

Department of Veterans Affairs

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the appeal concerns documents protected by another confidentiality statute, the email transmission must contain an image of the requester's handwritten signature, such as an attachment that shows the requester's handwritten signature. In order to assure prompt processing, e-mail FOIA appeals must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA appeals; an e-mail FOIA appeal that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA appeal. Mailbox addresses designated to receive e-mail FOIA appeals are available on VA's FOIA home page. See § 1.552(a) for the pertinent Internet address.

(d) *Time limits and content of appeal.* The appeal to the VA OGC (024), or VA Office of Inspector General (50), as appropriate, must be postmarked no later than sixty (60) calendar days after the date of the adverse determination. The appeal must clearly identify the determination being appealed, including any assigned request number. Other information should also be included, such as the name of the FOIA officer, the address of the component, the date of the component's determination, if any, and the precise subject matter of the appeal. If appealing only a portion of the component's determination, the requester must specify which part of the determination he or she is appealing. Copies of the request and VA's response, if any, should be included with the appeal. An appeal is not perfected until VA either receives the information identified above or the appeal is otherwise sufficiently defined. Appeals should be marked "Freedom of Information Act Appeal." The General Counsel, Deputy General Counsel, or Assistant General Counsel with jurisdiction over information disclosure matters (024) will act on behalf of the Secretary on all appeals under this section, except those pertaining to the Office of Inspector General. The designated official in the Office of Inspector General will act on all appeals pertaining to Office of Inspector General records. A determination by the General Counsel, Deputy General Counsel, or Assistant General Counsel, or designated official within the Office of In-

spector General, will be the final VA action.

(e) *Responses to appeals.* The Office of the General Counsel or the Office of Inspector General, as applicable, will provide the requester a decision on the appeal in writing. The decision will include a brief statement of the reasons for the decision, including, if applicable, any FOIA exemptions applied and notice of the right to judicial review of the decision.

(f) *Court review.* Unless the requester has been deemed to have exhausted all administrative remedies, he or she must first appeal the adverse determination in accordance with this section before seeking review by a court.

[76 FR 51895, Aug. 19, 2011]

§ 1.560 Maintenance and preservation of records.

(a) Each component will preserve all correspondence pertaining to FOIA requests as well as copies of pertinent records, until disposition is authorized under title 44, U.S.C., or the National Archives and Records Administration's General Records Schedule 14.

(b) The FOIA Officer must maintain copies of records that are the subject of a pending request, appeal, or lawsuit under the FOIA. A copy of all records shall be provided promptly to the Office of the General Counsel upon request.

[76 FR 51895, Aug. 19, 2011]

§ 1.561 Fees.

(a) *General.* Components will charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (e) of this section or where a waiver or reduction of fees is granted under paragraph (n) of this section. The FOIA Officer will collect all applicable fees before releasing copies of requested records to the requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States. Note that fees associated with requests from VA beneficiaries, applicants for VA benefits, or other individuals, for records retrievable by their names or individual identifiers processed under 38 U.S.C. 5701 (records associated with

claims for benefits) and 5 U.S.C. 552a (the Privacy Act), will be assessed fees in accordance with the applicable regulatory fee provisions relating to VA benefits and VA Privacy Act records.

(b) *Definitions.* For purposes of assessing or determining fees, the following definitions apply:

(1) *All other requests* means a request that does not fit into any of the categories in this section.

(2) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, to include furthering those interests through litigation. To the extent possible, the FOIA Officer shall determine the use to which the requester will put the requested records. When the intended use of the records is unclear from the request or when there is reasonable cause to doubt the use to which the requester will put the records sought, the FOIA Officer will provide the requester a reasonable opportunity to submit further clarification.

(3) *Direct costs* mean expenses that VA incurs in responding to a FOIA request, including searching for and duplicating (and in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits costs) and the cost of operating duplication machinery. Direct costs do not include overhead expenses, such as the costs of space or heating and lighting of the facility where the records are kept.

(4) *Duplication* means making a copy of a record necessary to respond to a FOIA request; copies may take the form of paper, microform, audiovisual materials or machine readable-documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

(5) *Educational institution* means a pre-school, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, or an institution

of vocational education, which operates a program or programs of scholarly research. To be in this category, the FOIA Officer must make a determination that the request is authorized by and made under the auspices of a qualifying institution and that the records are sought to further a scholarly research goal of the institution and not the individual goal of the requester or a commercial goal of the institution.

(6) *Non-commercial scientific institution* means an institution that is not operated on a “commercial” basis (as that term is defined in paragraph (b)(2) of this section) and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, the requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not sought for a commercial use.

(7) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase or subscription or free distribution to the general public. These examples are not all-inclusive. As methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media that otherwise meet the criteria for news media shall be considered to be news-media entities. Freelance journalists may be regarded as working for a news-media entity if they can demonstrate a solid basis for

expecting publication through that entity, even though not actually employed by it. A publication contract would be the clearest proof, but the requester's publication history may also be considered. To be in this category, the requester must not be seeking the requested records for a commercial use; a records request supporting the requester's news-dissemination function shall not be considered to be for a commercial use.

(8) *Review* means examining a record including audiovisual, electronic mail, data bases, documents and the like in response to a commercial use request to determine whether any portion of it is exempt from disclosure. Review includes the deletion of exempt material or other processing necessary to prepare the record(s) for disclosure. Review time includes time spent contacting any submitter and considering or responding to any objections to disclosure made by a submitter under § 1.558(d) but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if, after review, a record is not disclosed.

(9) *Search* means the process of looking for and retrieving records that are responsive to a request, including line-by-line or page-by-page identification of responsive information within records. *Search* also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The component will conduct searches in the most efficient and least expensive manner reasonably possible. The FOIA Officer may charge for time spent searching even if he or she does not locate any responsive record(s) or if any record(s) located is withheld as entirely exempt from disclosure.

(c) *Categories of requesters and fees to be charged each category.* There are four categories of FOIA requesters: Commercial use requesters, educational and non-commercial scientific institutional requesters, representatives of the news media, and all other requesters. Unless a waiver or reduction of fees is granted under paragraph (n) of this section or is limited in accordance with paragraph (e) of this section, specific levels

of fees will be charged for each category as follows:

(1) *Commercial use requesters.* Subject to the limitations in paragraph (e) of this section, commercial use requesters will be charged the full direct costs of the search, review, and duplication of records sought. Commercial use requesters are not entitled to 2 hours of free search time or the first 100 pages of reproduced documents free of charge.

(2) *Educational and non-commercial scientific institution requesters.* Subject to the limitations in paragraph (e) of this section, educational and non-commercial scientific institution requesters will be charged for the cost of reproduction only, excluding charges for the first 100 pages.

(3) *Representative of the news media.* Subject to the limitations in paragraph (e) of this section, representatives of the news media will be charged for the cost of reproduction only, excluding charges for the first 100 pages.

(4) *All other requesters.* Subject to the limitations in paragraph (e) of this section, a requester who does not fit into any of the categories in this section will be charged fees to recover the full, reasonable direct cost of searching for and reproducing records responsive to a request, except that the first 2 hours of search time and the first 100 pages of reproduction will be furnished without cost.

(d) *Fees to be charged.* The following fees will be used when calculating the fee owed pursuant to a request or appeal. The fees also apply to making documents available for public inspection and copying under § 1.553 of this part.

(1) *Search.* (i) *Search fees.* When a FOIA Officer determines that a search fee applies, the fee will be based on the hourly salary of VA personnel performing the search, plus 16 percent of the salary. The type and number of personnel involved in addressing the request or appeal depends on the nature and complexity of the request and responsive records. Fees are charged in quarter hour increments.

(ii) *Computer search.* In cases where a computer search is required, the requester will be charged the direct costs

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of conducting the search, although certain requesters (as provided in paragraph (e)(1) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (e)(4) of this section) will be entitled to the cost of 2 hours of employee search time without charge. When a computer search is required, VA will combine the hourly cost of operating the computer with the employee's salary, plus 16 percent of the salary. When the cost of the search (including the employee time, to include the cost of developing a search methodology, and the cost of the computer to process a request) equals the dollar amount of 2 hours of the salary of the employee performing the search, VA will begin to assess charges for a computer search.

(2) *Duplication.* When a duplication fee applies, the FOIA Officer will charge a fee of 15 cents per one-sided page for a paper photocopy of a record; no more than one copy will be provided. For other forms of duplication, including electronic copies, the FOIA Officer will charge the direct costs of that duplication.

(3) *Review.* When review fees apply, review fees will be charged at the initial level of review only, when the component responsible for processing the request determines whether an exemption applies to a record or portion of a record. For review at the appeal level, no fee will be charged for an exemption that has already been applied and is determined to still apply. However, record or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable. Review fees will be charged at the same rates as those charged for search under paragraph (d)(1) of this section.

(e) *Limitations on charging fees.* (1) No search fee will be charged for requests by educational institutions, non-commercial scientific institutions, or representatives of the news media.

(2) No search or review fee will be charged for a quarter hour period unless more than half of that period is required for search or review.

(3) No search fee (or duplication fee, when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or a representative of the news media) will be charged in accordance with this section if the agency fails to comply with the time limit under §1.556(a), and if no unusual or exceptional circumstances apply to the processing of the request pursuant to §1.556(c). Duplication and search fees may still be charged to commercial use requesters. Duplication fees may still be charged for "all other" requesters.

(4) Except for requesters seeking records for a commercial use, the following will be provided without charge:

(i) The first 100 pages of duplication (or the cost equivalent).

(ii) The first 2 hours of search time (or the cost equivalent).

(5) Whenever a total fee calculated under paragraph (d) of this section is less than \$25.00, no fee will be charged.

(6) VA may provide free copies of records or free services in response to an official request from other government agencies and Congressional offices and when a component head or designee determines that doing so will assist in providing medical care to a VA patient or will otherwise assist in the performance of VA's mission.

(f) The following table summarizes the chargeable fees for each category of requester.

Category	Search fees	Review fees	Duplication fees
(1) Commercial Use	Yes	Yes	Yes.
(2) Educational Institution.	No	No	Yes (100 pages free).
(3) Non-Commercial Scientific Institution.	No	No	Yes (100 pages free).
(4) News Media	No	No	Yes (100 pages free).
(5) All other	Yes (2 hours free)	No	Yes (100 pages free).

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(g) *Fee schedule.* If it is determined that a fee will be charged for processing the FOIA request, VA will charge the requester to search for, review, and duplicate the requested records according to his or her fee category (see § 1.561(c)) and the following fee schedule. In addition, VA will charge the requester for any special handling or services performed in connection with processing the request and/or appeal. The following fees will be used by VA; these fees apply to services performed in making documents available for public inspection and copying under § 1.553 as well. The duplicating fees also are applicable to records provided in response to requests made under the Privacy Act. Fees will not be charged under either the FOIA or the Privacy Act where the total amount of fees for processing the request is \$25.00 or less or where the requester has met the requirements for a statutory fee waiver.

(1) Search and review (review applies to commercial-use requesters only). Fees are based on the average hourly salary (base salary plus DC locality payment), plus 16 percent for benefits, of employees in the following three categories. Fees will be increased annually consistent with Congressionally approved pay increases. Fees are charged in quarter-hour increments.

- (i) Clerical—Based on GS-6, Step 5, pay (all employees at GS-7 and below).
- (ii) Professional—Based on GS-11, Step 7, pay (all employees at GS-8 through GS-12).
- (iii) Managerial—Based on GS-14, Step 2, pay (all employees at GS-13 and above).

NOTE TO PARAGRAPH (g)(1): Fees for the current fiscal year are posted on VA's FOIA home page (see § 1.552(a) for the pertinent Internet address).

(2) Schedule of fees:

Activity	Fees
(i) Duplication of standard size (8½"×11"; 8½"×14"; 11"×14") paper records.	\$0.15 per page.
(ii) Duplication of non-paper items (e.g., x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings), or other items which do not fall under category (1), in paragraph (c)(1) of this section.	Direct cost to VA.
(iii) Record search by manual (non-automated) methods	Basic hourly salary rate of the employee(s), plus 16 percent. *Note—If a component uses a single class of personnel for a search, e.g., all clerical or professional, an average rate for the grades of employees involved in the search may be used.
(iv) Record search using automated methods, such as by computer.	Direct cost to perform search.
(v) Record review (for Commercial Use Requesters only)	Basic hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
(vi) Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the federal government is not a party to, and does not have an interest in, the litigation.	Direct cost to VA.

(h) *Notification of fee estimate or other fee issues.* (1) Threshold for charging fees: VA will not charge the requester if the fee is \$25.00 or less.

(2) When a FOIA Officer determines or estimates that the fees to be charged under this section will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify the requester in writing of the actual or es-

timated amount of the fees, and ask the requester to provide written assurance of the payment of all fees or fees up to a designated amount, unless he or she has indicated a willingness to pay fees as high as those anticipated. Any such agreement to pay the fees shall be memorialized in writing. In addition, when the requester does not provide sufficient information upon which VA can identify a fee category

(see paragraphs (c)(1) through (4) of this section), or an issue otherwise arises regarding fee assessment, the FOIA Officer may seek clarification from the requester. In either case, the timeline for responding to the request will be tolled and no further work will be done on it until the fee issue has been resolved. If VA does not receive a written response within ten (10) days after contacting the requester regarding a fee issue, it will assume that the requester no longer wishes to pursue the request and will close the file on the request.

(i) *Charges for other services.* Apart from the other provisions of this section, when special service, such as certifying that records are true copies or sending them by other than ordinary mail, is requested, and the FOIA Officer chooses to provide such a service as a matter of administrative discretion, the direct costs of providing the service ordinarily will be charged.

(j) *Charging interest.* The FOIA Officer may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue until payment is received by the component. Components will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(k) *Aggregating requests.* Whenever a FOIA Officer reasonably believes that a requester or group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the FOIA Officer may aggregate those requests and charge accordingly. FOIA Officers may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, the FOIA Officer will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(1) *Advance payments.* (1) For requests other than those described in paragraphs (1)(2) and (1)(3) of this section, a FOIA Officer shall not require the requester to make an advance payment—in other words, a payment made before work is begun or continued on a request. Payment owed for work already completed (*i.e.*, a prepayment before copies are sent to the requester) is not an advance payment.

(2) Where a FOIA Officer determines or estimates that a total fee to be charged under this section will be more than \$250.00, the FOIA Officer may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request.

(3) Where the requester previously has failed to pay a properly charged FOIA fee to any component within thirty (30) days of the date of billing, a FOIA Officer may require the requester to pay the full amount due, plus any applicable interest as specified in this section, and to make an advance payment of the full amount of any anticipated fee, before the FOIA Officer begins to process a new request or continues to process a pending request from that requester.

(4) When the requester has a history of prompt payment, the FOIA Officer may accept a satisfactory assurance of full payment from the requester rather than an advance payment.

(5) In cases in which a FOIA Officer requires advance payment or payment is due under this section, the timeline for responding to the request will be tolled and further work will not be done on it until the required payment is received.

(m) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. Where records responsive to requests are maintained for distribution by agencies operating such statutorily-based fee schedule programs, the FOIA Officer will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(n) *Requirements for waiver or reduction of fees.* (1) Waiving or reducing fees. Fees for processing the request may be waived if the requester meets the criteria listed in this section. The requester must submit adequate justification for a fee waiver; without adequate justification, the request will be denied. The FOIA Officer may, at his or her discretion, communicate with the requester to request additional information, if necessary, regarding the fee waiver request. If such additional information is not received within ten (10) business days, VA will assume that the requester does not agree to pay the required fees and the file will be closed pending receipt of the requester's notice that he or she will pay the required fee. Requests for fee waivers are decided on a case-by-case basis; receipt of a fee waiver in the past does not establish entitlement to a fee waiver each time a request is submitted.

(2) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (d) of this section where a FOIA Officer determines, based on all available evidence, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(3) To determine whether the fee waiver requirement under paragraph (n)(2)(i) of this section is met, the FOIA Officer will consider the following factors:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.* The disclosable portions of

the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.* The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The FOIA Officer will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is important enough to be made public.

(4) To determine whether the fee waiver requirement under paragraph (n)(2)(ii) of this section is met, the FOIA Officer will consider the following factors:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* The FOIA Officer shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b)(2) of this section), or of any person on whose behalf the requester may be

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acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”*

A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The FOIA Officer ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(5) Where only some of the records to be released satisfy the requirements for a waiver of fees, a fee waiver will be granted only for those records which so qualify.

(6) Requests for the waiver or reduction of fees should address the factors listed in paragraph (n)(3) and (4) of this section, insofar as they apply to each request. FOIA Officers will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in this decision-making process, however, in deciding to grant waivers or reductions of fees.

(7) An appeal from an adverse fee determination will be processed in accordance with § 1.559.

(8) When considering a request for fee waiver, VA may require proof of identity.

[76 FR 51895, Aug. 19, 2011]

§ 1.562 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclo-

sure of any record to which such person is not entitled under the FOIA.

(Authority: Sections 1.550 to 1.562 issued under 72 Stat. 1114; 38 U.S.C. 501)

[76 FR 51895, Aug. 19, 2011]

SAFEGUARDING PERSONAL INFORMATION IN DEPARTMENT OF VETERANS AFFAIRS RECORDS

NOTE: Sections 1.575 through 1.584 concern the safeguarding of individual privacy from the misuse of information from files, records, reports, and other papers and documents in Department of Veterans Affairs custody. As to the release of information from Department of Veterans Affairs claimant records see § 1.500 series. As to the release of information from Department of Veterans Affairs records other than claimant records see § 1.550 series. Section 1.575 series implement the provisions of Pub. L. 93–579, December 31, 1974, adding a section 552a to title 5 U.S.C. providing that individuals be granted access to records concerning them which are maintained by Federal agencies, and for other purposes.

SOURCE: 40 FR 33944, Aug. 12, 1975, unless otherwise noted.

§ 1.575 Social security numbers in veterans' benefits matters.

(a) Except as provided in paragraph (b) of this section, no one will be denied any right, benefit, or privilege provided by law because of refusal to disclose to the Department of Veterans Affairs a social security number.

(b) VA shall require mandatory disclosure of a claimant's or beneficiary's social security number (including the social security number of a dependent of a claimant or beneficiary) on necessary forms as prescribed by the Secretary as a condition precedent to receipt or continuation of receipt of compensation or pension payable under the provisions of chapters 11, 13 and 15 of title 38, United States Code, provided, however, that a claimant shall not be required to furnish VA with a social security number for any person to whom a social security number has not been assigned. VA may also require mandatory disclosure of an applicant's social security number as a condition for receiving loan guaranty benefits and a social security number or other taxpayer identification number from existing direct and vendee loan borrowers and as a condition precedent to receipt