assistance. For offset of Federal salary payments under 5 U.S.C. 5514 for certain types of debt see subpart C of this part.

(3) Administrative offset under this subsection does not apply to debts specified in the FCCS, 31 CFR 901.3(a)(2).

(4) Before administrative offset is instituted by another Federal agency or the FMS, STATE shall certify in writing to that entity that the debt is past due and legally enforceable and that STATE has complied with all applicable due process and other requirements as described in this part and other Federal law and regulations.

(5) Administrative offset of anticipated or future benefit payments under the Civil Service Retirement and Disability Fund will be requested by STATE pursuant to 5 CFR 831.1801–1808.

(6) *Expedited offset.* STATE may effect an offset against a debtor prior to sending a notice to the debtor as described in § 34.8, when:

(i) The offset is in the nature of a recoupment,

(ii) Offset is executed pursuant to procedures set out in the Contracts Disputes Act,

(iii) Previous notice and opportunity for review have been given, or

(iv) There is insufficient time before payment would be made to the debtor/payee to allow prior notice and an opportunity for review. In such case, STATE shall give the debtor notice and an opportunity for review as soon as practicable and shall promptly refund any money ultimately found not to have been owed to the Government.

(7) Unless otherwise provided by law, administrative offset of payments under the authority of 31 U.S.C. 3716 to collect a debt may not be conducted more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official charged with the responsibility to discover and collect such debts. This limitation does not apply to debts reduced to a judgment.

(b) *Referral to private collection agency.* STATE may contract for collection services to recover delinquent debts, or transfer a delinquent debt to FMS for private collection action, pursuant to 31 U.S.C. 3718, 22 U.S.C. 2716 and the FCCS, 31 CFR 901.5, as applicable. STATE will not use a collection agency to collect a debt owed by a currently employed or retired Federal employee, if collection by salary or annuity offset is available.

(c) *Disclosure to consumer reporting agencies.* STATE may disclose delinquent debts to consumer reporting agencies and other automated databases in accordance with 31 U.S.C. 3711(e) and the FCCS, 31 CFR 901.4, and in compliance with the Bankruptcy Code and the Privacy Act 5 U.S.C. 552a.

(d) Liquidation of Collateral, if applicable, in accordance with the FCCS, 31 CFR 901.7.

(e) Suspension or revocation of eligibility for loans and loan guaranties, licenses, permits, or privileges in accordance with the FCCS, 31 CFR 901.6.

(f) *Litigation*. Debts may be referred to the Department of Justice for litigation for collection in accordance with the standards set forth in the FCCS, 31 CFR part 904.

(g) *Transfer to FMS*. Debts delinquent more than 180 days shall be transferred to the Financial Management Service of the Department of the Treasury for collection by all available means. Debts delinquent less that 180 days may also be so transferred.

(h) *Administrative wage garnishment*. STATE may collect debts from a non-Federal employee's wages by means of administrative wage garnishment in accordance with the requirements of 31 U.S.C. 3720D and 31 CFR 285.11. All parts of 31 CFR 285.11 are incorporated by reference into these regulations, including the hearing procedures described in 31 CFR 285.11(f).

(i) *Salary offset*. See subpart C of this part.

Subpart C—Salary Offset

§ 34.11 Scope.

(a) This subpart sets forth STATE's procedures for the collection of a Federal employee's current pay by salary offset to satisfy certain debts owed to the United States.

(b) This subpart applies to:

(1) Current employees of STATE and other agencies who owe debts to STATE;

(2) Current employees of STATE who owe debts to other agencies.

(c) This subpart does not apply to

(1) Offset of a separating employee's final payments or Foreign Service annuity payments which are covered under administrative offset (See § 34.10(a)),

(2) Debts or claims arising under the Internal Revenue Code of 1954 (26 U.S.C. 1 *et seq.*); the Social Security Act (42 U.S.C. 301 *et seq.*); the tariff laws of the United States.

(3) Any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over 4 pay periods or less.

(4) Any routine intra-agency adjustment of pay that is made to correct an overpayment of pay attributable to clerical or administrative errors or delays in processing pay documents, if the overpayment occurred within the 4 pay periods preceding the adjustment and, at the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and the amount of the adjustment and point of contact for contesting such adjustment.

(5) Any adjustment to collect a debt amounting to $50 or less, if, at the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and the amount of the adjustment and a point of contact for contesting such adjustment.

(d) These regulations do not preclude an employee from requesting waiver of the debt, if waiver is available under subpart D of this part or by other regulation or statute.

(e) Nothing in these regulations precludes the compromise, suspension or termination of collection actions where appropriate under subpart D of this part or other regulations or statutes.

§ 34.12 Coordinating offset with another Federal agency.

(a) When STATE is owed a debt by an employee of another agency, the other agency shall not initiate the requested offset until STATE provides the agency with a written certification that the debtor owes STATE a debt (including the amount and basis of the debt and the due date of payment) and that STATE has complied with these regulations.

(b) When another agency is owed the debt, STATE may use salary offset against one of its employees who is indebted to another agency, if requested to do so by that agency. Such request must be accompanied by a certification that the person owes the debt (including the amount and basis of the debt and the due date of payment) and that the agency has complied with its regulations as required by 5 U.S.C. 5514 and 5 CFR part 550, subpart K.

§ 34.13 Notice requirements before offset.

Except as provided in § 34.16, salary offset deductions will not be made unless STATE first provides the employee with a written notice that he/she owes a debt to the Federal Government at least 30 calendar days before salary offset is to be initiated. When STATE is the creditor agency, this notice of intent to offset an employee's salary shall be hand-delivered or sent by first class mail to the last known address that is available to the Department and will state:

(a) That STATE has reviewed the records relating to the debt and has determined that the debt is owed, its origin and nature, and the amount due;

(b) The intention of STATE to collect the debt by means of deduction from the employee's current pay until the debt and any and all accumulated interest, penalties and administrative costs are paid in full;

(c) The amount, frequency, approximate beginning date, and duration of the intended deductions;

(d) The requirement to assess and collect interest, penalties, and administrative costs in accordance with § 34.6, unless waived in accordance with § 34.6(f);

(e) The employee's right to inspect and copy any STATE records relating to the debt, or, if the employee or their representative cannot personally inspect the records, to request and receive a copy of such records;

(f) The opportunity to voluntarily repay the debt or to enter into a written agreement (under terms agreeable to STATE) to establish a schedule for repayment of the debt in lieu of offset;

(g) *Right to an internal review or outside hearing.* (1) An internal review under § 34.9 may be requested in cases of collections by salary offset for debts arising under 5 U.S.C. 5705 (travel advances), 5 U.S.C. 4108 (training expenses), and other statutes specifically providing for collection by salary offset.

(2) For all other debts, an internal review or an outside hearing conducted by an official not under the supervision or control of STATE may be requested with respect to the existence of the debt, the amount of the debt, or the repayment schedule (*i.e.*, the percentage of disposable pay to be deducted each pay period);

(h) That the timely filing of a request for an outside hearing or internal review within 30 calendar days after the date of the notice of intent to offset will stay the commencement of collection proceedings;

(i) The method and time period for requesting an internal review or outside hearing;

(j) That a final decision on the internal review or outside hearing (if one is requested) will be issued at the earliest practical date, but not later than 60 days after the filing of the request, unless the employee requests and the outside hearing official grants a delay in the proceedings;

(k) That any knowingly false or frivolous statements, representation, or evidence may subject the employee to disciplinary procedures (5 U.S.C. Chapter 75, 5 CFR part 752 or other applicable statutes or regulations); penalties (31 U.S.C. 3729–3731 or other applicable statutes or regulations); or criminal penalties (18 U.S.C. 286, 287, 1001, and 1002 or other applicable statutes or regulations);

(l) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made;

(m) That the amounts paid on the debt which are later waived or found not owed to the United States will be promptly refunded to the employee, unless there are applicable contractual or statutory provisions to the contrary; and

(n) The name and address of the STATE official to whom communications should be directed.

§ 34.14 Request for an outside hearing for certain debts.

(a) Except as provided in paragraph (d) of this section, an employee must file a request that is received by STATE not later than 30 calendar days from the date of STATE's notice described in § 34.13 if an employee wants an outside hearing pursuant to § 34.13(g)(2) concerning:

(1) The existence or amount of the debt; or

(2) STATE's proposed offset schedule.

(b) The request must be signed by the employee and should identify and explain with reasonable specificity and brevity the facts, evidence and witnesses which the employee believes support his or her position. If the employee objects to the percentage of disposable pay to be deducted from each check, the request should state the objection and the reasons for it.

(c) The employee must also specify whether an oral or paper hearing is requested. If an oral hearing is desired, the request should explain why the matter cannot be resolved by review of the documentary evidence alone.

(d) If the employee files a request for an outside hearing later than the required 30 calendar days as described in paragraph (a) of this section, STATE may accept the request if the employee can show that the delay was because of circumstances beyond his or her control or because of failure to receive notice of the filing deadline (unless the employee has actual notice of the filing deadline).

(e) An employee waives the right to an outside hearing and will have his or her pay offset if the employee fails to file a petition for a hearing as prescribed in paragraph (a) of this section.

§ 34.15 Outside hearings.

(a) If an employee timely files a request for an outside hearing under § 34.13(g)(2), pursuant to 5 U.S.C. 5514(a)(2), STATE shall select the time, date, and location of the hearing.

(b) Outside hearings shall be conducted by a hearing official not under the supervision or control of STATE.

(c) *Procedure.* (1) After the employee requests a hearing, the hearing official shall notify the employee of the form of the hearing to be provided. If the hearing will be oral, notice shall set forth the date, time and location of the hearing. If the hearing will be paper, the employee shall be notified that he or she should submit arguments in writing to the hearing official by a specified date after which the record shall be closed. This date shall give the employee reasonable time to submit documentation.

(2) *Oral hearing.* An employee who requests an oral hearing shall be provided an oral hearing if the hearing official determines that the matter cannot be resolved by review of documentary evidence alone (e.g., when an issue of credibility or veracity is involved). The hearing is not an adversarial adjudication, and need not take the form of an evidentiary hearing.

(3) *Paper hearing.* If the hearing official determines that an oral hearing is not necessary, he or she will make a decision based upon a review of the available written record.

(4) *Record.* The hearing official must maintain a summary record of any hearing provided by this subpart. Witnesses who provide testimony will do so under oath or affirmation.

(5) *Content of decision.* The written decision shall include:

(i) A statement of the facts presented to support the origin, nature, and amount of the debt;

(ii) The hearing official's findings, analysis, and conclusions; and

(iii) The terms of any repayment schedules, or the date salary offset will commence, if applicable.

(6) *Failure to appear.* In the absence of good cause shown (e.g., excused illness), an employee who fails to appear at a hearing shall be deemed, for the purpose of this subpart, to admit the existence and amount of the debt as described in the notice of intent. The hearing official shall schedule a new hearing date upon the request of the creditor agency representative when good cause is shown.

(d) A hearing official's decision is considered to be an official certification regarding the existence and amount of the debt for purposes of executing salary offset under 5 U.S.C. 5514 only. It does not supersede the finding by STATE that a debt is owed and does not affect the Government's ability to recoup the indebtedness through alternative collection methods under § 34.10.

§ 34.16 Procedures for salary offset.

Unless otherwise provided by statute or contract, the following procedures apply to salary offset:

(a) *Method.* Salary offset will be made by deduction at one or more officially established pay intervals from the current pay account of the employee without his or her consent.

(b) *Source.* The source of salary offset is current disposable pay.

(c) *Types of collection.* (1) Lump sum payment. Ordinarily debts will be collected by salary offset in one lump sum if possible. However, if the amount of the debt exceeds 15 percent of disposable pay for an officially established pay interval, the collection by salary offset must be made in installment deductions.

(2) *Installment deductions.* (i) The size of installment deductions must bear a reasonable relation to the size of the debt and the employee's ability to pay. If possible, the size of the deduction will be that necessary to liquidate the debt in no more than 1 year. However, the amount deducted for any period must not exceed 15 percent of the disposable pay from which the deduction is made, except as provided by other regulations or unless the employee has agreed in writing to a greater amount.

(ii) Installment payments of less than $25 per pay period will be accepted only in the most unusual circumstances.

(iii) Installment deductions will be made over a period of not greater than the anticipated period of employment.

§ 34.17 Non-waiver of rights by payments.

So long as there are no statutory or contractual provisions to the contrary, no employee payment (of all or a portion of a debt) collected under this subpart will be interpreted as a waiver of any rights that the employee may have under 5 U.S.C. 5514.

Subpart D—Collection Adjustments

§ 34.18 Waivers of indebtedness.

(a) Waivers of indebtedness may be granted only as provided for certain types of debt by specific statutes and according to the standards set out under those statutes.

(b) *Authorities*—(1) *Debts arising out of erroneous payments of pay and allowances.* 5 U.S.C. 5584 provides authority for waiving in whole or in part debts arising out of erroneous payments of pay and allowances, and travel, transportation and relocation expenses and allowances, if collection would be against equity and good conscience and not in the best interests of the United States.

(i) Waiver may not be granted if there exists in connection with the claim an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver.

(ii) Fault is considered to exist if in light of the circumstances the employee knew or should have known through the exercise of due diligence that an error existed but failed to take corrective action. What an employee should have known is evaluated under a reasonable person standard. Employees are, however, expected to have a general understanding of the Federal pay system applicable to them.

(iii) An employee with notice that a payment may be erroneous is expected to make provisions for eventual repayment. Financial hardship is not a basis for granting a waiver for an employee who was on notice of an erroneous payment.

(iv) If the deciding official finds no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim, the employee is not automatically entitled to a waiver. Before a waiver can be granted, the deciding official must also determine that collection of the claim against an employee would be against equity and good conscience and not in the best interests of the United States. Factors to consider when determining if collection of a claim against an employee would be against equity and good conscience and not in the best interests of the United States include, but are not limited to:

(A) Whether collection of the claim would cause serious financial hardship to the employee from whom collection is sought.

(B) Whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances.

(C) The time elapsed between the erroneous payment and discovery of the error and notification of the employee;

(D) Whether failure to make restitution would result in unfair gain to the employee;

(E) Whether recovery of the claim would be unconscionable under the circumstances.

(2) *Debts arising out of advances in pay.* 5 U.S.C. 5524a provides authority for waiving in whole or in part a debt arising out of an advance in pay if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of an advance payment would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(3) *Debts arising out of advances in situations of authorized or ordered departures.* 5 U.S.C. 5522 provides authority for waiving in whole or in part a debt arising out of an advance payment of pay, allowances, and differentials provided under this section if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of an advance payment would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(4) *Debts arising out of advances of allowances and differentials for employees stationed abroad.* 5 U.S.C. 5922 provides authority for waiving in whole or in part a debt arising out of an advance of allowances and differentials provided under this subchapter if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of an advance payment would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(5) *Debts arising out of employee training expenses.* 5 U.S.C. 4108 provides authority for waiving in whole or in part a debt arising out of employee training expenses if it is shown that recovery would be against equity and good conscience or against the public interest.

(i) Factors to be considered when determining if recovery of a debt arising out of employee training expenses would be against equity and good conscience or against the public interest include, but are not limited to:

(A) Death of the employee;

(B) Retirement of the employee for disability;

(C) Inability of the employee to return to duty because of disability (supported by an acceptable medical certificate); and

(D) Whether failure to repay would result in unfair gain to the employee.

(ii) [Reserved]

(6) *Under-withholding of life insurance premiums.* 5 U.S.C. 8707(d) provides authority for waiving the collection of unpaid deductions resulting from under-withholding of Federal Employees' Group Life Insurance Program premiums if the individual is without fault and recovery would be against equity and good conscience.

(i) Fault is considered to exist if in light of the circumstances the employee knew or should have known through the exercise of due diligence

that an error existed but failed to take corrective action.

(ii) Factors to be considered when determining whether recovery of unpaid deduction resulting from under-withholding would be against equity and good conscience include, but are not limited to:

(A) Whether collection of the claim would cause serious financial hardship to the individual from whom collection is sought.

(B) The time elapsed between the failure to properly withhold and discovery of the failure and notification of the individual;

(C) Whether failure to make restitution would result in unfair gain to the individual;

(D) Whether recovery of the claim would be unconscionable under the circumstances.

(7) *Overpayments of Foreign Service annuities.* For waiver of debts arising from overpayments from the Foreign Service Retirement and Disability Fund under the Foreign Service Retirement and Disability System or the Foreign Service Pension System see 22 CFR part 17.

(8) As otherwise provided by law.

(c) Waiver of indebtedness is an equitable remedy and as such must be based on an assessment of the facts involved in the individual case under consideration.

(d) The burden is on the employee to demonstrate that the applicable waiver standard has been met.

(e) *Requests.* A debtor requesting a waiver shall do so in writing to the contact office by the payment due date stated within the initial notice sent under § 34.8(b) or other applicable provision. The debtor's written response shall state the basis for the dispute and include any relevant documentation in support.

(f) While a waiver request is pending, STATE may suspend collection, including the accrual of interest and penalties, on the debt if STATE determines that suspension is in the Department's best interest or would serve equity and good conscience.

§ 34.19 Compromise.

STATE may attempt to effect compromise in accordance with the standards set forth in the FCCS, 31 CFR part 902.

§ 34.20 Suspension.

The suspension of collection action shall be made in accordance with the standards set forth in the FCCS, 31 CFR 903.1–903.2

§ 34.21 Termination.

The termination of collection action shall be made in accordance with the standards set forth in the FCCS, 31 CFR 903.1 and 903.3–903.4.

§ 34.22 Discharge.

Once a debt has been closed out for accounting purposes and collection has been terminated, the debt is discharged. STATE must report discharged debt as income to the debtor to the Internal Revenue Service per 26 U.S.C. 6050P and 26 CFR 1.6050P–1.

§ 34.23 Bankruptcy.

A debtor should notify STATE at the contact office provided in the original notice of the debt, if the debtor has filed for bankruptcy. STATE will require documentation from the applicable court indicating the date of filing and type of bankruptcy. Pursuant to the laws of bankruptcy, STATE will suspend debt collection upon such filing unless the automatic stay is no longer in effect or has been lifted. In general, collection of a debt discharged in bankruptcy shall be terminated unless otherwise provided for by bankruptcy law.

§ 34.24 Refunds.

(a) STATE will refund promptly to the appropriate individual amounts offset under this regulation when:

(1) A debt is waived or otherwise found not owing the United States (unless expressly prohibited by statute or regulation); or

(2) STATE is directed by an administrative or judicial order to make a refund.

(b) Refunds do not bear interest unless required or permitted by law or contract.

PART 35—PROGRAM FRAUD CIVIL REMEDIES

AUTHORITY: 31 U.S.C. 3801–3812.

SOURCE: 55 FR 23424, June 8, 1990, unless otherwise noted.

§ 35.1 General.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Public Law 99–509, sections. 6101–6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false fictitious, or fraudulent claims or written statements to authorities or to their agents; and specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

(c) *Special considerations abroad.* Where a party, witness or material evidence in a proceeding under these regulations is located abroad, the investigating official, reviewing official or ALJ, as the case may be, may adjust the provisions below for service, filing of documents, time limitations, and related matters to meet special problems arising out of that location.

§ 35.2 Definitions.

(a) *ALJ* means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

(b) *Authority* means the United States Department of State.

(c) *Authority head* means the Under Secretary for Management.

(d) *Benefit* means, in the context of ''statement,'' anything of value, including but not limited to, any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan gurarantee.

(e) *Claim* means any request, demand, or submission—

(1) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(2) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(i) For property or services if the United States—

(A) Provided such property or services;

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

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

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

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

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

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

(f) *Complaint* means the administrative complaint served by the reviewing official on the defendant under §35.7.

(g) *Defendant* means any person alleged in a complaint under §35.7 to be liable for a civil penalty or assessment under §35.3.

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

(i) *Government* means the United States Government.

(j) *Individual* means a natural person.

(k) *Initial decision* means the written decision of the ALJ required by §35.10 or §35.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

(l) *Investigating official* means the Inspector General of the Department of State or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(m) *Knows or has reason to know* means that a person, with respect to a claim or statement—

(1) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(3) Acts in reckless disregard of the truth or falsity of the claim or statement.

(n) *Makes*, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

(o) *Person* means any individual, partnership, corporation, association or private organization, and includes the plural of the term.

(p) *Representative* means an attorney who is a member in good standing of the bar of any state, territory, or possession of the United States, or of the District of Columbia, or the Commonwealth of Puerto Rico.

(q) *Representative for the Authority* means the Counsel to the Inspector General.

(r) *Reviewing official* means the chief Financial Officer of the Department or her or his designee who is—

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

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

(3) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(s) *Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for)—

(i) A contract with, or a bid or proposal for a contract with; or

(ii) A grant, loan or benefit from, the authority, or any state, political subdivision of a state, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such state, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 35.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know the following shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

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

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

(iv) Is for payment for the provision of property or services which the person has not provided as claimed.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

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

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

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

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any state or political subdivision thereof, acting for or on behalf of the authority.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 35.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued (and, in the case of a subpoena to be served outside the jurisdiction of the United States, the basis

for such service), and shall identify the records or documents sought;

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

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefore, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

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

§ 35.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 35.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 35.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 35.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 35.3;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

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

§ 35.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 35.7 only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 35.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 35.3(a) does not exceed $150,000.

(b) For purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand or submission.

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

§ 35.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official

may serve a complaint on the defendant, as provided in § 35.8.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 35.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 35.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt;

(3) Written acknowledgment of receipt by the defendant or his or her representative; or

(4) In case of service abroad authenticated in accordance with the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters.

§ 35.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

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

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 35.10. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 35.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 35.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 35.8, a notice that an initial decision will be issued under this section.

(c) If the defendant fails to answer, the ALJ shall assume the facts alleged in the complaint to be true, and, if such facts established liability under § 35.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it was issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 35.38.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

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

§ 35.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 35.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 35.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Authority.

(b) Such notice shall include—

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 35.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 35.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 35.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 35.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify herself or himself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objects shall be deemed waived

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f) If the ALJ—

(1) Determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice;

(2) Disqualifies himself or herself, the case shall be reassigned promptly to another ALJ; or

(3) Denies a motion to disqualify, the authority head may determine the mater only as part of his or her review of the initial decision upon appeal, if any.

§ 35.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oreal arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 35.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas to be served within the United States requiring the attendance of witnesses and the production of documents at depositions or at hearings. Subpoenas to be served outside the jurisdiction of the United States shall state on their face the authority therefore;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

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

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find treaties and other international agreements or federal statutes or regulations invalid.

§ 35.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

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

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

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

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 35.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 35.4(b) are based, unless such materials are subject to a privilege under federal law or classified pursuant to Executive Order. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 35.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 35.9.

§ 35.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 35.22 and 35.23, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) Motions for discovery. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 35.24.

(3) The ALJ may grant a motion for discovery only if he finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged or classified information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 35.24.

(e) Depositions. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 35.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

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

(f) Each party shall bear its own costs of discovery.

§ 35.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 35.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

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

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 35.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

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

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the day fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

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

(e) The party seeking the subpoena shall serve it in the manner prescribed in §35.8. A subpoena on a party or upon an individual under the control of a party may be served within the United States by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 35.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

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

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, classified material, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 35.25 Fees.

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

§ 35.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, a designation of the paper (e.g., motion to quash subpoena), and shall be in English or accompanied by an English translation.

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than the complaint or notice of hearing, shall be made by delivering or mailing a copy to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting

forth the manner of service, shall be proof of service.

§ 35.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

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

(c) Where a document has been served or issued by mail, or by airmail abroad, an additional five days will be added to the time permitted for any response.

§ 35.28 Motions.

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

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 35.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 35.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 35.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

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

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

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 35.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a state, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 35.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place within the United States as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 35.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the

hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 35.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence in order to make—

(1) The interrogation and presentation effective for the ascertainment of the truth;

(2) To avoid needless consumption of time; and

(3) To protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 35.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided herein, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is classified or otherwise privileged under Federal law.

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

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 35.24.

§ 35.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 35.24.

§ 35.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief.

The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 35.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 35.3; and

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 35.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all defendants with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

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

§ 35.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail within the United States, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

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

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration of the initial decision, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 35.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 35.39.

§ 35.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) No notice of appeal may be filed until the time period for filing a motion for reconsideration under § 35.38 has expired.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be

filed within 30 days after the ALJ issues the initial decision.

(4) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under § 35.38 has expired, the ALJ shall forward the record of the proceeding to the authority head.

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

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

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

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

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

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of the defendant to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 35.3 is final and is not subject to judicial review.

§ 35.40 Stays ordered by the Department of Justice.

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

§ 35.41 Stay pending appeal.

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

(b) No administrative stay is available following a final decision of the authority head.

§ 35.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 35.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 35.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 35.42 or § 35.43, or any amount agreed upon in a compromise or settlement under § 35.46, may be collected by

administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of federal taxes, then or later owing by the United States to the defendant.

§ 35.45 Deposit in Treasury of United States.

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

§ 35.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 35.42 or during the pendency of any action to collect penalties and assessments under § 35.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 35.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 35.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 35.8 within six years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of notice under § 35.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.