

National Mediation Board

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may, in lieu of a transcript or electronic recording, maintain a set of minutes fully and accurately summarizing any action taken, the reason therefor and views thereof, documents considered, and the members' vote on each roll call vote.

(b) The agency shall maintain a complete verbatim transcript, a complete electronic recording, or a complete set of minutes for each meeting or portion thereof closed to public observation, for a period of at least one year after the close of the agency proceeding of which the meeting was a part, but in no event for a period of less than two years after such meeting.

(c) The agency shall make promptly available to the public copies of transcripts, electronic recordings or minutes maintained as provided in paragraphs (a) and (b) of this section, except to the extent the items therein contain information which the agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552b(c).

(d) Upon request in accordance with the provisions of this paragraph and except to the extent they contain information which the agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552b(c), copies of transcripts or minutes, or transcriptions of electronic recordings including the identification of speakers, shall be furnished subject to the payment of duplication costs in accordance with the schedule of fees set forth in § 1208.06 of the Board's Rules, and the actual cost of transcription. Requests for copies of transcripts or minutes, or

transcriptions of electronic recordings of Board meetings shall be directed to the Chief of Staff, National Mediation Board, Washington, DC 20572. Such requests shall reasonably identify the records sought and include a statement that whatever costs are involved in furnishing the records will be acceptable or, alternatively, that costs will be acceptable up to a specified amount. The Board may determine to require prepayment of such costs.

[42 FR 60739, Nov. 29, 1977, as amended at 64 FR 40287, July 26, 1999]

§ 1209.09 Requests for records under Freedom of Information Act.

Requests to review or obtain copies of agency records other than notices or records prepared under this part may be pursued in accordance with the Freedom of Information Act (5 U.S.C. 552). Part 1208 of the Board's Rules addresses the requisite procedures under that Act.

§ 1209.10 Capacity of public observers.

The public may attend open Board meetings for the sole purpose of observation. Observers may not participate in meetings unless expressly invited or otherwise interfere with the conduct and disposition of agency business. When a portion of a meeting is closed to the public, observers will leave the meeting room upon request to enable discussion of the exempt matter therein under consideration.

PARTS 1210–1299 [RESERVED]

CHAPTER XII—FEDERAL MEDIATION AND CONCILIATION SERVICE

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PART 1400—STANDARDS OF CONDUCT, RESPONSIBILITIES, AND DISCIPLINE

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APPENDIX TO PART 1400—CODE OF PROFESSIONAL CONDUCT FOR LABOR MEDIATORS

AUTHORITY: E.O. 11222, 30 FR 6469, 3 CFR, 1965 Supp.; 5 CFR 735.104.

SOURCE: 33 FR 5765, Apr. 13, 1968, unless otherwise noted.

Subpart A—General

§ 1400.735-3 Advice and counseling service.

The Director will designate a counselor for the Service on all matters relating to the conduct and responsibilities of employees, and special Government employees, under the Executive order. The counselor is responsible for providing individual employees with interpretations on questions of conflicts of interest, and other matters covered by this part. (Due to the small size of the Federal Mediation and Conciliation Service, it is unrealistic to designate deputy counselors, and therefore, all questions concerning matters covered in this part should be directed to the one counselor appointed by the Director.)

Subpart B—Employees: Ethical and Other Conduct and Responsibilities

§ 1400.735-12 Outside employment, business activities, or interests (paid or unpaid).

(a) *Outside employment.* (1) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment.

(2) Outside employment limitations in paragraph (a)(1) of this section do not preclude an employee from:

(i) Receipt of a bona fide reimbursement, unless prohibited by law, for actual expenses for travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency order.

(ii) Participation in the activities of national or State political parties not prohibited by law.

(iii) Participation in the affairs of, or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, non-profit educational and recreational, public service, or civic organization.

(3) Incompatible activities referred to in paragraph (a)(1) of this section include, but are not limited to:

(i) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interests; or

(ii) Outside employment if it is determined that engaging in the proposed outside activity might:

(a) Influence or conflict with the employee's decisions or actions in planning, interpreting, or executing policies, programs, and work assignments of the Service;

(b) Injure relations of the Service with the public;

(c) Impair the employee's physical capacity to render proper and efficient service at all times;

(d) Interfere with the impartial performance or jeopardize acceptability of the employee in his work;

(e) Conflict with the employee's normal office hours, including an allowance for sufficient time for travel to place of outside employment or activity. (Normal office hours will be considered as those which are established for the specific office in which the employee works.) In the absence of extenuating circumstances, approval generally will not be granted where the outside activity requires presence of the employee prior to 6 p.m.

NOTE: Teaching activities are not approved automatically, but rather on the basis of time required, appropriate subject matter, etc.

(4) The Service, as a matter of policy, does not look upon any outside employment or business activity, including concurrent employment by the Federal Mediation and Conciliation Service and any other Governmental political subdivision or agency, as being consistent with the best interests of the Service.

(5) Employees may not engage in any outside employment, including teaching, lecturing, or writing, which might reasonably result in a conflict of interest, or an apparent conflict of interest, between the private interests of the employee and his official government duties and responsibilities. No employee shall directly or indirectly accept, engage in, or continue in any outside employment or business activity, full- or part-time, paid or unpaid, without advance written approval (including teaching or lecturing).

(b) *Private compensation.* An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(c) *Teaching, writing and lecturing.* (1) Teaching, writing and lecturing by Federal employees are generally to be encouraged so long as the laws, general standards, and regulations pertaining to conflicts of interest and the standards and regulations in this part applying to outside employment are ob-

served. Teaching commitments will generally be limited to one class, course, or assignment during a concurrent period. These activities frequently serve to enhance the employee's value to the Service, as well as to increase the spread of knowledge and information in our society. Such activities, if remuneration is anticipated, must not be dependent on information obtained as a result of the employee's official government position if such information is not available to others, at least on request.

(2) This provision does not, of course, prevent the Director from authorizing an employee to base his writings or lectures on nonpublic materials in the Federal Mediation and Conciliation Service files (not involving national security) when this will be done in the public interest. Personal research relating to mediation, collective bargaining and labor management relations is encouraged as a progressive step in self-development. The writing of articles in this area, which may be released or submitted for publication, is also encouraged. Research and writing are not considered official activity, and therefore may not be undertaken on duty time; and the author may receive compensation for publication thereof. Advance approval by the Director, before undertaking the research or writing, is not required. However, when such research is undertaken, or such article is being written on the basis of an official assignment, the work will be performed on duty time and the product will be the property of the Service.

(3) If any type of article, when published or released, will identify the author in any manner as an employee of the Service, such identification necessarily implies that the article reflects either the official policy or the philosophies of the Service. For that reason, it must be submitted to the Director before release or publication, or it must contain a disclaimer phrase to the effect that the article or statement does not necessarily reflect the official policy or philosophies of the Service.

(d) *Procedure for approval of outside employment or teaching.* Clerical and administrative employees' approval for outside activity shall be in writing and

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may be granted by the Regional Director, if a regional employee, or by the Director of Administrative Management, if a national office employee. Approval for such outside activity for all other employees of the Service shall be granted by the Director or his designee. Requests for approval shall be made in writing through the employee's supervisor and must contain the following:

- (1) The name and address of the employer or business activity;
- (2) The exact nature of the work or employment;
- (3) Working hours.

[33 FR 5765, Apr. 13, 1968, as amended at 58 FR 35377, July 1, 1993]

§ 1400.735-19 Influencing Members of Congress.

No money appropriated to the Service shall be used by any employee of the Service to pay for any personal service, printed or written matter, or other devices intended to influence any Member of Congress regarding any legislation or appropriation before the Congress.

§ 1400.735-20 Code of Professional Conduct for Labor Mediators.

In 1964, a Code of Professional Conduct for Labor Mediators was drafted by a Federal-State Liaison Committee and approved by the Service and the Association of Labor Mediation Agencies at its annual meeting. It is expected that mediators in the Federal Mediation and Conciliation Service will make themselves familiar with this Code and will conduct themselves in accordance with the responsibilities outlined therein. The complete narrative of the Code appears in the appendix to this part.

§ 1400.735-21 Miscellaneous statutory provisions.

Each employee shall acquaint himself with the statutes that relate to his ethical and other conduct as an employee of the Federal Mediation and Conciliation Service and of the Government. The attention of all employees is directed to the following statutory provisions and to the accompanying chart of penalties and statutory references:

(a) House Concurrent Resolution 175, 85th Congress, 2d session, 72 Stat. B12, the "Code of Ethics for Government Service."

(b) Chapter 11 of title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibitions against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(g) The provisions relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a (c)).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination of personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibitions against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibitions against political activities in subchapter III of chapter

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73 of title 5, United States Code and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

(r) Penalties: The following table, copied from the Federal Personnel Manual, lists maximum penalties for some of the more serious offenses.

Prohibition	Statute and United States Code	Maximum penalty
A-1. Gifts to official superiors	5 U.S.C. 7351	Removal.
A-2. Conflicts of interest:		
a. Receiving compensation in relation to claims contracts, etc.	18 U.S.C. 203	\$10,000 fine; 2 years imprisonment or both; and removal.
b. Prosecuting claims against and other matters affecting the Government.	18 U.S.C. 205	\$10,000 fine; 2 years imprisonment or both.
c. Prosecuting claims involving matters connected with former duties—disqualification of partners.	18 U.S.C. 207	\$10,000 fine; 2 years imprisonment or both.
d. Interested persons acting as Government agents.	18 U.S.C. 208	\$10,000 fine; 2 years imprisonment or both.
e. Salaries from other than Government sources.	18 U.S.C. 209	\$5,000 fine; 1 year imprisonment or both.
A-3. Lobbying with appropriated funds	18 U.S.C. 1913	\$500 fine; 1 year imprisonment or both; and removal.
A-4. Denial of rights to petition Congress	5 U.S.C. 7102	No specific penalty provided.
A-5. Failure to make return or report	18 U.S.C. 2075	\$1,000 fine.
A-6. Disloyalty and striking	5 U.S.C. 7311; 18 U.S.C. 1918.	\$1,000 fine, 1 year and a day imprisonment or both; and removal.
A-7. Employment of member of proscribed communist organization.	50 U.S.C. 784 et seq	\$10,000 fine; 5 years imprisonment or both; and removal.
A-8. Disclosure of classified information	18 U.S.C. 798; 50 U.S.C. 783.	\$10,000 fine; 10 years imprisonment or both; and removal.
A-9. Disclosure of confidential information	18 U.S.C. 1905	\$1,000 fine; 1 year imprisonment or both; and removal.
A-10. Habitual use of intoxicants to excess	5 U.S.C. 7352	Removal.
A-11. Misuse of Government vehicles	31 U.S.C. 638a(c)	Removal.
A-12. Misuse of franking privilege	18 U.S.C. 1719	\$300 fine.
A-13. Deceit in examinations and personnel actions.	5 U.S.C. 1917	\$1,000 fine; 1 year imprisonment or both.
A-14. Fraud and false statements	18 U.S.C. 1001	\$10,000 fine; 5 years imprisonment or both.
A-15. Unlawful mutilating or destroying public records.	18 U.S.C. 2071(b)	\$2,000 fine; 3 years imprisonment or both; and removal.
A-16. Bribery and graft:		
a. Bribery of public officials	18 U.S.C. 201	\$20,000 fine or three times the money or thing received, whichever is greater; 15 years imprisonment or both; and removal.
b. Acceptance or solicitation to obtain appointive office.	18 U.S.C. 211	\$1,000 fine; 1 year imprisonment or both.
A-17. Counterfeiting and forgery of transportation requests.	18 U.S.C. 508	\$5,000 fine; 10 years imprisonment or both.
A-18. Embezzlement and theft:		
a. Taking money, property, or records	18 U.S.C. 641	\$10,000 fine; 10 years imprisonment or both.
b. Failure to render accounts for public money.	18 U.S.C. 643	Fine equal to amount embezzled; imprisonment not more than 10 years or both.
c. Wrongfully converting property of another ..	18 U.S.C. 654	Same as penalty immediately above.
A-19. Taking or using papers related to claims	18 U.S.C. 285	\$5,000 fine; 5 years imprisonment or both.

Subpart F—Disciplinary Actions and Penalties

§ 1400.735-60 **Disciplinary actions.**

The Service shall take prompt disciplinary action against an employee committing prohibited activity, or whose conduct is prejudicial to the best interests of the Service, or of a nature to bring discredit to it. There are four

major types of disciplinary action possible, following the above proceedings.

(a) *Reprimand*. An official reprimand usually shall be issued to an employee or special Government employee for a first offense which is not serious.

(b) *Suspension*. Under Civil Service and Federal Mediation and Conciliation Service regulations, an employee or special Government employee may

be suspended without pay during the course of an investigation of alleged criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct. Also, an employee may be suspended without pay for a definite period of time because of some offense of a less serious nature for which more drastic action is not justified.

(c) *Demotion.* When such action will "promote the efficiency of the Service," an employee or special Government employee may be demoted because of some offense for which more drastic action is not justified.

(d) *Separation.* The Service is responsible for the prompt dismissal of unsatisfactory, incompetent, or unfit employees. Separation (dismissal or removal) can be the penalty for a single breach of conduct that is extremely serious in nature.

§ 1400.735-61 Notice to and appeal of employee.

The Director of Administrative Management will prepare charges and institute proceedings, which in all cases will be in accordance with Civil Service procedures for disciplinary actions against status employees. Such proceedings will include notification to the employee of his appeal rights.

APPENDIX TO PART 1400—CODE OF PROFESSIONAL CONDUCT FOR LABOR MEDIATORS

PREAMBLE

The practice of mediation is a profession with ethical responsibilities and duties. Those who engage in the practice of mediation must be dedicated to the principles of free and responsible collective bargaining. They must be aware that their duties and obligations relate to the parties who engage in collective bargaining, to every other mediator, to the agencies which administer the practice of mediation, and to the general public.

Recognition is given to the varying statutory duties and responsibilities of the city, State and Federal agencies. This code, however, is not intended in any way to define or adjust any of these duties and responsibilities, nor is it intended to define when and in what situations mediators from more than one agency should participate. It is, rather, a personal code relating to the conduct of the individual mediator.

This code is intended to establish principles applicable to all professional medi-

ators employed by city, State or Federal agencies or to mediators privately retained by parties.

I. *The responsibility of the mediator to the parties.* The primary responsibility for the resolution of a labor dispute rests upon the parties themselves. The mediator at all times should recognize that the agreements reached in collective bargaining are voluntarily made by the parties. It is the mediator's responsibility to assist the parties in reaching a settlement.

It is desirable that agreement be reached by collective bargaining without mediation assistance. However, public policy and applicable statutes recognize that mediation is the appropriate form of governmental participation in cases where it is required. Whether and when a mediator should intercede will normally be influenced by the desires of the parties. Intercession by a mediator on his own motion should be limited to exceptional cases.

The mediator must not consider himself limited to keeping peace at the bargaining table. His role should be one of being a resource upon which the parties may draw and, when appropriate, he should be prepared to provide both procedural and substantive suggestions and alternatives which will assist the parties in successful negotiations.

Since mediation is essentially a voluntary process, the acceptability of the mediator by the parties as a person of integrity, objectivity, and fairness is absolutely essential to the effective performance of the duties of the mediator. The manner in which the mediator carries out his professional duties and responsibilities will measure his usefulness as a mediator. The quality of his character as well as his intellectual, emotional, social and technical attributes will reveal themselves by the conduct of the mediator and his oral and written communications with the parties, other mediators and the public.

II. *The responsibility of the mediator toward other mediators.* A mediator should not enter any dispute which is being mediated by another mediator or mediators without first conferring with the person or persons conducting such mediation. The mediator should not intercede in a dispute merely because another mediator may also be participating. Conversely, it should not be assumed that the lack of mediation participation by one mediator indicates a need for participation by another mediator.

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments which are essential to a cooperative effort, and should extend every possible courtesy to his fellow mediator.

The mediator should carefully avoid any appearance of disagreement with or criticism of his fellow mediator. Discussions as

to what positions and actions mediators should take in particular cases should be carried on solely between or among the mediators.

III. *The responsibility of the mediator toward his agency and his profession.* Agencies responsible for providing mediation assistance to parties engaged in collective bargaining are a part of government. The mediator must recognize that, as such, he is part of government. The mediator should constantly bear in mind that he and his work are not judged solely on an individual basis but that he is also judged as a representative of his agency. Any improper conduct or professional shortcoming, therefore, reflects not only on the individual mediator but upon his employer and, as such, jeopardizes the effectiveness of his agency, other government agencies, and the acceptability of the mediation process.

The mediator should not use his position for private gain or advantage, nor should he engage in any employment, activity or enterprise which will conflict with his work as a mediator, nor should he accept any money or thing of value for the performance of his duties—other than his regular salary—or incur obligations to any party which might interfere with the impartial performance of his duties.

IV. *The responsibility of the mediator toward the public.* Collective bargaining is in essence a private, voluntary process. The primary purpose of mediation is to assist the parties to achieve a settlement. Such assistance does not abrogate the rights of the parties to resort to economic and legal sanctions. However, the mediation process may include a responsibility to assert the interest of the public that a particular dispute be settled; that a work stoppage be ended; and that normal operations be resumed. It should be understood, however, that the mediator does not regulate or control any of the content of a collective bargaining agreement.

It is conceivable that a mediator might find it necessary to withdraw from a negotiation, if it is patently clear that the parties intend to use his presence as implied governmental sanction for an agreement obviously contrary to public policy.

It is recognized that labor disputes are settled at the bargaining table; however, the mediator may release appropriate information with due regard (1) to the desires of the parties, (2) to whether that information will assist or impede the settlement of the dispute and (3) to the needs of an informed public.

Publicity shall not be used by a mediator to enhance his own position or that of his agency. Where two or more mediators are mediating a dispute, public information should be handled through a mutually agreeable procedure.

V. *Responsibility of the mediator toward the mediation process.* Collective bargaining is an

established institution in our economic way of life. The practice of mediation required the development of alternatives which the parties will voluntarily accept as a basis for settling their problems. Improper pressures which jeopardize voluntary action by the parties should not be a part of mediation.

Since the status, experience, and ability of the mediator lend weight to his suggestions and recommendations, he should evaluate carefully the effect of his suggestions and recommendations and accept full responsibility for their honesty and merit.

The mediator has a continuing responsibility to study industrial relations to improve his skills and upgrade his abilities.

Suggestions by individual mediators or agencies to parties, which give the implication that transfer of a case from one mediation "forum" to another will produce better results, are unprofessional and are to be condemned.

Confidential information acquired by the mediator should not be disclosed to others for any purpose, or in a legal proceeding or be used directly or indirectly for the personal benefit or profit of the mediator.

Bargaining positions, proposals or suggestions given to the mediator in confidence during the course of bargaining for his sole information, should not be disclosed to another party without first securing permission from the party or person who gave it to him.

[31 FR 5423, Apr. 6, 1966]

PART 1401—PUBLIC INFORMATION

Subpart A—Information in Response to Subpoenas

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- 1401.22 Partial disclosure of records.
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AUTHORITY: Sec. 202, 61 Stat. 136, as amended; 5 U.S.C. 552.

SOURCE: 40 FR 8169, Feb. 26, 1975, unless otherwise noted.

Subpart A—Information in Response to Subpoenas

§ 1401.1 Purpose and scope.

This subpart contains the regulations of the Service concerning procedures to be followed when a subpoena, order, or other demand of a court or other authority is issued for the production or disclosure of (a) any material contained in the files of the Service; (b) any information relating to material contained in the files of the Service; or (c) any information or material acquired by any person as a part of the performance of his official duties or because of his official status, while such person was an employee of the Service.

§ 1401.2 Production of records or testimony by FMCS employees.

(a) Public policy and the successful effectuation of the Federal Mediation and Conciliation Service's mission require that commissioners and employees maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the Service will not subsequently be divulged, voluntarily or because of compulsion, unless authorized by the Director of the Service.

(b) No officer, employee, or other person officially connected in any capacity with the Service, currently or formerly shall, in response to a subpoena, subpoena duces tecum, or other judicial or administrative order, produce any material contained in the files of the Service, disclose any information acquired as part of the performance of his official duties or because of his official status, or testify on behalf of any party to any matter pending in any judicial, arbitral or administrative proceeding, without the prior approval of the Director.

§ 1401.3 Procedure in the event of a demand for production, disclosure, or testimony.

(a) Any request for records of the Service, whether it be by letter, by subpoena duces tecum or by any other written demand, shall be handled pursuant to the procedures established in subpart B of this part, and shall comply with the rules governing public disclosure.

(b) Whenever any subpoena or subpoena duces tecum calling for production of records or testimony as described above shall have been served upon any officer, employee or other person as noted in §1401.2(b), he will, unless notified otherwise appear in answer thereto, and unless otherwise expressly directed by the Director, respectfully decline to produce or present such records or to give such testimony, by reason of the prohibitions of this section, and shall state that the production of the record(s) involved will be handled by the procedures established in this part.

Subpart B—Production or Disclosure of Information

SOURCE: 50 FR 52917, Dec. 27, 1985, unless otherwise noted.

§ 1401.20 Purpose and scope.

This subpart contains the regulations of the Federal Mediation and Conciliation Service providing for public access to information under the Freedom of Information Act, 5 U.S.C. 552. It is the policy of the FMCS to disseminate information on matters of interest to the public and to disclose upon request information contained in Agency records insofar as such disclosure is compatible with the discharge of its responsibilities and the principle of confidentiality and neutrality of dispute resolution by third party neutrals.

[77 FR 66539, Nov. 6, 2012]

§ 1401.21 Information policy.

(a) Except for matters specifically excluded by subsection 552(b) of title 5, United States Code, matters covered by the Privacy Act, or other applicable statutes, all documents and records maintained by this agency or in its

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custody shall be available to the public upon request filed in accordance with these regulations. To the extent permitted by other laws, the Service also will make available records which it is authorized to withhold under 5 U.S.C. 552(b) whenever it determines that such disclosure is in the public interest.

(b) Any document released for inspection under the provisions of this part may be manually copied by the requesting party. The Service shall provide facilities for copying such documents at reasonable times during normal working hours so long as it does not interfere with the efficient operation of the agency.

(c) FMCS maintains a public reading room that contains the records required by the FOIA to be made readily available for public inspection and copying. FMCS shall maintain and make available for public inspection and copying a current subject-matter index of its reading room records. Each index shall be updated regularly, at least quarterly, with respect to newly included records. FMCS shall also make reading room records created on or after November 1, 1996, available electronically through FMCS's World Wide Web Site (which can be found at <http://www.fmcs.gov>)

(d) Records or documents prepared by FMCS for routine public distribution, e.g., pamphlets and brochures, will be furnished upon request to Office of the Director of Public Affairs, Federal Mediation and Conciliation Service, 2100 K Street NW., Washington, DC 20427, as long as the supply lasts. The provisions of §1401.36 (fees) are not applicable to such requests except when the supply of such material is exhausted and it is necessary to reproduce individual copies upon specific request.

(e) All existing FMCS records are subject to disposition according to agency record retention schedules and General Records Schedules promulgated by the National Archives and Records Administration.

[50 FR 52917, Dec. 27, 1985, as amended at 77 FR 66539, Nov. 6, 2012]

§ 1401.22 Partial disclosure of records.

(a) If a record contains both disclosable and nondisclosable information, the nondisclosable information

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will be deleted and the remaining record will be disclosed unless the two are so inextricably intertwined that it is not possible to separate them.

(b) Records disclosed in part shall be marked or annotated to show both the amount and the location of the information deleted and the applicable exemption.

[77 FR 66540, Nov. 6, 2012]

§ 1401.23 Preparation of new records.

(a) Freedom of Information Act and the provisions of this part apply only to existing records that are reasonably described in a request filed with the Federal Mediation and Conciliation Service pursuant to the procedures established in §§1401.31-1401.36.

(b) The Director may, in his or her discretion, prepare new records in order to respond to a request for information when he or she concludes that it is in the public interest and promotes the objectives of the Labor-Management Relations Act, 1947, as amended.

§ 1401.30 Applicability of procedures.

Requests for inspection or copying of information from records in the custody of the FMCS which are reasonably identifiable and available under the provisions of this part shall be made and acted upon as provided in the following sections of this subpart. The prescribed procedure shall be followed in all cases where access is sought to official records pursuant to the provisions of the Freedom of Information Act, except with respect to records for which a less formal disclosure procedure is provided specifically in this part.

§ 1401.31 Filing a request for records.

(a) Any person who desires to inspect or copy an Agency record should submit a written request to the Office of the General Counsel, Federal Mediation and Conciliation Service, 2100 K Street NW., Washington, DC 20427. The envelope [or cover sheet] should be marked "Freedom of Information Act request." Electronic mail requests should be sent to foia@fmcs.gov.

(b) Each request should reasonably describe the records being sought, so

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that the records requested may be located and identified. If the description is insufficient to locate the requested records, the officer processing the request will notify the requester and ask for additional information.

[77 FR 66540, Nov. 6, 2012]

§ 1401.32 Logging of written requests.

(a) All requests for records should be clearly and prominently identified as a request for information under the Freedom of Information Act, and if submitted by mail or otherwise submitted in an envelope or other cover, should be clearly and prominently identified as such on the envelope or other cover.

(b) Upon receipt of a request for records from the FMCS Office of the General Counsel, the FMCS office or division responding to the request shall enter it in a public log. The log shall state the date and time received, the name and address of person making the request, the nature of the records requested, the action taken on the request, the date of the determination letter sent pursuant to §1401.34 (b) and (d), the date(s) any records are subsequently furnished, the number of staff hours and grade levels of persons who spent time responding to the request, and the payment requested and received.

[50 FR 52917, Dec. 27, 1985, as amended at 77 FR 66540, Nov. 6, 2012]

§ 1401.33 Description of information requested.

(a) Each request should reasonably describe the records being sought, in a way that they can be identified and located. A request should include all pertinent details that will help identify the records sought.

(b) If the description is insufficient, the officer processing the request will so notify the person making the request and indicate the additional information needed. Every reasonable effort shall be made to assist in the identification and location of the records sought.

§ 1401.34 Time for processing requests.

(a) All time limitations established pursuant to this section shall begin as of the time a request for records is re-

ceived by the Office of the General Counsel.

(b) The officer or employee responsible for responding to the request shall, within twenty (20) working days following receipt of the request, respond in writing to the requester, determining whether, or the extent to which, the Agency shall comply with the request.

(1) If all of the records requested have been located and a final determination has been made with respect to disclosure of all the records requested, the response shall so state.

(2) If all of the records have not been located or a final determination has not been made with respect to disclosure of all records requested, the response shall state the extent to which the records involved will be disclosed pursuant to the rules established in this part.

(c) Where the time limits for processing a request cannot be met because of unusual circumstances and FMCS determines to extend the time limit on that basis, FMCS will, as soon as practicable, notify the requester in writing of the unusual circumstances and the date by which the processing can be expected to be completed. Where the extension is for more than 10 working days, FMCS will provide the requester with an opportunity either to modify the request so that it may be processed within the time limits or to arrange an alternative time period for processing the request or a modified request. If FMCS reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated.

(d) If any request for records is denied in whole or in part, the response required by paragraph (b) of this section shall notify the requester of the denial. Such denial shall specify the reason and also advise that the denial may be appealed to the Office of the FMCS Deputy Director as specified in §1401.35. In addition, such denial shall include an estimate of the volume of records or information withheld, in

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numbers of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable estimation.

(e) FMCS offices may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and or time needed to process the request. A person making a request that does not qualify for the fastest multitrack processing should be given an opportunity to limit the scope of the request in order to qualify for faster processing.

(f) Requests and appeals will be taken out of order and given expedited processing in cases where the requester demonstrates a compelling need.

(1) Compelling need means:

(i) Circumstances in which failure to obtain copies of the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information.

(2) A requester seeking expedited processing should so indicate in the initial request, and should state all the facts supporting the need to obtain the requested records quickly. The requester must also certify in writing that these facts are true and correct to the best of the requester's knowledge and belief.

(3) Within 10 calendar days of its receipt of a request for expedited processing, FMCS will notify the requester of its decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

[50 FR 52917, Dec. 27, 1985, as amended at 77 FR 66540, Nov. 6, 2012]

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§ 1401.35 Appeals from denials of request.

(a) Whenever any request for records is denied, a written appeal may be filed with the Deputy Director, FMCS, 2100 K Street, NW., Washington, DC 20427, within 30 days after requester receives notification that the request has been denied or after the requester receives any records being made available, in the event of partial denial. The appeal shall state the grounds for appeal, including any supporting statements or arguments.

(b) Final action on the appeal shall be taken within 20 working days from the time of receipt of the appeal. Where novel and complicated questions have been raised or unusual difficulties have been encountered, the Deputy Director may extend the time for final action up to an additional 10 days, depending upon whether there had been an extension pursuant to §1401.34(c) at the initial stage. In such cases, the applicant shall be notified in writing of the reasons for the extension of time and the approximate date on which a final response will be forthcoming.

(c) If on appeal the denial of the request for records is upheld in whole or in part, the Deputy Director shall notify the applicant of the reasons therefor, and shall advise the requester of the provisions for judicial review under 5 U.S.C. 552(a) (4) and (6).

§ 1401.36 Freedom of Information Act fee schedules.

(a) *Definitions.* For purposes of §1401.36, the following definitions apply:

(1) *Direct costs* means those expenditures which are actually incurred in searching for and duplicating and, in the case of commercial use requesters, reviewing to respond to a FOIA request.

(2) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(3) *Duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Copies may be in various forms including machine-readable documentation (e.g. magnetic tape or disk) among others. A requester's specified preference of form or format of disclosure will be honored if the record is readily reproducible with reasonable efforts in the requested form or format.

(4) *Review* refers to the process of examining documents located in response to a request that is for commercial use, to determine whether a document or any portion of any document located is permitted to be withheld. It includes processing any documents for disclosure to the requester, e.g., doing all that is necessary to excise them or otherwise prepare them for release. It does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions that are applied. However, records or portions withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review is assessable.

(5) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial trade or profit interest of the requester or the person on whose behalf the request is made.

(6) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate or professional education or an institution of vocational education, which operates a program or programs of scholarly research.

(7) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. In the case of "freelance" journalists, they may be regarded as working for a news organi-

zation if they can demonstrate a reasonable expectation of publication through the organization, even though not actually employed by it.

(8) *Non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as defined under "commercial use request" in paragraph (a)(5) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(b) *Fee schedules and waivers.* Requests submitted shall be subject to direct costs, including search, duplication and review, in accordance with the following schedules, procedures and conditions.

(1) *Schedule of charges*—(i) *Clerical time.* For each one-quarter hour or portion thereof of clerical time, \$4.00.

(ii) *Professional time.* For each one-quarter hour or portion thereof of profession time, \$10.00.

(iii) *Duplication.* For each sheet of duplication (not to exceed 8½ by 14 inches) of requested records, \$.20.

(iv) *Computer time.* For computer searches of records, requestors will be charged the direct costs of conducting the search (as provided in paragraph (b)(3)(i) of this section), although certain requestors will be charged no search fee (as provided in paragraphs (b)(3)(ii) and (iii) of this section), and certain other requestors will be entitled to the cost equivalent of two hours of manual search time without charge (as provided in paragraph (b)(3)(iv) of this section). These direct costs will include the cost of operating a central processing unit for that portion of operating time that is directly attributable to the searching for responsive records, as well as the costs of operator/programmer salary attributable to the search. Computer time expressed in fractions of minutes will be rounded to the next whole minute.

(v) *Certification or authorization of records.* The fee per certification or authentication is \$2.00.

(vi) *Forwarding material to destination.* No charge will be assessed for ordinary packaging and mailing costs. The FMCS may assess a charge if compliance with the request requires special

handling procedures such as express mail or other unusual procedures. Such charges will be made on the basis of actual costs.

(vii) *Other costs.* All other direct costs of preparing a response to a request shall be charged to requester in the same amount as incurred by FMCS. Charges may also be assessed for searches even if the records requested are not found, or the records are determined to be exempted from disclosure.

(2) *Rules of construction.* (i) In providing the foregoing schedules pursuant to the provisions of 5 U.S.C. 552(a)(4)(A), it is the intent of FMCS to apply 29 CFR part 70 and the user charge statute, 31, U.S.C. 9701, to cover those situations in which the Agency is performing for a requester services other than those related to arbitration which are not required under the Freedom of Information Act.

(ii) For those matters coming within the scope of this regulation, the FMCS will look to the provisions of the guidance published by in the Office of Management and Budget's Uniform Fee Schedule and Guidelines (available at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html>) and the Department of Justice Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (available at http://www.usdoj.gov/04foia/04_7.html) for making such interpretations as necessary.

(3) *Fee categories.* Fees shall be determined in accordance with the following categories of requesters.

(i) Commercial use requesters will be assessed charges to recover the full direct cost of searching for, reviewing for release, and duplicating the records sought. This includes the full direct costs of computer production programming, searching and production of records. Commercial use requesters are not entitled to 2 hours of free search time nor 100 free pages of reproduction of documents, as described below.

(ii) Educational and non-commercial scientific institution requesters will be assessed charges for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying in-

stitution pursuant to the criteria in paragraphs (a)(6) and (a)(8) of this section, and that the records are not sought for commercial use, but are sought in furtherance of scholarly or scientific research.

(iii) Requesters who are representatives of the news media will be assessed charges for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (a)(7) of this section, and the request must not be made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use.

(iv) All other requesters will be assessed charges to recover the full reasonable direct costs of searching for and reproducing records that are responsive to the request, including costs of computer production programming, searching and production, except that the first 100 pages of reproduction, and the first 2 hours of search time shall be furnished without charge.

(v) In no event shall fees be charged when the total charges are less than \$14.00, which is the Agency cost of collecting and processing the fee itself. If the request is expected to involve an assessed fee in excess of \$14.00, the response shall specify or estimate the fee involved before the records are made available.

(4) *Waiver or reduction of charge.* A fee waiver must be requested at the same time that a request for records is made. The requester should provide an explanation of why the waiver is appropriate. If the request for a waiver or reduction is denied, the denial may be appealed to FMCS Deputy Director. In the appeal letter the requester should discuss whatever reasons are given in the denial letter. Documents may be furnished without charge or at reduced levels if FMCS determines that disclosure of the information is in the public interest; that is, because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(c) *Fee payments.* (1) Payments shall be made by check or money order payable to "Federal Mediation and Conciliation Service" and shall be sent to: Director, Financial Management Staff, Federal Mediation and Conciliation Service, 2100 K Street NW., Washington, DC 20427.

(2) If a requester fails to pay chargeable fees that were incurred as a result of this Agency's processing of the information request, the Agency beginning on the 31st day following the date on which the notification of charges was sent, may assess interest charges against the requester in the manner prescribed in 31 U.S.C. 3717.

(3) The Agency may use the provisions of the Debt Collection Act of 1982, (Pub. L. 97-365, 29 CFR part 1450) including disclosure to consumer reporting agencies, for the purpose of obtaining payment.

(d) *Advance payments.* FMCS may require a requester to make an advance payment of anticipated fees under the following circumstances:

(1) If the anticipated charges are likely to exceed \$250, FMCS may notify the requestor of the likely cost and obtain satisfactory assurance of full payment when the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payments.

(2) If a requester has previously failed to pay fees that have been charged in processing a request, within 30 days of the date when the notification of fees was sent, the requester may be required to:

(i) Pay the entire amount of fees that are owed, plus any applicable interest as provided for in paragraph (c)(2) of this section, and

(ii) To make an advance payment of the full amount of the estimated fee before the Agency will process the new pending request.

[55 FR 17602, Apr. 26, 1990, as amended at 77 FR 66540, Nov. 6, 2012]

PART 1402—PROCEDURES OF THE SERVICE

AUTHORITY: Sec. 202, 61 Stat. 153, sec. 3, 80 Stat. 250, sec. 203, 61 Stat. 153; 5 U.S.C. 552, 29 U.S.C. 172, 173.

§ 1402.1 Notice of dispute.

The notice of dispute filed with the Federal Mediation and Conciliation Service pursuant to the provisions of section 8(d)(3), of the Labor-Management Relations Act, 1947, as amended, shall be in writing. The following Form F-7, for use by the parties in filing a notice of dispute, has been prepared by the Service:

FMCS Form F-7.
Revised May 1964.

NOTICE TO MEDIATION AGENCIES

To: Federal Mediation and Conciliation Service, Washington, D.C. 20427; and
To: (Appropriate State or Territorial agency.)

Date _____
You are hereby notified that written notice of the proposed termination or modification of the existing collective bargaining contract was served upon the other party to this contract and that no agreement has been reached.

1. (a) Name of employer (if more than one company or an association, submit names and addresses on separate sheet in duplicate). Phone No. _____

Address of establishment affected (Street) (City) (State) (Zip Code).

(If more than one establishment, or plant, list addresses on separate sheet.)

(b) Employer Official to communicate with (name and title).

Address: _____ Phone No. _____
(Street), _____
(City), _____ (State).

2. (a) International union _____
Local No. _____. AFL-CIO (). Independent (). Phone No. _____. Address of local union: _____
(Street), _____
(City), _____ (State), _____ (Zip Code).

(b) Union official to communicate with _____.

Address: _____ Phone No. _____
(Street), _____
(City), _____ (State), _____ (Zip Code).

3. (a) Number of employees covered by the Contract(s) _____.

(b) Total number employed by the Company at this location(s) _____.

4. Type of establishment and principal products, or services _____

(Factory, mine, wholesaler, over-the-road trucking, etc.).

5. Contract expiration or reopening date _____.

6. Name of official filing this notice _____ Title _____.

Address _____ Phone No. _____.

Check on whose behalf this notice is filed:

Union _____ Employer _____

Signature _____

Receipt of this notice does not constitute a request for mediation nor does it commit the agencies to offer their facilities. This particular form of notice is not legally required. Receipt of notice will not be acknowledged in writing by the Federal Mediation and Conciliation Service. (Attach copies of any statement you wish to make to the Mediation Agencies.)

Copies of this Form F-7 are obtainable at the national, regional and field offices of the Service. This form may be duplicated for use by representatives of employers or unions provided it is copied in full without change.

[32 FR 9812, July 6, 1967, as amended at 47 FR 10531, Mar. 11, 1982]

PART 1403—FUNCTIONS AND DUTIES

Sec.

1403.1 Definitions.

1403.2 Policies of the Federal Mediation and Conciliation Service.

1403.3 Obtaining data on labor-management disputes.

1403.4 Assignment of mediators.

1403.5 Relations with State and local mediation agencies.

AUTHORITY: Sec. 202, 61 Stat. 153, sec. 3, 80 Stat. 250, sec. 203, 61 Stat. 153; 29 U.S.C. 172, 5 U.S.C. 552, 29 U.S.C. 173.

SOURCE: 32 FR 9813, July 6, 1967, unless otherwise noted.

§ 1403.1 Definitions.

As used in this part, unless the context clearly indicates otherwise;

(a) The term *commerce* means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia, or any Territory, or between points in the same State but through any other State or any Terri-

tory or the District of Columbia or any foreign country.

(b) The term *affecting commerce* means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor-management dispute burdening or obstructing commerce or the free flow of commerce.

(c) The term *labor union or labor organization* means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(d) The term *State or other conciliation services* means the official and accredited mediation and conciliation establishments of State and local governments, which are wholly or partially supported by public funds.

(e) The term *proffer its services*, as applied to the functions and duties of the Federal Mediation and Conciliation Service, means to make mediation services and facilities available either on its own motion or upon the request of one or more of the parties to a dispute.

§ 1403.2 Policies of the Federal Mediation and Conciliation Service.

It is the policy of the Federal Mediation and Conciliation Service:

(a) To facilitate and promote the settlement of labor-management disputes through collective bargaining by encouraging labor and management to resolve differences through their own resources.

(b) To encourage the States to provide facilities for fostering better labor-management relations and for resolving disputes.

(c) To proffer its services in labor-management disputes in any industry affecting commerce, except as to any matter which is subject to the provisions of the Railway Labor Act, as amended, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption to commerce.

(d) To refrain from proffering its services:

(1) In labor-management disputes affecting intrastate commerce exclusively,

(2) In labor-management disputes having a minor effect on interstate commerce, if State or other conciliation services are available to the parties, or

(3) In a labor-management dispute when a substantial question of representation has been raised, or to continue to make its facilities available when a substantial question of representation is raised during the negotiations.

(e) To proffer its services in any labor-management dispute directly involving Government procurement contracts necessary to the national defense, or in disputes which imperil or threaten to imperil the national health or safety.

(f) To proffer its services to the parties in grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement only as a last resort and in exceptional cases.

§ 1403.3 Obtaining data on labor-management disputes.

When the existence of a labor-management dispute comes to the attention of the Federal Service upon a request for mediation service from one or more parties to the dispute, through notification under the provisions of section 8(d)(3), title I of the Labor-Management Relations Act, 1947, or otherwise, the Federal Service will examine the information to determine if the Service should proffer its services under its policies. If sufficient data on which to base a determination is not at hand, the Federal Service will inquire into the circumstances surrounding the case. Such inquiry will be conducted for fact-finding purposes only and is not to be interpreted as the Federal Service proffering its services.

§ 1403.4 Assignment of mediators.

The Federal Service will assign one or more mediators to each labor-management dispute in which it has been determined that its services should proffered.

§ 1403.5 Relations with State and local mediation agencies.

(a) If under State or local law a State or local mediation agency must offer its facilities in a labor-management dispute in which the Federal Service is proffering its services, the interests of such agencies will be recognized and their co-operation will be encouraged in order that all efforts may be made to prevent or to effectively minimize industrial strife.

(b) If, in a labor-management dispute there is reasonable doubt that the dispute threatens to cause a substantial interruption to commerce or that there is more than a minor effect upon interstate commerce, and State or other conciliation services are available to the parties, the regional director of the Federal Service will endeavor to work out suitable arrangements with the State or other conciliation or mediation agency for mediation of the dispute. Decisions in such cases will take into consideration the desires of the parties, the effectiveness and availability of the respective facilities, and the public welfare, health, and safety.

(c) If requested by a State or local mediation agency or the chief executive of a State or local government, the Federal Service may make its services available in a labor-management dispute which would have only a minor effect upon interstate commerce when, in the judgment of the Federal Service, the effect of the dispute upon commerce or the public welfare, health, or safety justifies making available its mediation facilities.

PART 1404—ARBITRATION SERVICES

Subpart A—Arbitration Policy; Administration of Roster

Sec.

1404.1 Scope and authority.

1404.2 Policy.

1404.3 Administrative responsibilities.

Subpart B—Roster of Arbitrators; Admission and Retention

1404.4 Roster and status of members.

1404.5 Listing on the roster, criteria for listing and removal, procedure for removal.

1404.6 Inactive status.

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Subpart C—Procedures for Arbitration Services

- 1404.8 Freedom of choice.
- 1404.9 Procedures for requesting arbitration lists and panels.
- 1404.10 Arbitrability.
- 1404.11 Nominations of arbitrators.
- 1404.12 Selection by parties and appointments of arbitrators.
- 1404.13 Conduct of hearings.
- 1404.14 Decision and award.
- 1404.15 Fees and charges of arbitrators.
- 1404.16 Reports and biographical sketches.

Subpart D—Expedited Arbitration

- 1404.17 Policy.
- 1404.18 Procedures for requesting expedited panels.
- 1404.19 Arbitration process.
- 1404.20 Proper use of expedited arbitration.

APPENDIX TO PART 1404—ARBITRATION POLICY; SCHEDULE OF FEES

AUTHORITY: 29 U.S.C. 172 and 29 U.S.C. 173 *et seq.*

SOURCE: 62 FR 34171, June 25, 1997, unless otherwise noted.

Subpart A—Arbitration Policy; Administration of Roster

§ 1404.1 Scope and authority.

This chapter is issued by the Federal Mediation and Conciliation Service (FMCS) under Title II of the Labor Management Relations Act of 1947 (Pub. L. 80-101) as amended. It applies to all arbitrators listed on the FMCS Roster of Arbitrators, to all applicants for listing on the Roster, and to all persons or parties seeking to obtain from FMCS either names or panels of names of arbitrators listed on the Roster in connection with disputes which are to be submitted to arbitration or fact-finding.

§ 1404.2 Policy.

The labor policy of the United States promotes and encourages the use of voluntary arbitration to resolve disputes over the interpretation or application of collective bargaining agreements. Voluntary arbitration and fact-finding are important features of constructive employment relations as alternatives to economic strife.

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§ 1404.3 Administrative responsibilities.

(a) *Director.* The Director of FMCS has responsibility for all aspects of FMCS arbitration activities and is the final agency authority on all questions concerning the Roster and FMCS arbitration procedures.

(b) *Office of Arbitration Services.* The Office of Arbitration Services (OAS) maintains a Roster of Arbitrators (the Roster); administers subpart C of this part (Procedures for Arbitration Services); assists, promotes, and cooperates in the establishment of programs for training and developing new arbitrators; and provides names or panels of names of listed arbitrators to parties requesting them.

(c) *Arbitrator Review Board.* The Arbitrator Review Board shall consist of a chairman and members appointed by the Director who shall serve at the Director's pleasure. The Board shall be composed entirely of full-time officers or employees of the Federal Government and shall establish procedures for carrying out its duties.

(1) *Duties of the Board.* The Board shall:

(i) Review the qualifications of all applicants for listing on the Roster, interpreting and applying the criteria set forth in § 1404.5;

(ii) Review the status of all persons whose continued eligibility for listing on the Roster has been questioned under § 1404.5;

(iii) Recommend to the Director the acceptance or rejection of applicants for listing on the Roster, or the withdrawal of listing on the Roster for any of the reasons set forth in this part;

(iv) At the request of the Director of FMCS, or upon its own volition, review arbitration policies and procedures, including all regulations and written guidance regarding the use of the FMCS arbitrators, and make recommendations regarding such policies and procedures to the Director; and

(v) Review the qualifications of all persons who request a review in anticipation of attending the FMCS-sponsored labor arbitrator training course, interpreting and applying the criteria set forth in Sec. 1404.5.

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(2) [Reserved]

[62 FR 34171, June 25, 1997, as amended at 70 FR 76397, Dec. 27, 2005]

Subpart B—Roster of Arbitrators; Admission and Retention

§ 1404.4 Roster and status of members.

(a) *The Roster.* FMCS shall maintain a Roster of labor arbitrators consisting of persons who meet the criteria for listing contained in § 1404.5 and who remain in good standing.

(b) *Adherence of Standards and Requirements.* Persons listed on the Roster shall comply with FMCS rules and regulations pertaining to arbitration and with such guidelines and procedures as may be issued by the OAS pursuant to subpart C of this Part. Arbitrators shall conform to the ethical standards and procedures set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, as approved by the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and the American Arbitration Association (Code).

(c) *Status of arbitrators.* Persons who are listed on the Roster and are selected or appointed to hear arbitration matters or to serve as factfinders do not become employees of the Federal Government by virtue of their selection or appointment. Following selection or appointment, the arbitrator's relationship is solely with the parties to the dispute, except that arbitrators are subject to certain reporting requirements and to standards of conduct as set forth in this part.

(d) *Role of FMCS.* FMCS has no power to:

- (1) Compel parties to appear before an arbitrator;
- (2) Enforce an agreement to arbitrate;
- (3) Compel parties to arbitrate any issue;
- (4) Influence, alter, or set aside decisions of arbitrators on the Roster;
- (5) Compel, deny, or modify payment of compensation to an arbitrator.

(e) *Nominations and Panels.* On request of the parties to an agreement to arbitrate or engage in fact-finding, or where arbitration or fact-finding may

be provided for by statute, OAS will provide names or panels of names for a fee. Procedures for obtaining these services are outlined in subpart C of this part. Neither the submission of a nomination or panel nor the appointment of an arbitrator constitutes a determination by FMCS that an agreement to arbitrate or enter fact-finding proceedings exists; nor does such action constitute a ruling that the matter in controversy is arbitrable under any agreement.

(f) *Rights of persons listed on the Roster.* No person shall have any right to be listed or to remain listed on the Roster. FMCS retains its authority and responsibility to assure that the needs of the parties using its services are served. To accomplish this purpose, FMCS may establish procedures for the preparation of panels or the appointment of arbitrators or factfinders which include consideration of such factors as background and experience, availability, acceptability, geographical location, and the expressed preferences of the parties. FMCS may also establish procedures for the removal from the Roster of those arbitrators who fail to adhere to provisions contained in this part.

[62 FR 34171, June 25, 1997, as amended at 70 FR 76397, Dec. 27, 2005]

§ 1404.5 Listing on the roster, criteria for listing and removal, procedure for removal.

Persons seeking to be listed on the Roster must complete and submit an application form that may be obtained from OAS. Upon receipt of an executed application, OAS will review the application, assure that it is complete, make such inquiries as are necessary, and submit the application to the Board. The Board will review the completed application under the criteria in paragraphs (a), (b) and (c) of this section, and will forward to the FMCS Director its recommendation as to whether or not the applicant meets the criteria for listing on the Roster. The Director shall make all final decisions as to whether an applicant may be listed on the Roster. Each applicant shall be notified in writing of the Director's decision and the reasons therefore.

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(a) *General criteria.* (1) Applicants will be listed on the Roster upon a determination that he or she:

(i) Is experienced, competent and acceptable in decision-making roles in the resolution of labor relations disputes; or

(ii) Has extensive and recent experience in relevant positions in collective bargaining; and

(iii) Is capable of conducting an orderly hearing, can analyze testimony and exhibits and can prepare clear and concise findings and awards within reasonable time limits.

(iv) For applicants who are governmental employees, the following criteria shall also apply:

(A) Federal Employees: These applicants must provide the OAS with written permission from their employer to work as an arbitrator. Federal employees will not be assigned to panels involving the Federal Government.

(B) Governmental Employees other than Federal: These applicants must provide the OAS with written permission from their employer to work as an arbitrator as well as a statement of the jurisdiction(s) in which the applicant is permitted to do this work.

(2) FMCS may identify certain positions relating to collective bargaining that will substitute for the General Criteria. FMCS may also identify periodic educational requirements for remaining on the Roster.

(b) *Proof of qualification.* The qualifications listed in paragraph (a) of this section are preferably demonstrated by the submission of five recent arbitration awards prepared by the applicant while serving as an impartial arbitrator of record chosen by the parties to labor relations disputes arising under collective bargaining agreements, or the successful completion of the FMCS labor arbitrator training course plus two awards as described above, and the submission of information demonstrating extensive and recent experience in collective bargaining, including at least the position or title held, duties or responsibilities, the name and location of the company or organization, and the dates of employment.

(c) *Advocacy.* Any person who at the time of application is an advocate as

defined in paragraph (c)(1) of this section, must agree to cease such activity before being recommended for listing on the Roster by the Board. Except in the case of persons listed on the Roster as advocates before November 17, 1976, any person who did not divulge his or her advocacy at the time of listing or who becomes an advocate while listed on the Roster and who did not request to be placed on inactive status pursuant to Sec. 1404.6 prior to becoming an advocate, shall be recommended for removal by the Board after the fact of advocacy is revealed.

(1) *Definition of Advocacy.* An advocate is a person who represents employers, labor organizations, or individuals as an employee, attorney, or consultant, in matters of labor relations or employment relations, including but not limited to the subjects of union representation and recognition matters, collective bargaining, arbitration, unfair labor practices, equal employment opportunity, and other areas generally recognized as constituting labor or employment relations. The definition includes representatives of employers or employees in individual cases or controversies involving worker's compensation, occupational health or safety, minimum wage, or other labor standards matters.

(2) This definition of advocate also includes a person who is directly or indirectly associated with an advocate in a business or professional relationship as, for example, partners or employees of a law firm. Individuals engaged only in joint education or training or other non-adversarial activities will not be deemed as advocates.

(d) *Listing on roster, removal.* Listing on the Roster shall be by decision of the Director of FMCS based upon the recommendations of the Board or upon the Director's own initiative. The Board may recommend for removal, and the Director may remove, any person listed on the Roster for violation of this part or of the Code of Professional Responsibility. FMCS will provide to the affected arbitrator written notice of removal from the Roster. Complaints about arbitrators should be in writing and sent to the Director of OAS. The complaint should cite the specific section of the Code or the

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FMCS rule the arbitrator has allegedly violated. The following criteria shall be a basis for the Board to recommend and/or the Director to initiate a member's removal from the Roster:

(1) No longer meets the criteria for admission;

(2) Has become an advocate as defined in paragraph (c) of this section;

(3) Has been repeatedly or flagrantly delinquent in submitting awards;

(4) Has refused to make reasonable and periodic reports in a timely manner to FMCS, as required in subpart C of this part, concerning activities pertaining to arbitration;

(5) Has been the subject of a complaint by parties who use FMCS services and the Board, after appropriate inquiry, concludes that cause for removal has been shown;

(6) Is determined to be unacceptable to the parties who use FMCS arbitration services. Such a determination of unacceptability may be based on FMCS records which show the number of times the arbitrator's name has been proposed to the parties and the number of times he or she has been selected. Such cases will be reviewed for extenuating circumstances, such as length of time on the Roster or prior history;

(7) Has been in an inactive status pursuant to §1404.6 for longer than two years and has not paid the annual listing fee.

(e) *Procedure for removal.* Prior to any recommendation by the Board to remove an arbitrator from the Roster, the Board shall conduct an inquiry into the facts of any such recommended removal. When the Board recommends removal of an arbitrator, it shall send the arbitrator a written notice. This notice shall inform the arbitrator of the Board's recommendation and the basis for it, and that he or she has 60 days from the date of such notice to submit a written response or information showing why the arbitrator should not be removed. When the Director removes an arbitrator from the Roster, he or she shall inform the arbitrator of this in writing, stating the effective date of the removal and the length of time of the removal if it is not indefinite. An arbitrator so removed may seek reinstatement to the Roster by making written application to the Di-

rector no earlier than two years after the effective date of his or her removal.

(f) *Suspension.* The director of OAS may suspend for a period not to exceed 180 days any person listed on the Roster who has violated any of the criteria in paragraph (d) of this section. Arbitrators shall be promptly notified of a suspension. The arbitrator may appeal a suspension to the Board, which shall make a recommendation to the Director of FMCS. The decision of the Director of FMCS shall constitute the final action of the agency.

[62 FR 34171, June 25, 1997, as amended at 70 FR 76397, Dec. 27, 2005; 75 FR 30705, June 2, 2010]

§ 1404.6 Inactive status.

(a) A member of the Roster who continues to meet the criteria for listing on the Roster may request that he or she be put in an inactive status on a temporary basis because of ill health, vacation, schedule or other reasons.

(b) Arbitrators whose schedules do not permit cases to be heard within six months of assignment are encouraged to make themselves inactive temporarily until their caseload permits the earlier scheduling of cases.

(c) An arbitrator can remain on inactive status without paying any annual listing fee for a period of two (2) years. If an arbitrator is on inactive status for longer than two (2) years, the arbitrator will be removed from the Roster unless he or she pays the annual listing fee.

[75 FR 30705, June 2, 2010]

§ 1404.7 Listing fee.

All arbitrators will be required to pay an annual fee for listing on the Roster, as set forth in the appendix to this part.

Subpart C—Procedures for Arbitration Services

§ 1404.8 Freedom of choice.

Nothing contained in this part should be construed to limit the rights of parties who use FMCS arbitration services to jointly select any arbitrator or arbitration procedure acceptable to them.

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Once a request is made to OAS, all parties are subject to the procedures contained in this part.

§ 1404.9 Procedures for requesting arbitration lists and panels.

(a) The Office of Arbitration Services (OAS) has been delegated the responsibility for administering all requests for arbitration services. Requests should be addressed to the Federal Mediation and Conciliation Service, Office of Arbitration Services, 2100 K Street, NW., Washington, DC 20427.

(b) The OAS will refer a panel of arbitrators to the parties upon request. The parties are encouraged to make joint requests. In the event, however, that the request is made by only one party, the OAS will submit a panel of arbitrators. However, the issuance of a panel—pursuant to either joint or unilateral request—is nothing more than a response to a request. It does not signify the adoption of any position by the FMCS regarding the arbitrability of any dispute or the terms of the parties' contract.

(c) As an alternative to a request for a panel of names, OAS will, upon written request, submit a list of all arbitrators and their biographical sketches from a designated geographical area. The parties may then select and deal directly with an arbitrator of their choice, with no further involvement of FMCS with the parties or the arbitrator. The parties may also request FMCS to make a direct appointment of their selection. In such a situation, a case number will be assigned.

(d) The OAS reserves the right to decline to submit a panel or to make an appointment of an arbitrator if the request submitted is overly burdensome or otherwise impracticable. The OAS, in such circumstances, may refer the parties to an FMCS mediator to help in the design of an alternative solution. The OAS may also decline to service any request from a party based on the party's non-payment of arbitrator fees or other behavior that constrains the spirit or operation of the arbitration process.

(e) The parties are required to use the Request for Arbitration Panel (Form R-43), which has been prepared by the OAS and is available upon re-

quest to the Federal Mediation and Conciliation Service, Office of Arbitration Services, Washington, DC 20427, or by calling (202) 606-5111. Form R-43 is also available on the FMCS Internet Web site, <http://www.fmcs.gov>. Requests that do not contain all required information requested on Form R-43 in typewritten form or legible handwriting may be rejected.

(f) Parties may submit requests for any standard geographical arbitration panels electronically by accessing the agency's Internet Web site, <http://www.fmcs.gov>, and receive panels via e-mail, fax or mail. Panel requests that contain certain special requirements may not be processed via the agency's internet system. Parties must provide all required information and must pay the cost of such panels using methods of payment that are accepted by the agency.

(g) The OAS will charge a nominal fee for all requests for lists, panels, and other major services. Payments for these services must be received with the request for services before the service is delivered and may be paid by either labor or management or both. A schedule of fees is listed in the appendix to this part.

(h) The OAS will charge a fee for all requests for lists, panels, and other major services. Payments for these services must be received with the request for services before the service is delivered and may be paid by either labor or management or both. A schedule of fees is listed in the appendix to this part.

[62 FR 34171, June 25, 1997, as amended at 70 FR 76398, Dec. 27, 2005; 75 FR 30705, June 2, 2010]

§ 1404.10 Arbitrability.

The OAS will not decide the merits of a claim by either party that a dispute is not subject to arbitration.

§ 1404.11 Nominations of arbitrators.

(a) The parties may also report a randomly selected panel containing the names of seven (7) arbitrators accompanied by a biographical sketch for each member of the panel. This sketch states the background, qualifications, experience, and all fees as furnished to the OAS by the arbitrator. Requests for

a panel of seven (7) arbitrators, whether joint or unilateral, will be honored. Requests for a panel of other than seven (7) names, for a direct appointment of an arbitrator, for special qualifications or other service will not be honored unless jointly submitted or authorized by the applicable collective bargaining agreement. Alternatively, the parties may request a list and biographical sketches of some or all arbitrators in one or more designated geographical areas. If the parties can agree on the selection of an arbitrator, they may appoint their own arbitrator directly without any further case tracking by FMCS. No case number will be assigned.

(b) All panels submitted to the parties by the OAS, and all letters issued by the OAS making a direct appointment, will have an assigned FMCS case number. All future communications between the parties and the OAS should refer to this case number.

(c) The OAS will provide a randomly selected panel of arbitrators located in geographical areas in proximity of the hearing site. The parties may request special qualification of arbitrators experienced in certain issues or industries or that possess certain backgrounds. The OAS has no obligation to put an individual on any given panel or on a minimum number of panels in any fixed period. In general:

(1) The geographic location of arbitrators placed on panels is governed by the site of the dispute as stated on the request received by the OAS.

(2) If at any time both parties request that a name or names be included, or omitted, from a panel, such name or names will be included, or omitted, unless the number of names is excessive. These inclusions/exclusions may not discriminate against anyone because of age, race, color, gender, national origin, disability, or religion.

(d) If the parties do not agree on an arbitrator from the first panel, the OAS will furnish second and third panels to the parties upon joint request, or upon a unilateral request if authorized by the applicable collective bargaining agreement, and payment of additional fees. Requests for second or third panels should be accompanied by a brief explanation as to why the previous

panel(s) was inadequate. In addition, if parties are unable to agree on a selection after having received three panels, the OAS will make a direct appointment upon joint request.

[62 FR 34171, June 25, 1997, as amended at 70 FR 76399, Dec. 27, 2005]

§ 1404.12 Selection by parties and appointment of arbitrators.

(a) After receiving a panel of names, the parties must notify the OAS of their selection of an arbitrator or of the decision not to proceed with arbitration. Upon notification of the selection of an arbitrator, the OAS will make a formal appointment of the arbitrator. The arbitrator, upon notification of appointment, shall communicate with the parties within 14 days to arrange for preliminary matters, such as the date and place of hearing. Should an arbitrator be notified directly by the parties that he or she has been selected, the arbitrator must promptly notify the OAS of the selection and of his or her willingness to serve. The arbitrator must provide the OAS with the FMCS case number and other pertinent information for the OAS to make an appointment. A pattern of failure by an arbitrator to notify FMCS of a selection in an FMCS case may result in suspension or removal from the Roster. If the parties settle a case prior to the hearing, the parties must inform the arbitrator as well as the OAS. Consistent failure to follow these procedures may lead to a denial of future OAS services.

(b) If the parties request a list of names and biographical sketches rather than a panel, the parties may choose to contact and select an arbitrator directly from that list. In this situation, neither the parties nor the arbitrator is required to furnish any additional information to FMCS and no case number will be assigned.

(c) Where the parties' collective bargaining agreement is silent on the manner of selecting arbitrators, FMCS will accept one of the following methods for selection from a panel:

(1) A selection by mutual agreement;

(2) A selection in which each party alternately strikes a name from the submitted panel until one remains;

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(3) A selection in which each party advises OAS of its order of preference by numbering each name on the panel and submitting the numbered list in writing to OAS. If the parties separately notify OAS of their preferred selections, OAS, upon receiving the preferred selection of the first party, will notify the other party that it has fourteen (14) days in which to submit its selections. Where both parties respond, the name that has the lowest combined number will be appointed. If the other party fails to respond, the first party's choice will be honored.

(d) Where the parties' collective bargaining agreement permits each party to separately notify OAS of its preferred selection, OAS will proceed with the selection process as follows. When the OAS receives the preferred selection from one party, it will notify the other party that it has fourteen (14) days in which to submit its selections. If that party fails to respond within the deadline, the first party's choice will be honored unless prohibited by the collective bargaining agreement. Where both parties respond, the name that has the lowest combined number will be appointed. If, within fourteen (14) days, a second panel is requested, and is permitted by the collective bargaining agreement, the requesting party must pay a fee for the second panel.

(e) The OAS will make a direct appointment of an arbitrator only upon joint request or as provided by paragraphs (c) (3) or (d) of this section.

(f) A direct appointment in no way signifies a determination of arbitrability or a ruling that an agreement to arbitrate exists. The resolution of disputes over these issues rests solely with the parties.

[75 FR 30705, June 2, 2010]

§ 1404.13 Conduct of hearings.

All proceedings conducted by the arbitrators shall be in conformity with the contractual obligations of the parties. The arbitrator shall comply with § 1404.4(b). The conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control, and the arbitrator's decision shall be based upon the evidence and testimony presented at the hearing or otherwise in-

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corporated in the record of the proceeding. The arbitrator may, unless prohibited by law, proceed in the absence of any party who, after due notice, fails to be present or to obtain a postponement. An award rendered in an *ex parte* proceeding of this nature must be based upon evidence presented to the arbitrator.

§ 1404.14 Decision and award.

(a) Arbitrators shall make awards no later than 60 days from the date of the closing of the record as determined by the arbitrator, unless otherwise agreed upon by the parties or specified by the collective bargaining agreement or law. However, failure to meet the 60 day deadline will not invalidate the process or award. A failure to render timely awards reflects upon the performance of an arbitrator and may lead to removal from the FMCS Roster.

(b) The parties should inform the OAS whenever a decision is unduly delayed. The arbitrator shall notify the OAS if and when the arbitrator:

(1) Cannot schedule, hear, and render decisions promptly, or

(2) Learns a dispute has been settled by the parties prior to the decision.

(c) Within 15 days after an award has been submitted to the parties, the arbitrator shall submit an Arbitrator's Report and Fee Statement (Form R-19) to OAS showing a breakdown of the fee and expense charges for use in the event the OAS decides to review conformance with the basis for the arbitrator's fees and expenses as stated in the biographical sketch.

(d) While FMCS encourages the publication of arbitration awards, arbitrators should not publicize awards if objected to by one of the parties.

[62 FR 34171, June 25, 1997, as amended at 70 FR 76399, Dec. 27, 2005]

§ 1404.15 Fees and charges of arbitrators.

(a) Fees to Parties. Prior to appointment, the parties should be aware of all significant aspects of the bases for an arbitrator's fees and expenses. Each arbitrator's biographical sketch shall include a statement of the bases for the arbitrator's fees and expenses, which shall conform to this part and the Code. The parties and the arbitrator

shall be bound by the arbitrator's statement of the bases for fees and expenses in the biographical sketch unless they mutually agree otherwise in writing. Arbitrators listed on the Roster may change the bases for their fees and expenses if they provide them in writing to OAS at least 30 days in advance.

(b) Dual Addresses. Arbitrators with dual business addresses must bill the parties for expenses from the lesser expensive business address to the hearing site.

(c) Additional Administrative Fee. In cases involving unusual amounts of time and expense relative to the pre-hearing and post-hearing administration of a particular case, the arbitrator may charge an administrative fee. This fee shall be disclosed to the parties as soon as it is foreseeable by the arbitrator.

(d) Fee Disputes. The OAS requests that it be notified of an arbitrator's deviation from this Part. While the OAS does not resolve individual fee disputes, repeated complaints concerning the fees charged by an arbitrator will be brought to the attention of the Board for consideration. Similarly, complaints by arbitrators concerning non-payment of fees by the parties may lead to the denial of services or other actions by the OAS.

[70 FR 76399, Dec. 27, 2005]

§ 1404.16 Reports and biographical sketches.

(a) Arbitrators listed on the Roster shall execute and return all documents, forms and reports required by the OAS. They shall also keep the OAS informed of changes of address, telephone number, availability, and of any business or other connection or relationship which involves labor-management relations or which creates or gives the appearance of advocacy as defined in § 1404.5(c)(1).

(b) The OAS will provide parties with biographical sketches for each arbitrator on the Roster from information supplied by the arbitrator in conformance with this section and Sec. 1404.15. The OAS reserves the right to decide

and approve the format and content of biographical sketches.

[62 FR 34171, June 25, 1997, as amended at 70 FR 76399, Dec. 27, 2005]

Subpart D—Expedited Arbitration

SOURCE: 62 FR 48949, Sept. 18, 1997, unless otherwise noted.

§ 1404.17 Policy.

In an effort to reduce the time and expense of some grievance arbitrations, FMCS offers expedited procedures that may be appropriate in certain non-precedential cases or those that do not involve complex or unique issues. Expedited arbitration is intended to be a mutually agreed-upon process whereby arbitrator appointments, hearings and awards are acted upon quickly by the parties, FMCS, and the arbitrators. Mandating short deadlines and eliminating requirements for transcripts, briefs and lengthy opinions streamline the process.

[70 FR 76399, Dec. 27, 2005]

§ 1404.18 Procedures for requesting expedited panels.

(a) With the excepting of the specific changes noted in this Subpart, all FMCS rules and regulations governing its arbitration services shall apply to Expedited Arbitration.

(b) Upon receipt of a joint Request for Arbitration Panel (Form R-43) indicating that both parties desire expedited services, the OAS will refer a panel of arbitrators.

(c) A panel of arbitrators submitted by the OAS in expedited cases shall be valid for up to 30 days. Only one panel will be submitted per case. If the parties are unable to mutually agree upon an arbitrator or if prioritized selections are not received from both parties within 30 days, the OAS will make a direct appointment of an arbitrator not on the original panel.

(d) If the parties mutually select an arbitrator, but the arbitrator is not available, the parties may select a second name from the same panel or the OAS will make a direct appointment of

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another arbitrator not listed on the original panel.

[62 FR 48949, Sept. 18, 1997, as amended at 70 FR 76400, Dec. 27, 2005]

§ 1404.19 Arbitration process.

(a) Once notified of the expedited case appointment by the OAS, the arbitrator must contact the parties within seven (7) calendar days.

(b) The parties and the arbitrator must attempt to schedule a hearing within 30 days of the appointment date.

(c) Absent mutual agreement, all hearings will be concluded within one day. No transcripts of the proceedings will be made and the filing of post-hearing briefs will not be allowed.

(d) All awards must be completed within seven (7) working days from the hearing. These awards are expected to be brief, concise, and not required extensive written opinion or research time.

§ 1404.20 Proper use of expedited arbitration.

(a) FMCS reserves the right to cease honoring request for Expedited Arbitration if a pattern of misuse of this becomes apparent. Misuse may be indicated by the parties' frequent delay of the process or referral of inappropriate cases.

(b) Arbitrators who exhibit a pattern of unavailability of appointments or who are repeatedly unable to schedule hearings or render awards within established deadlines will be considered ineligible for appointment for this service.

[62 FR 48949, Sept. 18, 1997. Redesignated at 70 FR 76400, Dec. 27, 2005]

APPENDIX TO 29 CFR PART 1404—ARBITRATION POLICY; SCHEDULE OF FEES

Annual listing fee for all arbitrators: \$150 for the first address; \$50 for the second address
Request for panel of arbitrators processed by FMCS staff: \$50

Request for panel of arbitrators on-line: \$30.00

Direct appointment of an arbitrator when a panel is not used: \$20.00 per appointment

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List and biographic sketches of arbitrators in a specific area: \$25.00 per request plus \$.25 per page.

[68 FR 10659, Mar. 6, 2003, amended at 75 FR 30706, June 2, 2010]

PART 1405—PART-TIME EMPLOYMENT

Subpart A—General

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1405.2 Policy.

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Subpart B—Part-time Employment Program

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1405.7 Goals and timetables.

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1405.9 Part-time employment practices.

1405.10 Effect on employment ceilings.

1405.11 Effect on employee benefits.

AUTHORITY: Pub. L. 95–437, Federal Employees Part-time Career Employment Act of 1978.

SOURCE: 47 FR 15779, Apr. 13, 1982, unless otherwise noted.

Subpart A—General

§ 1405.1 Purpose.

These regulations implement Public Law 95–437, the Federal Employees Part-time Career Employment Act of 1978, by establishing a continuing program in the Federal Mediation and Conciliation Service (FMCS) to provide career part-time employment opportunities.

§ 1405.2 Policy.

It is the policy of FMCS to provide career part-time employment opportunities in positions through GS–16 (or equivalent) subject to agency resources and mission requirements.

§ 1405.3 Definition.

Part-time career employment means regularly scheduled work of from 16 to 32 hours per week performed by employees in competitive or excepted appointments in tenure groups I or II.

§ 1405.4 Applicability.

The regulations cover permanent positions which are deemed by management to be appropriately structured on a part-time basis. The regulations do not apply to positions at GS-16 (or equivalent) and above.

Subpart B—Part-time Employment Program**§ 1405.6 Program coordination.**

The Director of Personnel is designated the FMCS Part-time Employment Coordinator with responsibility for:

- (a) Consulting in the part-time employment program with the Director of Equal Employment Opportunity, Federal Women's Program Coordinator, Handicapped Program Coordinator, representatives of employee unions, and other interested parties;
- (b) Responding to requests for advice and assistance on part-time employment within the agency;
- (c) Maintaining liaison with groups interested in promoting part-time employment opportunities;
- (d) Monitoring the agency's part-time employment efforts; and preparing reports on part-time employment for transmittal to OPM and the Congress.

§ 1405.7 Goals and timetables.

On an annual basis, as part of the manpower and budget process, management will set goals for establishing part-time positions to part-time along with a timetable setting forth interim and final deadlines for achieving the goals. Decisions on part-time employment will be based on such factors as agency mission, occupational mix, workload fluctuations, affirmative actions, geographic dispersion, effect on providing services to the public, and employee interest in part-time employment.

§ 1405.8 Reporting.

FMCS will report as required by regulations to the Office of Personnel Management on the part-time employment program. The program will be reviewed through internal personnel management evaluations.

§ 1405.9 Part-time employment practices.

FMCS will review positions which become vacant for the feasibility of utilizing part-time career appointments. Part-time positions will be advertised in vacancy announcements. Agency employees may request and receive consideration to switch from full-time to part-time schedules. The request should be addressed through the supervisor to the Director of Personnel listing any and all reasons for the request. The Director of Personnel, with input from all affected management officials, will decide whether or not to grant the request. Any employee requesting a change from full-time to part-time employment will be advised of effects on pay and fringe benefits by the Director of Personnel.

§ 1405.10 Effect on employment ceilings.

Effective October 1, 1980, part-time employees will be counted on the basis of the fractional part of the 40-hour week actually worked. For example two employees each working twenty hours a week will count as one employee.

§ 1405.11 Effect on employee benefits.

Career part-time employees are entitled to coverage under the Federal Employees Group Life Insurance and Federal Employees Health Benefits Programs. The Government contribution for health insurance of eligible part-time employees will be prorated on the basis of the fraction of a full-time schedule worked.

PART 1410—PRIVACY

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1410.12 Specific exemptions.

AUTHORITY: Privacy Act 1974, Pub. L. 93-579, 88 Stat. 1896 (5 U.S.C. 552a).

SOURCE: 40 FR 47418, Oct. 8, 1975, unless otherwise noted.

§ 1410.1 Purpose and scope.

(a) The purpose of this part is to set forth rules to inform the public about information maintained by the Federal Mediation and Conciliation Service about individuals, to inform those individuals how they may gain access to and correct or amend information about themselves, and to exempt disclosure of identity of confidential sources of certain records.

(b) [Reserved]

§ 1410.2 Definitions.

For the purposes of this part, unless otherwise required by the context—

(a) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) *Maintain* means maintain, collect, use or disseminate.

(c) *Record* means any item, collection or grouping of information about an individual that is maintained by the Federal Mediation and Conciliation Service including, but not limited to, his education, financial transactions, medical history, and criminal or employment history, that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print, or a photograph.

(d) *System of records* means a group of any records under the control of Federal Mediation and Conciliation Service from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual.

§ 1410.3 Individual access requests.

(a) Individuals who desire to know whether the agency maintains a system of records containing records pertaining to him may submit a written request to the Director of Administration, Federal Mediation and Conciliation Service, Washington, DC 20427. The request must include the name and address of the requestor. The Director of Administration, or his designated representative, will advise the re-

questor in writing within 10 working days whether the records are so maintained and the general category of records maintained within the system.

(b) Any individual who desires to inspect or receive copies of any record maintained within the system concerning him shall submit a written request to the Director of Administration, Federal Mediation and Conciliation Service, Washington, DC 20427, reasonably identifying the records sought to be inspected or copied.

(c) The individual seeking access to his record may also have another person accompanying him during his review of the records. If the requestor desires another person to accompany him during the inspection, the requestor must sign a statement, to be furnished to the Service representative at the time of the inspection authorizing such other person to accompany him. Except as required under the Freedom of Information Act, permitted as a routine use as published in the agency's annual notice, or for internal agency use, disclosure of records will only be made to the individual to whom the record pertains, unless written consent is obtained from that individual. The Director of Administration will verify the signature of the individual requesting or consenting to the disclosure of a record prior to the disclosure thereof to any other person by a comparison of signatures, if the request or consent is not executed within the presence of a designated Service representative.

(d) The Director of Administration or his designated representative will advise the requestor in writing within 10 working days of receipt of the request whether, to what extent, and approximately when and where access shall be granted. Within 30 days of receipt of the request, the records will be made available for review at the FMCS National Office in Washington, DC, or one of the Regional Offices. The following is a list of the Regional Office locations:

1. *Eastern Region:*

Address: Jacob K. Javits Federal Building, 26 Federal Plaza, Room 2937, New York, NY 10278.

Consists of: Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, New York, Puerto Rico, the Virgin

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Islands, Pennsylvania, Delaware, New Jersey, Garrett and Alleghany Counties of Maryland; and Brooke and Hancock Counties of West Virginia.

2. *Central Region:*

Address: Insurance Exchange Building, Room 1641, 175 W. Jackson Street, Chicago, IL 60604.

Consist of: Illinois (except counties listed under the Southern Region); Indiana (except counties listed under Southern Region); Wisconsin, Minnesota, North Dakota, South Dakota, Michigan, and Ohio (except counties listed under the Southern Region).

3. *Southern Region:*

Address: Suite 400, 1422 W. Peachtree St., NW., Atlanta, GA 30309.

Consists of: Virginia, Maryland (except counties listed under the Eastern Region); Tennessee; North Carolina; South Carolina; Georgia; Alabama; Florida; Mississippi; Louisiana; Arkansas; Kentucky; Texas (except for Hudspeth and El Paso counties); Oklahoma; Missouri (except for those counties listed for the Western Region); Illinois (in counties of Calhoun, Greene, Jersey, McCoupin, Montgomery, Fayette, Bond, Madison, St. Clair, Monroe, Clinton, Washington, Marion, White, Hamilton, Wayne, Edwards, Wabash, Lawrence, Richland, Clay, Effingham, Jasper, and Crawford); Indiana (the counties of Knox, Daviess, Martin, Orange, Washington, Clark, Floyd, Harrison, Crawford, Perry, Spencer, DuBois, Pike, Gibson, Posey, Vanderburgh, and Warrick); Ohio (the counties of Butler, Hamilton, Warren, Clermont, Brown, Highland, Clinton, Ross, Pike, Adams, Scioto, Lawrence, Ballia, Jackson, Vinton, Hocking, Athens, and Meigs); Kansas (the counties of Bourbon, Crawford, Cherokee, and Ottawa); West Virginia (except counties listed under the Central Region); and the Canal Zone.

4. *Western Region:*

Address: Francisco Bay Building, Suite 235, 50 Francisco Street, San Francisco, CA 94133.

Consists of: California; Nevada; Arizona; New Mexico; El Paso and Hudspeth Counties (only) in Texas; Hawaii; Guam; Alaska; Washington; Oregon; Colorado; Utah; Wyoming; Montana; Idaho; Nebraska; Kansas; Iowa; Missouri (the counties of Atchinson, Nodaway, Worth, Harrison, Mercer, Putnam, Schuyler, Scotland, Knox, Adair, Sullivan, Grundy, Daviess, Gentry, DeKalb, Andrew, Holt, Buchanan, Clinton, Caldwell, Livingston, Linn, Macon, Shelby, Randolph, Chariton, Carrol, Ray, Clay, Platte, Jackson, Lafayette, Saline, Howard, Boon, Cooper, Pettis, Johnson, Cass, Bates, Henry, St. Clair, Benton, and Morgan); American Samoa; and Wake Island.

[40 FR 47418, Oct. 8, 1975, as amended at 47 FR 10530, Mar. 11, 1982]

§ 1410.4 Requirements for identification of individuals making requests.

Satisfactory identification (i.e., employ identification number, current address, and verification of signature) must be provided to FMCS prior to review of the record. The requestor will be provided the opportunity to review the records during normal business hours.

§ 1410.5 Special procedures: Medical records.

(a) If medical records are requested for inspection which, in the opinion of the Director of Administration, may be harmful to the requestor if personally inspected by him, such records will be furnished only to a licensed physician, designated to receive such records by the requestor. Prior to such disclosure, the requestor must furnish a signed written authorization to the Service to make such disclosure and the physician must furnish a written request to the Director of Administration for the physician's receipt of such records.

(b) Verification of the requestor's signature will be accomplished by a comparison of signatures if such authorization is not executed within the presence of a Service representative.

§ 1410.6 Requests for correction or amendment of records.

(a) If the individual disagrees with the information in the record, he may request that the record be amended by addition or deletion. Such a request must be in writing and directed to the Director of Administration, Federal Mediation and Conciliation Service, Washington, DC, 20427. The request must also specifically outline the amendment sought. The Director of Administration or his designated representative will acknowledge receipt of the request within 10 working days from the date of receipt of such request. Under normal circumstances, not later than 30 days after receipt of the request for amendments, the Director of Administration will either:

(1) Amend the record and notify the requestor in a written letter of determination to what extent the record is amended; or

(2) If the amendment or correction is denied in whole or in part, notify the

§ 1410.7

requestor in a written letter of determination the reason for denial and the requestor's right to request review by the Deputy National Director.

(b) Routine requests of arbitrators maintained on the Service's roster of arbitrators to amend records for such matters as address, experience, fees charged, may be made in writing to the Director of Arbitration Services, Washington, DC, 20427. If such routine requests are not granted or involve other types of amendments, then the procedure to be followed is that which includes a request in writing to the Director of Administration.

§ 1410.7 Agency review of refusal to amend a record.

(a) The requestor may appeal any determination of the Director of Administration not to amend a record by submitting a written request for review of refusal to amend a record to the Deputy National Director, Washington, DC 20427. Such a request shall indicate the specific corrections or amendments sought. Not later than 30 days from receipt of a request for review (unless such period is extended by the National Director for good cause shown), the Deputy National Director will complete such a review and make a final determination on the request, and shall advise the requestor in a written letter of determination whether, and to what extent the correction or amendment will be made. If the correction or amendment is denied, in whole or in part, the letter of determination will specify the reasons for such denial.

(b) If the Deputy National Director makes a final determination not to amend the record, the individual may provide to the Service a concise written statement explaining the reasons for disagreement with the refusal.

(c) In addition, the individual may file a civil action in the U.S. District Court to seek an order compelling the Service to amend the record as requested.

§ 1410.8 Notation of dispute.

After an individual has filed a statement of disagreement as described in § 1410.7(b), any disclosure of the contested records must contain a notation of the dispute. In addition, a copy of

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the individual's statement will be provided to the person or agency to whom the disputed record is disclosed. The Service may also, but it is not required to, provide a statement reflecting the agency's reasons for not making the requested amendments.

§ 1410.9 Fees.

Upon request, the Service will provide a photostatic copy of the records to the individual to whom they pertain. There will be a charge of \$.10 per page.

§ 1410.10 Penalties.

Any person who knowingly and willfully requests or obtains any record concerning an individual from the Service under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000.

§ 1410.11 Standards of review.

Upon a request for inspection of records or a determination on a request for amendment, the Director of Administration, his designated representative, or the Deputy National Director will review the pertinent records and discard any material in them that is not:

(a) Relevant and necessary to accomplish a statutory purpose or a purpose not authorized by executive order.

(b) Accurate, relevant, timely, and complete, to assure fairness to the individual.

§ 1410.12 Specific exemptions.

With regard to Agency Internal Personnel Records and Arbitrator Personal Data Files, separately described in the system notices, such records will be exempted from section (d) of the Act as follows:

Investigatory material maintained solely for the purposes of determining an individual's qualification, eligibility, or suitability for employment in the Federal civilian service, Federal contracts, or access to classified information, but only to the extent that disclosure of such material would reveal the identity of the source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

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In order to obtain accurate information pertaining to employee or arbitrator eligibility, the nondisclosure of the identity of such a confidential source is essential.

PART 1420—FEDERAL MEDIATION AND CONCILIATION SERVICE—ASSISTANCE IN THE HEALTH CARE INDUSTRY

Sec.

1420.1 Functions of the Service in health care industry bargaining under the Labor-Management Relations Act, as amended (hereinafter “the Act”).

1420.2–1420.4 [Reserved]

1420.5 Optional input of parties to Board of Inquiry selection.

1420.6–1420.7 [Reserved]

1420.8 FMCS deferral to parties’ own private factfinding procedures.

1420.9 FMCS deferral to parties’ own private interest arbitration procedures.

AUTHORITY: Secs. 8(d), 201, 203, 204, and 213 of the Labor Management Relations Act, as amended in 1974 (29 U.S.C. 158(d), 171, 173, 174 and 183).

SOURCE: 44 FR 42683, July 20, 1979, unless otherwise noted.

§ 1420.1 Functions of the Service in health care industry bargaining under the Labor-Management Relations Act, as amended (hereinafter “the Act”).

(a) *Dispute mediation.* Whenever a collective bargaining dispute involves employees of a health care institution, either party to such collective bargaining must give certain statutory notices to the Federal Mediation and Conciliation Service (hereinafter “the Service”) before resorting to strike or lockout and before terminating or modifying any existing collective bargaining agreement. Thereafter, the Service will promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be called by the Service for the purpose of aiding in a settlement of the dispute. (29 U.S.C. 158(d) and 158(g).)

(b) *Boards of inquiry.* If, in the opinion of the Director of the Service a threatened or actual strike or lockout affecting a health care institution will

substantially interrupt the delivery of health care in the locality concerned, the Director may establish within certain statutory time periods an impartial Board of Inquiry. The Board of Inquiry will investigate the issues involved in the dispute and make a written report, containing the findings of fact and the Board’s non-binding recommendations for settling the dispute, to the parties within 15 days after the establishment of such a Board. (29 U.S.C. 183.)

§§ 1420.2–1420.4 [Reserved]

§ 1420.5 Optional input of parties to Board of Inquiry selection.

The Act gives the Director of the Service the authority to select the individual(s) who will serve as the Board of Inquiry if the Director decides to establish a Board of Inquiry in a particular health care industry bargaining dispute (29 U.S.C. 183). If the parties to collective bargaining involving a health care institution(s) desire to have some input to the Service’s selection of an individual(s) to serve as a Board of Inquiry (hereinafter “BoI”), they may jointly exercise the following optional procedure:

(a) At any time at least 90 days prior to the expiration date of a collective bargaining agreement in a contract renewal dispute, or at any time prior to the notice required under clause (B) of section 8(d) of the Act (29 U.S.C. 158(d)) in an initial contract dispute, the employer(s) and the union(s) in the dispute may jointly submit to the Service a list of arbitrators or other impartial individuals who would be acceptable BoI members both to the employer(s) and to the union(s). Such list submission must identify the dispute(s) involved and must include addresses and telephone numbers of the individuals listed and any information available to the parties as to current and past employment of the individuals listed. The parties may jointly rank the individuals in order of preference if they desire to do so.

(b) The Service will make every effort to select any BoI that might be appointed from that jointly submitted list. However, the Service cannot promise that it will select a BoI from

§§ 1420.6–1420.7

such list. The chances of the Service finding one or more individuals on such list available to serve as the BoI will be increased if the list contains a sufficiently large number of names and if it is submitted at as early a date as possible. Nevertheless, the parties can even preselect and submit jointly to the Service one specific individual if that individual agrees to be available for the particular BoI time period. Again the Service will not be bound to appoint that individual, but will be receptive to such a submission by the parties.

(c) The jointly submitted list may be worked out and agreed to by (1) A particular set of parties in contemplation of a particular upcoming negotiation dispute between them, or (2) a particular set of parties for use in all future disputes between that set of parties, or (3) a group of various health care institutions and unions in a certain community or geographic area for use in all disputes between any two or more of those parties.

(d) Submission or receipt of any such list will not in any way constitute an admission of the appropriateness of appointment of a BoI nor an expression of the desirability of a BoI by any party or by the Service.

(e) This joint submission procedure is a purely optional one to provide the parties with an opportunity to have input into the selection of a BoI if they so desire.

(f) Such jointly submitted lists should be sent jointly by the employer(s) and the union(s) to the appropriate regional office of the Service. The regional offices of the Service are as follows:

1. *Eastern Region:*

Address: Jacob K. Javits Federal Building, 26 Federal Plaza, Room 2937, New York, NY 10278.

Consists of: Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, New York, Puerto Rico, the Virgin Islands, Pennsylvania, Delaware, New Jersey, Garrett and Alleghany Counties of Maryland; and Brooke and Hancock Counties of West Virginia.

2. *Central Region:*

Address: Insurance Exchange Building, Room 1641, 175 W. Jackson Street, Chicago, IL 60604.

Consist of: Illinois (except counties listed under the Southern Region); Indiana (except

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counties listed under Southern Region); Wisconsin, Minnesota, North Dakota, South Dakota, Michigan, and Ohio (except counties listed under the Southern Region).

3. *Southern Region:*

Address: Suite 400, 1422 W. Peachtree St., NW., Atlanta, GA 30309.

Consists of: Virginia, Maryland (except counties listed under the Eastern Region); Tennessee; North Carolina; South Carolina; Georgia; Alabama; Florida; Mississippi; Louisiana; Arkansas; Kentucky; Texas (except for Hudspeth and El Paso counties); Oklahoma; Missouri (except for those counties listed for the Western Region); Illinois (in counties of Calhoun, Greene, Jersey, McCoupin, Montgomery, Fayette, Bond, Madison, St. Clair, Monroe, Clinton, Washington, Marion, White, Hamilton, Wayne, Edwards, Wabash, Lawrence, Richland, Clay, Effingham, Jasper, and Crawford); Indiana (the counties of Knox, Daviess, Martin, Orange, Washington, Clark, Floyd, Harrison, Crawford, Perry, Spencer, DuBois, Pike, Gibson, Posey, Vanderburgh, and Warrick); Ohio (the counties of Butler, Hamilton, Warren, Clermont, Brown, Highland, Clinton, Ross, Pike, Adams, Scioto, Lawrence, Ballia, Jackson, Vinton, Hocking, Athens, and Meigs); Kansas (the counties of Bourbon, Crawford, Cherokee, and Ottawa); West Virginia (except counties listed under the Central Region); and the Canal Zone.

4. *Western Region:*

Address: Francisco Bay Building, Suite 235, 50 Francisco Street, San Francisco, CA 94133.

Consists of: California; Nevada; Arizona; New Mexico; El Paso and Hudspeth Counties (only) in Texas; Hawaii; Guam; Alaska; Washington; Oregon; Colorado; Utah; Wyoming; Montana; Idaho; Nebraska; Kansas; Iowa; Missouri (the counties of Atchinson, Nodaway, Worth, Harrison, Mercer, Putnam, Schuyler, Scotland, Knox, Adair, Sullivan, Grundy, Daviess, Gentry, DeKalb, Andrew, Holt, Buchanan, Clinton, Caldwell, Livingston, Linn, Macon, Shelby, Randolph, Chariton, Carrol, Ray, Clay, Platte, Jackson, Lafayette, Saline, Howard, Boon, Cooper, Pettis, Johnson, Cass, Bates, Henry, St. Clair, Benton, and Morgan); American Samoa; and Wake Island.

[44 FR 42683, July 20, 1979, as amended at 47 FR 10530, Mar. 11, 1982]

§§ 1420.6–1420.7 [Reserved]

§ 1420.8 **FMCS deferral to parties' own private factfinding procedures.**

(a) The Service will defer to the parties' own privately agreed to factfinding procedure and decline to appoint a Board of Inquiry (BoI) as long as the parties' own procedure meets certain conditions so as to satisfy the

Service's responsibilities under the Act. The Service will decline to appoint a BoI and leave the selection and appointment of a factfinder to the parties to a dispute if both the parties have agreed in writing to their own factfinding procedure which meets the following conditions:

(1) The factfinding procedure must be invoked automatically at a specified time (for example, at contract expiration if no agreement is reached).

(2) It must provide a fixed and determinate method for selecting the impartial factfinder(s).

(3) It must provide that there can be no strike or lockout and no changes in conditions of employment (except by mutual agreement) prior to or during the factfinding procedure and for a period of at least seven days after the factfinding is completed.

(4) It must provide that the factfinder(s) will make a written report to the parties, containing the findings of fact and the recommendations of the factfinder(s) for settling the dispute, a copy of which is sent to the Service. The parties to a dispute who have agreed to such a factfinding procedure should jointly submit a copy of such agreed upon procedure to the appropriate regional office of the Service at as early a date as possible, but in any event prior to the appointment of a BoI by the Service. See §1420.5(f) for the addresses of the regional offices.

(b) Since the Service does not appoint the factfinder under paragraph (a) of this section, the Service cannot pay for such factfinder. In this respect, such deferral by the Service to the parties' own factfinding procedure is different from the use of stipulation agreements between the parties which give to the Service the authority to select and appoint a factfinder at a later date than the date by which a BoI would have to be appointed under the Act. Under such stipulation agreements by which the parties give the Service authority to appoint a factfinder at a later date, the Service can pay for the factfinder. However, in the deferral to the parties' own factfinding procedure, the parties choose their own factfinder and they pay for the factfinder.

§1420.9 FMCS deferral to parties' own private interest arbitration procedures.

(a) The Service will defer to the parties' own privately agreed to interest arbitration procedure and decline to appoint a Board of Inquiry (BoI) as long as the parties' own procedure meets certain conditions so as to satisfy the Service's responsibilities under the Act. The Service will decline to appoint BoI if the parties to a dispute have agreed in writing to their own interest arbitration procedure which meets the following conditions:

(1) The interest arbitration procedure must provide that there can be no strike or lockout and no changes in conditions of employment (except by mutual agreement) during the contract negotiation covered by the interest arbitration procedure and the period of any subsequent interest arbitration proceedings.

(2) It must provide that the award of the arbitrator(s) under the interest arbitration procedure is final and binding on both parties.

(3) It must provide a fixed and determinate method for selecting the impartial interest arbitrator(s).

(4) The interest arbitration procedure must provide for a written award by the interest arbitrator(s).

(b) The parties to a dispute who have agreed to such an interest arbitration procedure should jointly submit a copy of their agreed upon procedure to the appropriate regional office of the Service at as early a date as possible, but in any event prior to the appointment of BoI by the Service. See §1420.5(f) for the addresses of regional offices.

These new regulations are a part of the Service's overall approach to implementing the health care amendments of 1974 in a manner consistent with the Congressional intent of promoting peaceful settlements of labor disputes at our vital health care facilities. The Service will work with the parties in every way possible to be flexible and to tailor its approach so as to accommodate the needs of the parties in the interest of settling the dispute. This was the motivating principle behind these new regulations which permit input by the parties to the Board of Inquiry selection and allow the parties to set up

their own factfinding or arbitration procedures in lieu of the Board of Inquiry procedure. We encourage the parties, both unions and management, to take advantage of these and other options and to work with the Service to tailor their approach and procedures to fit the needs of their bargaining situations.

PART 1425—MEDIATION ASSISTANCE IN THE FEDERAL SERVICE

Sec.

1425.1 Definitions.

1425.2 Notice to the Service of agreement negotiations.

1425.3 Functions of the Service under title VII of the Civil Service Reform Act.

1425.4 Duty of parties.

1425.5 Referral to FSIP.

1425.6 Use of third-party mediation assistance.

AUTHORITY: 5 U.S.C. 581(8), 7119, 7134.

SOURCE: 45 FR 62798, Sept. 22, 1980, unless otherwise noted.

§ 1425.1 Definitions.

As used in this part:

(a) *The Service* means Federal Mediation and Conciliation Service.

(b) *Party* or *Parties* means (1) any appropriate activity, facility, geographical subdivision, or combination thereof, of an agency as that term is defined in 5 U.S.C. 7103(3), or (2) a labor organization as that term is defined in 5 U.S.C. 7103(4).

(c) *Third-party mediation assistance* means mediation by persons other than FMCS commissioners.

(d) *Provide its services* means to make the services and facilities of the Service available either on its own motion or upon the special request of one or both of the parties.

§ 1425.2 Notice to the Service of agreement negotiations.

(a) In order that the Service may provide assistance to the parties, the party initiating negotiations shall file a notice with the FMCS Notice Processing Unit, 2100 K Street, N.W., Washington, D.C. 20427, at least 30 days prior to the expiration or modification date of an existing agreement, or 30 days prior to the reopener date of an existing agreement. In the case of an initial

agreement the notice shall be filed within 30 days after commencing negotiations.

(b) Parties engaging in mid-term or impact and/or implementation bargaining are encouraged to send a notice to FMCS if assistance is desired. Such notice may be sent by either party or may be submitted jointly. In regard to such notices a brief listing should be general in nature e.g., smoking policies, or Alternative Work Schedules (AWS).

(c) Parties requesting grievance mediation must send a request signed by both the union and the agency involved. Receipt of such request does not commit FMCS to provide its services. FMCS has the discretion to determine whether or not to perform grievance mediation, as such service may not be appropriate in all cases.

(d) The guidelines for FMCS grievance mediation are:

(1) The parties shall submit a joint request, signed by both parties requesting FMCS assistance. The parties agree that grievance mediation is a supplement to, and not a substitute for, the steps of the contractual grievance procedure.

(2) The grievant is entitled to be present at the grievance mediation conference.

(3) Any time limits in the parties labor agreement must be waived to permit the grievance to proceed to arbitration should mediation be unsuccessful.

(4) Proceedings before the mediator will be informal and rules of evidence do not apply. No record, stenographic or tape recordings of the meetings will be made. The mediator's notes are confidential and content shall not be revealed.

(5) The mediator shall conduct the mediation conference utilizing all of the customary techniques associated with mediation including the use of separate caucuses.

(6) The mediator has no authority to compel resolution of the grievance.

(7) In the event that no settlement is reached during the mediation conference, the mediator may provide the parties either in separate or joint session with an oral advisory opinion.

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(8) If either party does not accept an advisory opinion, the matter may then proceed to arbitration in the manner form provided in their collective bargaining agreement. Such arbitration hearings will be held as if the grievance mediation effort had not taken place. Nothing said or done by the parties or the mediator during the grievance mediation session can be used during arbitration proceedings.

(9) When the parties choose the FMCS grievance mediation procedure, they have agreed to abide by these guidelines established by FMCS, and it is understood that the parties and the grievant shall hold FMCS and the mediator appointed by the Service to conduct the mediation conference harmless of any claim of damages arising from the mediation process.

FMCS FORM F-53
REVISED 5-92

Form Approved
OMB No. 3076-0005
Exp. NOV. 1997

FEDERAL SECTOR LABOR RELATIONS
NOTICE TO FEDERAL MEDIATION AND CONCILIATION SERVICE

MAIL TO: NOTICE PROCESSING UNIT
FEDERAL MEDIATION AND CONCILIATION SERVICE
2100 K STREET N.W.
WASHINGTON D.C. 20427

THIS NOTICE IS IN REGARD TO: (MARK "X")

- AN INITIAL CONTRACT (INCLUDE FLRA CERTIFICATION NUMBER) # _____
- A CONTRACT REOPENER REOPENER DATE: ____/____/____
- THE EXPIRATION OF AN EXISTING AGREEMENT EXPIRATION DATE: ____/____/____

OTHER REQUESTS FOR THE ASSISTANCE OF FMCS IN BARGAINING (MARK "X")

2 SPECIFY TYPE OF ISSUE(S):

3 ISSUE(S): REQUEST FOR GRIEVANCE MEDIATION (SEE ITEM # 10) (MARK "X")

4 NAME OF FEDERAL AGENCY NAME OF SUBDIVISION OR COMPONENT, IF ANY

STREET ADDRESS OF AGENCY CITY STATE ZIP

AGENCY OFFICIAL TO BE CONTACTED AREA CODE & PHONE NUMBER

5 NAME OF NATIONAL UNION OR PARENT BODY NAME AND / OR LOCAL NUMBER

STREET ADDRESS CITY STATE ZIP

UNION OFFICIAL TO BE CONTACTED AREA CODE & PHONE NUMBER

6 LOCATION OF NEGOTIATIONS OR WHERE MEDIATION WILL BE HELD

STREET ADDRESS CITY STATE ZIP

7 APPROX. # OF EMPLOYEES IN BARGAINING UNIT(S) >> IN ESTABLISHMENT >>

8 THIS NOTICE OR REQUEST IS FILED ON BEHALF OF (MARK "X") UNION AGENCY

9 NAME AND TITLE OF OFFICIAL(S) SUBMITTING THIS NOTICE OR REQUEST AREA CODE & PHONE NUMBER

STREET ADDRESS CITY STATE ZIP

FOR GRIEVANCE MEDIATION, THE SIGNATURES OF BOTH PARTIES ARE REQUIRED:

10 SIGNATURE (AGENCY) DATE SIGNATURE (UNION) DATE

*Receipt of this form does not commit FMCS to offer its services. Receipt of this form will not be acknowledged in writing by FMCS. While use of this form is voluntary, its use will facilitate FMCS service to respondents. Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time for reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to FMCS Division of Administrative Services, Washington, D.C. 20427, and to the Office of Management and Budget, Paperwork Reduction Project, Washington, D.C. 20603

For Instructions, see back.

INSTRUCTIONS

Complete this form, please follow these instructions.

In item #1. Check the block and give the date if this is for an existing agreement or reopener. The FLRA Certification number

should be provided if available. If not known, please leave this item blank. Absence of this number will not impede processing of the Form.

In item #2. If other assistance in bargaining is requested please specify: e.g.; impact and

implementation bargaining (I&I) and/or mid-term bargaining and provide a brief listing of issues, e.g. Smoking, Alternative Work Schedules (AWS), ground rules, office moves, or if desired, add attached list. This is only if such issues are known at time of filing.

In *item #3*. Please specify the issues to be considered for grievance mediation. Please refer to FMCS guidelines for processing these requests. Please make certain that both parties sign this request!

In *item #4*. List the name of the agency, as follows: The Department, and the subdivision or component. For example: U.S. Dept. of Labor, BLS, or U.S. Dept. of Army, Aberdeen Proving Ground, or Illinois National Guard, Springfield Chapter. If an independent agency is involved, list the agency, e.g. Federal Deposit Insurance Corp. (FDIC) and any subdivision or component, if appropriate.

In *item #5*. List the name of the union and its subdivision or component as follows: e.g. Federal Employees Union, Local 23 or Government Workers Union, Western Joint Council.

In *item #6*. Provide the area where the negotiation or mediation will most likely take place, with zip code, e.g., Washington, D.C. 20427. The zip code is important because our cases are routed by computer through zip code, and mediators are assigned on that basis.

In *item #7*. Only the *approximate* number of employees in the bargaining unit and establishment are requested. The establishment is the entity referred to in item 4 as name of subdivision or component, if any.

In *item #8*. The filing need only be sent by one party unless it is a request for grievance mediation. (See item 9.)

In *item #9*. Please give the title of the official, phone number, address, and zip code.

In *item #10*. Both labor and management signatures are required for grievance mediation requests.

NOTICE

- Send original to F.M.C.S.
- Send one copy to opposite party.
- Retain one copy for party filing notice.

[60 FR 2509, Jan. 10, 1995]

§ 1425.3 Functions of the Service under title VII of the Civil Service Reform Act.

(a) The service may provide its assistance in any negotiation dispute when earnest efforts by the parties to reach agreement through direct negotiation have failed to resolve the dispute. When the existence of a negotiation dispute comes to the attention of the Service through a specific request for mediation from one or both of the

parties, through notification under the provisions of §1425.2, or otherwise, the Service will examine the information concerning the dispute and if, in its opinion, the need for mediation exists, the Service will use its best efforts to assist the parties to reach agreement.

(b) The Service may, at the outset of negotiations or at any time in the dispute, set time limits on its participation. If no settlement of the dispute is reached by the expiration of the time limits, the Service may make suggestions for settlement to the parties. If suggestions for settlement made by the Service are not accepted by the parties within time limits set by the Service, the matter may be referred to the Federal Services Impasses Panel (FSIP).

§ 1425.4 Duty of parties.

It shall be the duty of the parties to participate fully and promptly in any meetings arranged by the Service for the purpose of assisting in the settlement of a negotiation dispute.

§ 1425.5 Referral to FSIP.

If the mediation process has been completed and the parties are at a negotiation impasse, the Service or the parties may request consideration of the matter by the Federal Services Impasses Panel. The Service shall not refer a case to FSIP until the mediation process has been exhausted and the parties are at a negotiation impasse.

§ 1425.6 Use of third-party mediation assistance.

If the parties should mutually agree to third-party mediation assistance other than that of the Service, both parties shall immediately inform the Service in writing of this agreement. Such written communication shall be filed with the regional director of the region in which the negotiation is scheduled, and shall state what alternate assistance the parties have agreed to use.

PART 1430—FEDERAL MEDIATION AND CONCILIATION SERVICE ADVISORY COMMITTEES

Sec.
1430.1 Scope and purpose.

§ 1430.1

- 1430.2 Definitions.
- 1430.3 Establishment of advisory committees.
- 1430.4 Filing of advisory committee charter.
- 1430.5 Termination of advisory committees.
- 1430.6 Renewal of advisory committees.
- 1430.7 Application of the Freedom of Information Act to advisory committee functions.
- 1430.8 Advisory committee meetings.
- 1430.9 Agency management of advisory committees.

AUTHORITY: Pub. L. 92-463, 86 Stat. 770 (5 U.S.C. App.).

SOURCE: 39 FR 9433, Mar. 11, 1974, unless otherwise noted.

§ 1430.1 Scope and purpose.

(a) This part contains the Federal Mediation and Conciliation Service's regulations implementing section 8(a) of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, (5 U.S.C. App.)), which requires each agency head to establish uniform guidelines and management controls for the advisory committees. These regulations supplement the Government-wide guidelines issued jointly by the Office of Management and Budget and the Department of Justice, and should be read in conjunction with them.

(b) The regulations provided under this part do not apply to statutorily created or established advisory committees of the Service, to the extent that such statutes have specific provisions different from those promulgated herein.

§ 1430.2 Definitions.

For the purposes of this part:

- (a) The term *Act* means the Federal Advisory Committee Act;
- (b) The term *advisory committee* means any committee, board, commission, counsel, conference, panel, task force, or other similar group, or any subgroup or subcommittee thereof which is:
 - (1) Established by statute or reorganization, plan, or
 - (2) Established or utilized by the President, or
 - (3) Established or utilized by one or more agencies or officers of the Federal Government in the interest of obtaining advice or recommendations for the President or one or more agencies of

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the Federal Government, except that such term excludes:

- (i) The Advisory Commission on Intergovernmental Relations;
 - (ii) The Commission on Government Procurement; and
 - (iii) Any committee which is composed wholly of full-time officers or employees of the Federal Government.
- (c) The term *agency* has the same meaning as in 5 U.S.C. 552(1);
- (d) The term *committee management officer* means the Federal Mediation and Conciliation Service employee or his delegee, officially designated to perform the advisory committee management functions delineated in this part;
- (e) The term *Service* means the Federal Mediation and Conciliation Service;
- (f) The term *OMB* means the Office of Management and Budget;
- (g) The term *Director* means the Director of the Federal Mediation and Conciliation Service;
- (h) The term *secretariat* means the OMB Committee Management Secretariat.

§ 1430.3 Establishment of advisory committees.

(a) *Guidelines for establishing advisory committees.* The guidelines in establishing advisory committees are as follows:

- (1) No advisory committee shall be established if its functions are being or could be performed by an agency or an existing committee;
- (2) The purpose of the advisory committee shall be clearly defined;
- (3) The membership of the advisory committee shall be fairly balanced in terms of the points of view represented and the committee's functions;
- (4) There shall be appropriate safeguards to assure that an advisory committee's advice and recommendations will not be inappropriately influenced by any special interests; and
- (5) At least once a year, a report shall be prepared for each advisory committee, describing the committee's membership, functions, and actions.

(b) *Advisory committees established by the Service not pursuant to specific statutory authority.* (1) Advisory committees

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established by the Service not pursuant to specific statutory authority may be created by the Director after consultation with the secretariat.

(2) When the Director determines that such an advisory committee needs to be established, he shall notify the secretariat of his determination and shall inform the secretariat of the nature and purpose of the committee, the reasons why the committee is needed, and the inability of any existing agency or committee to perform the committee's functions.

(3) After the secretariat has determined that establishment of such a committee is in conformance with the Act and has so informed the Director, the Director shall prepare a certification of the committee, stating the committee's nature and purpose, and that it is established in the public interest. That certification shall be published in the FEDERAL REGISTER.

(c) *Advisory committees created pursuant to Presidential directive.* Advisory committees established by Presidential directive are those created pursuant to Executive Order, executive memorandum, or reorganization plan. The Director shall create such committees in accordance with the provisions of the Presidential directive and shall follow the provisions of this part, to the extent they are not inconsistent with the directive.

(d) *Advisory committees created pursuant to specific statutory authority.* The Director shall create advisory committees established pursuant to specific statutory authority in accordance with the provisions of the statute and shall follow the provisions of this part, to the extent they are not inconsistent with the statute: *Provided, however,* That the Director need not utilize the procedures described in paragraph (b) of this section.

(e) *Advisory committees established by persons outside the Federal Government, but utilized by the Service to obtain advice or opinion.* In utilizing such committees, the Director shall follow the provisions of this part and the requirements of the Act. Such committees, to the extent they are utilized by the Service, shall be considered, for the purposes of this part, to be advisory committees established by the Service.

§ 1430.4 Filing of advisory committee charter.

(a) *Filing charter with Director.* Before an advisory committee takes any action or conducts any business, a charter shall be filed with the Director, the standing committees of Congress with legislative jurisdiction over the Service, and the Library of Congress. Except for a committee in existence on the effective date of the Act, or when authorized by statute, Presidential directive, or by the secretariat, such charter shall be filed no earlier than 30 days after publication of the committee's certification in the FEDERAL REGISTER.

(b) *Charter information.* A charter shall contain the following information:

(1) The committee's official designation;

(2) The committee's objectives and scope of activity;

(3) The period of time necessary for the committee to carry out its purposes;

(4) The agency or official to whom the advisory committee reports;

(5) The agency responsible for providing necessary support;

(6) A description of the committee's duties;

(7) The estimated number and frequency of committee meetings;

(8) The estimated annual operating costs in dollars and man-years;

(9) The committee's termination date, if less than two years; and

(10) The date the charter is filed.

(c) *Preparation and filing of initial charter.* Responsibility for preparation of the initial committee charter shall be with the head of the appropriate program within the Service, in cooperation with the committee management officer. The Director of Administration shall have responsibility for assuring the appropriate filings of such charters.

§ 1430.5 Termination of advisory committees.

(a) All nonstatutory advisory committees including those authorized, but not specifically created by statute, shall terminate no later than 2 years after their charters have been filed, unless renewed as provided in § 1430.6.

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(b) The charter of any committee in existence on the date the Act became effective (January 5, 1973) shall terminate no later than January 5, 1975, unless renewed, as provided in §1430.6.

(c) Advisory committees specifically created by statute shall terminate as provided in the establishing statute.

§ 1430.6 Renewal of advisory committees.

(a) Renewal of advisory committees not created pursuant to specific statutory authority.

(1) The Director may renew an advisory committee not created pursuant to specific statutory authority after consultation with the secretariat.

(2) When the Director determines that such an advisory committee should be renewed, he shall so advise the secretariat within 60 days prior to the committee's termination date and shall state the reasons for his determination.

(3) Upon concurrence of the secretariat, the Director shall publish notice of the renewal in the FEDERAL REGISTER and cause a new charter to be prepared and filed in accordance with the provisions of §1430.3.

(b) Renewal of advisory committees established pursuant to specific statutory authority. The Director may renew advisory committees established pursuant to specific statutory authority through the filing of a new charter at appropriate 2-year intervals.

(c) No advisory committee shall take any action or conduct any business during the period of time between its termination date and the filing of its renewal charter.

§ 1430.7 Application of the Freedom of Information Act to advisory committee functions.

(a) Subject to 5 U.S.C. 552, the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, and other documents which are made available to or are prepared for or by an advisory committee shall be available to the public.

(b) Advisory committee meeting conducted in accordance with §1430.7 may be closed to the public when discussing a matter that is of a 5 U.S.C. 552(b) na-

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ture, whether or not the discussion centers on a written document.

(c) No record, report, or other document prepared for or by an advisory committee may be withheld from the public unless the Office of the General Counsel determines that the document is properly within the exemptions of 5 U.S.C. 552(b). No committee meeting, or portion thereof, may be closed to the public unless the Office of the General Counsel determines in writing, prior to publication of the meeting in the FEDERAL REGISTER that such a closing is within the exemptions of 5 U.S.C. 552(b).

§ 1430.8 Advisory committee meetings.

(a) *Initiation of meetings.* (1) Committee meetings may be called by:

(i) The Director or the head of the office most directly concerned with the committee's activities;

(ii) The agency officer referred to in paragraph (a)(1)(i) of this section, and the committee chairman, jointly; or

(iii) The committee chairman, with the advance approval of the officer referred to in paragraph (a)(1)(i) of this section.

(2) The Service's committee management officer shall be promptly informed that a meeting has been called.

(b) *Agenda.* Committee meetings shall be based on agenda approved by the officer referred to in paragraph (a)(1) of this section. Such agenda shall note those items which may involve matters which have been determined by the Office of the General Counsel as coming within the exemptions to the Freedom of Information Act, 5 U.S.C. 552(b).

(c) *Notice of meetings.* (1) Notice of advisory committee meetings shall be published in the FEDERAL REGISTER at least 7 days before the date of the meeting, irrespective of whether a particular meeting will be open to the public. Notice to interested persons shall also be provided in such other reasonable ways as are appropriate under the circumstances, such as press release or letter. Responsibility for preparation of FEDERAL REGISTER and other appropriate notice shall be with the officer referred to in paragraph (a)(1) of this section.

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(2) Notice in the FEDERAL REGISTER shall state all pertinent information related to a meeting and shall be published at least 7 days prior to a meeting.

(d) *Presence of agency officer or employee at meetings.* No committee shall meet without the presence of the officer referred to in paragraph (a)(1) of this section, or his delegate. At his option the officer or employee may elect to chair the meeting.

(e) *Minutes.* Detailed minutes shall be kept of all committee meetings and shall be certified by the chairman of the advisory committee as being accurate.

(f) *Adjournment.* The officer or employee referred to in paragraph (a)(1) of this section may adjourn a meeting at any time he determines it in the public interest to do so.

(g) *Public access to committee meetings.* All advisory committee meetings shall be open to the public, except when the Office of the General Counsel determines, in writing, and states his reasons therefor prior to FEDERAL REGISTER notice, that a meeting or any part thereof, is concerned with matters related to the exemptions provided in the Freedom of Information Act, 5 U.S.C. 552(b). In such instances, those portions of a committee meeting which come within the section 552(b) exemptions may be closed to the public.

(h) *Public participation in committee procedures.* Interested persons shall be permitted to file statements with advisory committees. Subject to reasonable committee procedures, interested persons may also be permitted to make oral statements on matters germane to the subjects under consideration at the committee meeting.

§ 1430.9 Agency management of advisory committees.

Consistent with the other provisions of this part, the Service's advisory committee management officer shall:

(a) Exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by the Service;

(b) Assemble and maintain the reports, records, and other papers of advisory committees, during their existence;

(c) Carry out, with the concurrence of the Office of the General Counsel, the provisions of the Freedom of Information Act, as those provisions apply to advisory committees;

(d) Have available for public inspection and copying all pertinent documents of advisory committees which are within the purview of the Freedom of Information Act; and

(e) When transcripts have been made of advisory committee meetings, provide for such transcripts to be made available to the public at actual cost of duplication, except where prohibited by contractual agreements entered into prior to January 5, 1973, the effective date of the Federal Advisory Committee Act.

PART 1440—ARBITRATION OF PESTICIDE DATA DISPUTES

Sec.

1440.1 Arbitration of pesticide data disputes.

APPENDIX TO PART 1440—FIFRA ARBITRATION RULES

AUTHORITY: Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*), as amended, Pub. L. 95-396, 92 Stat. 819.

SOURCE: 45 FR 55395, Aug. 19, 1980, unless otherwise noted.

§ 1440.1 Arbitration of pesticide data disputes.

(a) Persons requesting the appointment of an arbitrator under section 3(c)(1)(D)(ii) and section 3(c)(2)(B)(iii) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136, as amended), shall send such requests in writing to the appropriate American Arbitration Association Regional Office. Such requests must include the names, addresses, and telephone numbers of the parties to the dispute; issue(s) in dispute, the amount in dollars or any other remedy sought; sufficient facts to show that the statutory waiting period has passed, and the appropriate fee provided in the Fee Schedule.

(b) For the purpose of compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (hereinafter "the Act"), the roster of arbitrators maintained by the Federal Mediation and Conciliation Service shall be

the roster of commercial arbitrators maintained by the American Arbitration Association. Under this Act, arbitrators will be appointed from that roster. The fees of the American Arbitration Association shall apply, and the procedure and rules of the Federal Mediation and Conciliation Service, applicable to arbitration proceedings under the Act, shall be the FIFRA arbitration rules of the American Arbitration Association, which are hereby made a part of this regulation.

APPENDIX TO PART 1440—FIFRA
ARBITRATION RULES

Section 1

These rules shall apply as published in the FEDERAL REGISTER unless modified by FMCS.

Sec. 2. Definitions

For the purpose of these Rules of Procedure the terms are defined as follows:

(1) AAA means the American Arbitration Association.

(2) *Act* or *FIFRA* means the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*

(3) *EPA* means the United States Environmental Protection Agency.

(4) *Arbitrator(s)* means the person or persons appointed to the tribunal constituted by the parties for the settlement of their dispute under these Rules.

(5) *Claimant* means a person asserting a claim for compensation under these Rules or filing a claim concerning joint development of data.

(6) *Compulsory arbitration* means arbitration invoked under the mandatory provisions of section 3(c)(1)(d) or 3(c)(2)(B)(iii) of the Act.

(7) *Voluntary arbitration* means arbitration voluntarily agreed to by the parties to settle a dispute under section 3(c)(1)(d) or 3(c)(2)(B)(iii) of the Act.

(8) *Director* means Director, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, or any officer or employee of the EPA to whom authority has been or may hereafter be lawfully delegated to act in his stead.

(9) *Administrator* means the AAA, its Tribunal Administrators or such officers or committees as the AAA may direct.

(10) *Roster* means the Commercial Arbitration Roster of AAA.

(11) *FMCS* or *Service* means the Federal Mediation and Conciliation Service.

(12) *Party* means claimant or respondent.

(13) *Person* means any individual, partnership, association, corporation, or any orga-

nized group of persons, whether incorporated or not.

(14) *Respondent* means the person against whom a claim is made under section 3(c)(1)(D) or 3(c)(2)(B)(iii) of the Act.

Terms defined in the Act and not explicitly defined herein are used herein with the meanings given in the Act.

Sec. 3. Initiation of Arbitration

(a) *Under compulsory procedures of FIFRA.* Upon the request of a party qualified under FIFRA section 3(c)(1)(D) or 3(c)(2)(B)(iii) for the appointment of an arbitrator, the Service will appoint an arbitrator in accordance with 29 CFR 1440.1 (a) and these rules. Requests shall be submitted in writing to the appropriate AAA Regional Office and must include the names, addresses and telephone numbers of the parties to the dispute; issues in dispute; the amount in dollars or any other remedy sought; sufficient facts to show that the statutory waiting period has passed; and the appropriate fee as provided in the Fee Schedule.

AAA shall give notice of filing of a request for arbitration to the other party. If he so desires, the party upon whom the demand for arbitration is made may file an answering statement in duplicate with AAA within seven days after notice, in which event he shall simultaneously send a copy of his answer to the other party. If a monetary claim is made in the answer the appropriate fee provided in the Fee Schedule shall be forwarded with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

(b) *Under a Voluntary Submission.* Parties to any existing dispute may commence an arbitration under these Rules by filing at any AAA Regional Office two (2) copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, if any, and the remedy sought, together with the appropriate administrative fee as provided in the Fee Schedule.

Sec. 4. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If the locale is not designated within seven days from the date of filing the Demand or Submission the AAA shall have power to determine the locale. Its decision shall be final and binding. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the requests, the locale shall be the one requested.

Sec. 5. Qualification of Arbitrator

Any Arbitrator appointed pursuant to these rules shall be neutral, subject to disqualification for the reasons specified in section 11. If the agreement of the parties names an Arbitrator or specifies any other method of appointing an Arbitrator, or if the parties specifically agree in writing, such Arbitrator shall not be subject to disqualification for said reasons.

Sec. 6. Appointment From Panel

If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner. Immediately after the filing of the Request or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve, and the Service shall appoint the Arbitrator. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the FMCS shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

Sec. 7. Direct Appointment by Parties

If the agreement of the parties to a Submission names an Arbitrator or specifies a method of appointment of an Arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of such Arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members from the Panel from which the party may, if he so desires, make the appointment.

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

Sec. 8. Appointment of Neutral Arbitrator by Party Appointed Arbitrators

If the parties have appointed their Arbitrators or if either or both of them have been appointed as provided in section 7, and have

authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the FMCS shall appoint a neutral Arbitrator who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed Arbitrator, the FMCS shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that their Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in section 6, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such section.

Sec. 9. Number of Arbitrators

If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the AAA in its discretion, directs that a greater number of Arbitrators be appointed.

Sec. 10. Notice to Arbitrator of His or Her Appointment

Notice of the appointment of the neutral Arbitrator, whether appointed by the parties, by the AAA or FMCS shall be mailed to the Arbitrator, together with a copy of these Rules, and the signed acceptance of the Arbitrator shall be filed with AAA prior to the opening of the first hearing.

Sec. 11. Disclosure and Challenge Procedure

A person appointed as neutral Arbitrator shall disclose to the AAA any circumstances likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such Arbitrator or other source, the AAA shall communicate such information to the parties, and, if it deems it appropriate to do so, to the Arbitrator. Thereafter, the AAA shall make a determination whether the Arbitrator should be disqualified. The determination, however, may be appealed to FMCS. The decision of FMCS shall be conclusive.

Sec. 12. Vacancies

If any Arbitrator should resign, die, withdraw, refuse, be disqualified, or be unable to perform the duties of his office, AAA may, on proof satisfactory to it, declare the office vacant. Either party to a compulsory arbitration may request the FMCS to review a declaration of disqualification. Vacancies

shall be filled in accordance with the applicable provision of these Rules and the matter shall be reheard unless the parties shall agree otherwise.

Sec. 13. Commencement of Proceeding

(a) Within 60 days from receipt by the parties of notice of the appointment of an arbitrator, the claimant shall file with AAA:

(1) If appropriate, a detailed statement as to the amount of compensation claimed, the method of computing said amount, and terms of payment, and a list of the test data deemed to be compensable, together with a detailed justification therefore.

(2) A certification as to: (i) Whether any court or tribunal has made determinations for payment by any other persons to claimant for use of the same test data and, if so, identification of the persons against whom the 3(c)(2)(B) determinations were issued and the application for registration for which the test data was used; and (ii) whether any other claims against any persons are pending in arbitration or in any court for use of the same test data and, if so, an identification of the persons against whom the claims are pending and the applications for registration on which the claims are being made.

(3) A detailed statement of the matter in dispute under 3(c)(2)(B).

(b) Within 60 days of service of the documents referred to in subsection (a) the respondent shall file a detailed statement of its position as to the amount of compensation due, method of computation, terms of payment, and list of data deemed to be compensable together with a detailed justification therefore or a detailed statement of the dispute under 3(c)(2)(5). To the extent any portion of the claimant's statement of its claim is not denied or challenged by respondent, it shall be deemed admitted.

(c) After respondent's statement is filed, the arbitrator may, upon request by a party, request the Director to supplement the file with additional information, including copies of relevant test data, information contained in a relevant registration file, a statement as to data requirements for registration, or any other information which the arbitrator deems to be relevant. Upon request by a party or other interested person, the arbitrator shall order protective measures to safeguard and restrict access to confidential business information.

Sec. 14. Filing and Service

(a) All documents or papers required or authorized to be filed, shall be filed with the AAA for transmittal to the arbitrator, except as otherwise herein provided, and shall bear the caption of the case and the docket number. At the same time that a party files documents or papers with the AAA, the party shall serve upon all other parties cop-

ies thereof, with a certificate of service on or attached to each document or paper, including those filed with the arbitrator. If a party is represented by counsel or other representative, service shall be made on such representative. Service may be made personally or by regular mail, and if made by mail shall be deemed complete on mailing. If filing is accomplished by mail addressed to the AAA, filing shall be deemed timely if the papers are postmarked on the due date.

(b) All orders, decisions, or other documents made or signed by the arbitrator shall be served immediately upon all parties.

Sec. 15. Time

(a) In computing any period of time prescribed or allowed by these rules, except as otherwise provided, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Saturdays, Sundays and legal holidays shall be included in computing the time allowed for the filing of any document or paper, except that when such time expires on a Saturday, Sunday, or legal holiday, such period shall be extended to include the next following business day.

(b) When by these rules or by order of the arbitrators, an act is required or allowed to be done at or within a specified time, the arbitrator or AAA for cause shown may at any time in their discretion (1) with or without motion or notice, order the period enlarged if request therefore, which may be made *ex parte*, is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) on motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect or other good cause.

Sec. 16. Communication with Arbitrator and Serving of Notices

(a) There shall be no communication between the parties and a neutral arbitrator other than at oral hearings. Any other oral or written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

(b) Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or his attorney at his last known address or by personal service, within or without the State wherein the arbitration is to be held (whether such party be within or without the United States

of America): *Provided*, That reasonable opportunity to be heard with regard thereto has been granted such party.

Sec. 17. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, no later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

Sec. 18. Appearances

(a) Parties may appear in person or by counsel or other representative. Persons who appear as counsel or in a representative capacity must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(b) Any party to the proceeding who, after being duly notified and without good cause being shown fails to appear at a prehearing conference or fails to respond to correspondence, shall be deemed to have waived his rights with respect thereto and shall be subject to such orders or determinations with respect thereto as the arbitrator shall make. The failure of a party to appear at a hearing shall constitute a waiver of the right to present evidence at such hearing. Where either party fails to appear at a hearing, the arbitrator shall require the presentation by the present party of such evidence as he deems necessary to prepare a decision in conformity with the requirements of the act.

(c) Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

Sec. 19. Consolidation and Severance

(a) The AAA may with agreement of all parties consolidate any matters at issue in two or more proceedings docketed under these Rules of Procedure where there exist common parties, common questions of fact and law, and where such consolidation would expedite or simplify consideration of the issues. Consolidation may also be effected where separate claims for use of the same test data are made against different respondents. The arbitrator who presides over the consolidated proceeding shall be chosen in accordance with section 3, *supra*.

(b) The arbitrator may, by motion or *sua sponte*, for good cause shown order any proceeding severed with respect to some or all parties or issues.

Sec. 20. Protection of Confidential Information

(a) The arbitrator shall make such orders as required to protect the secrecy of confidential information or documents such as review *in camera*.

(b) The arbitrator shall impose a sanction against any party who violates an order issued under this section. Such sanction may include an award against the offending party.

Sec. 21. Scheduling of Hearing

(a) After consideration of the convenience of the parties, the AAA shall serve upon the parties a notice of hearing setting a time and place for such hearing.

(b) Except for good cause shown, no request for postponement of a hearing will be granted. Such request must be received in writing at least a day in advance of the time set for the hearing. In case of postponement, the hearing shall be rescheduled for a date as early as circumstances will permit.

Sec. 22. Optional Accelerated Procedure

(a) In claims involving \$25,000 or less, the parties may elect, prior to commencement of hearing, to have the claim processed under an expedited procedure. If no specific amount of claim is stated, a case will be considered to fall within this rule if the amount which the claimant represents in writing that it could recover as a result of any arbitrator's decision favorable to it does not exceed \$25,000. Upon such election, a case shall then be processed under this rule unless the respondent objects and shows good cause why the substantive nature of the dispute requires processing under the regular procedures. In cases proceeding under this rule, the parties have waived discovery and briefs.

(b) The arbitrator shall schedule the dispute for hearing within thirty (30) days of service of notice to the parties that the dispute will be governed by this accelerated procedure, unless either party requests that the case be submitted without hearing under section 19.

(c) Written decision by the arbitrators in cases proceeding under this rule normally will be short and contain summary findings of fact and conclusions only. The arbitrator shall render such decisions promptly, but in no event later than thirty days after the dispute is ready for decision.

Sec. 23. Discovery

(a) Either party may move for permission to serve written interrogatories and requests for production of documents upon the opposing party. The arbitrator shall grant such motion to the extent that such interrogatories and requests are designed to produce relevant evidence and only upon such terms as the arbitrator in his or her discretion considers to be consistent with the objective of

securing a just and inexpensive determination of the dispute without unnecessary delay.

(b) Upon motion by either party, the arbitrator may order a deposition upon a showing of good cause and a finding that the deposition is designed to secure relevant and probative evidence which (1) cannot be obtained by alternative means, or (2) may otherwise not be preserved for presentation at hearing.

(c) If a party fails to comply with an order issued under this section, the arbitrator shall draw inferences adverse to that party in connection with the facts sought to be discovered.

(d) At least thirty days prior to the hearing, each party shall make available to each other party the names of the expert and other witnesses it intends to call, together with a detailed summary of their expected testimony, and copies of all documents and exhibits which the party intends to introduce into evidence. Thereafter, witnesses, documents, or exhibits may be added and narrative summaries of expected testimony amended only upon motion by a party for good cause shown.

Sec. 24. Prehearing Conference

(a) When it appears that such procedure will expedite the proceeding, the arbitrator at any time prior to the commencement of the hearing may request the parties and their counsel or other representative to appear at a conference before him or her to consider:

(i) The possibility of settlement of the case;

(ii) The simplification of issues and stipulation of facts not in dispute;

(iii) The necessity or desirability of amending or supplementing documents in the record;

(iv) The possibility of obtaining admissions or stipulations of fact and of documents which will avoid unnecessary proof;

(v) The limitation of the number of expert or other witnesses;

(vi) The setting of a time and place for the hearing, giving consideration to the convenience of all parties and to the public interest; and

(vii) Any other matters as may expedite the disposition of the proceeding.

(b) No transcript of any prehearing conference shall be made unless ordered upon motion of a party or *sua sponte* by the arbitrator. In the absence of a transcript, the arbitrator shall prepare and file a report of the action taken at such conference. Such report shall incorporate any written stipulations or agreements made by the parties, all rulings upon matters considered at such conference, and appropriate orders containing directions to the parties. Such report shall, as appropriate, direct the subsequent course of the

proceeding, unless modified by the arbitrators on motion or *sua sponte*.

Sec. 25. Evidence

(a) The arbitrator shall admit all evidence which is relevant, competent, material, not privileged, and not unduly repetitious. The weight to be given evidence shall be determined by its reliability and probative value.

(b) Except as otherwise provided in these Rules of Procedure or by the arbitrator, witnesses shall be examined orally, under oath or affirmation. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) Except where the arbitrator finds it impracticable, an original and two copies of each exhibit shall be filed at the time the exhibit is offered into evidence and a copy shall be furnished to each party. A true copy of an exhibit may be substituted for the original.

(d) Official notice may be taken of any matter judicially noticed in the Federal courts. The parties shall be given adequate opportunity to show that such facts are erroneously noticed.

Sec. 26. Order of Proceedings

(a) Hearing shall be opened by the filing of the oath of the arbitrator, and by the recording of the place, time and date of the hearing, the presence of the arbitrator, parties, and counsel.

(b) The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. The claimant shall then present his claim and proofs and his witnesses. The respondent shall then present his response and proofs and his witnesses. The arbitrator may in his discretion vary this procedure but he or she shall afford full and equal opportunity to all parties for the presentation of any material or relevant proofs.

Sec. 28. Burden of Presentation; Burden of Persuasion

The claimant shall have the burden of going forward to establish his entitlement to an amount of compensation that respondent should pay for use of the test data relied upon. Each matter of controversy shall be decided by the arbitrator upon a preponderance of the evidence.

Sec. 29. Stenographic Record

Any party may request a stenographic record by making arrangements for same through the AAA. If such transcript is agreed by the parties to be, or in appropriate cases determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator, and to the other party for inspection, at a time and place determined by the arbitrator. The

total cost of such a record shall be shared equally by those parties that order copies.

Sec. 30. Filing of Briefs, Proposed Findings of Fact and Conclusions of Law, and Proposed Order

Unless otherwise ordered by the arbitrator, each party may within thirty days after delivery of the transcript of a hearing to the arbitrator as provided in section 29, file with AAA and serve upon all other parties a brief together with references to relevant exhibits and the record. Within Fifteen days thereafter each party may file a reply brief concerning matters contained in the opposing brief. Oral argument may be had at the discretion of the arbitrator.

Sec. 31. Closing of Hearings

The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and the time and date shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for filing with the AAA. The time limit within which the Arbitrator is required to make the award shall commence to run, in the absence of other agreement by the parties, upon the closing of the hearings.

Sec. 32. Arbitrators' Decision

(a) The arbitrator shall as soon as practicable after the filing of briefs evaluate the record and prepare and file a decision. The decision shall contain findings of fact and conclusions regarding all issues in dispute as well as reasons therefore.

(b) The decision shall contain a determination as to the compensation, if any respondent must pay to claimant, or other remedy as appropriate, the method of payment, and may fix such other terms and conditions as may be reasonable under the circumstances, including the furnishing of a bond or other guarantee of payment by the respondent to the claimant.

Sec. 33. Reopening of Hearings

(a) The hearings may be reopened by the arbitrator on his or her own motion, or upon application of a party at any time before the award is made. If the reopening of the hearings would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

(b) A motion to reopen a hearing to take further evidence, to rehear or reargue any matter related to such proceeding, or to reconsider the arbitrator's decision, must be made by motion in writing to the arbitrator in accordance with these Rules of Procedure. Every such motion must state the specific grounds upon which relief is sought.

(c) A motion to reopen a hearing for the purpose of taking further evidence may be filed at any time prior to the issuance of the arbitrator's decision. Such motion shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not cumulative, and shall set forth a good reason why such evidence was not adduced at a hearing.

(d) Motions to modify the arbitrator's decision shall be filed within 30 days after the date of service of the decision. Such motion must state specifically one of the following grounds for modification:

1. There was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

Sec. 34. Award Upon Settlement

If the parties settle their dispute during the course of the arbitration, the arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

Sec. 35. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at his last known address or to his attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

Sec. 36. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to such party, at his or her expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

Sec. 37. Application to Court

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor FMCS is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof.

Sec. 38. Administrative Fees

As a nonprofit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties, subject to final appointment by the arbitrator in his award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the refund schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.

Sec. 39. Fee When Oral Hearings Are Waived

Where all oral hearings are waived the Administrative Fee Schedule shall apply.

Sec. 40. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally among all parties ordering copies unless they shall otherwise agree and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the arbitrator, shall be borne equally by the parties.

Sec. 41. Arbitrator's Fee

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly by him or her with the parties. Where parties cannot agree, AAA shall fix reasonable compensation.

Sec. 42. Deposits

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee if any, and shall render an accounting to the parties and return any unexpended balance.

Sec. 43. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to his or her powers and duties. When there is more

than one arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for decision. All other Rules shall be interpreted and applied by the AAA. Either party may request that FMCS review any decision of AAA on interpretation or application of these rules.

ADMINISTRATIVE FEE SCHEDULE

The administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed, and is due and payable at the time of filing.

Amount of claim	Fee
Up to \$25,000	\$500.
\$25,000 to \$100,000	\$600, plus 1% of excess over \$25,000.
\$100,000 to \$200,000	\$1350, plus ½% of excess over \$100,000.
\$200,000 to \$5,000,000	\$1850, plus ¼% of excess over \$200,000.

Where the claim or counter claim exceeds \$5 million, an appropriate fee will be determined by the AAA.

When no amount can be stated at the time of filing, the administrative fee is \$500, subject to adjustment in accordance with the above schedule as soon as an amount can be disclosed.

If there are more than two parties represented in the arbitration, an additional 10% of the initiating fee will be due for each additional represented party.

Other Service Charges—\$50.00 payable by a party causing an adjournment of any scheduled hearing;

\$100 payable by a party causing a second or additional adjournment of any scheduled hearing.

\$25.00 payable by each party for each hearing after the first hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

Refund Schedule—If the AAA is notified that a case has been settled or withdrawn before a list of Arbitrators has been sent out, all the fees in excess of \$500 will be refunded.

If the AAA is notified that a case has been settled or withdrawn thereafter but before the due date for the return of the first list, two-thirds of the fee in excess of \$500.00 will be refunded.

If the AAA is notified that a case is settled or withdrawn thereafter but at least 48 hours before the date and time set for the first hearing, one-half of the fee in excess of \$500 will be refunded.

Federal Mediation and Conciliation Service

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PART 1450—COLLECTIONS OF CLAIMS OWED THE UNITED STATES

Subpart A—General Provisions

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AUTHORITY: 31 U.S.C. 3701-3719; 5 U.S.C. 5514; 4 CFR parts 101-105; 5 CFR part 550.

SOURCE: 51 FR 24817, July 9, 1986, unless otherwise noted.

Subpart A—General Provisions

§ 1450.1 Definitions.

(a) The term *agency* means the Federal Mediation and Conciliation Service (FMCS) or any other agency of the U.S. Government as stated at §1450.20.

(b) The term *agency head* means the Director of the Federal Mediation and Conciliation Service.

(c) The terms *appropriate agency official* or *designee* mean the Director of the Financial Management Staff of FMCS, or such other official as may be named in the future by the Director of FMCS.

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(d) The terms *claim* and *debt* are deemed synonymous and interchangeable. They refer to an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization or entity, except another Federal agency.

(e) A debt is considered *delinquent* if it has not been paid by the date specified in the agency's written notification or applicable contractual agreement, unless other satisfactory payment arrangements have been made by that date, or if at any time thereafter the debtor fails to satisfy obligations under a payment agreement with the agency.

(f) The term *referral for litigation* means referral to the Department of justice for appropriate legal proceedings.

§ 1450.2 Exceptions.

(a) Claims 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 regulations published under the authority of 31 U.S.C. 3726 (see 41 CFR part 101-41).

(b) Claims arising out of acquisition contracts subject to the Federal Acquisition Regulations (FAR) shall be determined, collected, compromised, terminated, or settled in accordance with those regulations. (See 48 CFR part 32). If not otherwise provided for in the FAR system, contract claims that have been the subject of a contracting officer's final decision in accordance with section 6(a) of the Contract Disputes Act of 1978 (41 U.S.C. 605)(a)), may be determined, collected, compromised, terminated or settled under the provisions of this regulation, except that no additional review of the debt shall be granted beyond that provided by the contracting officer in accordance with the provisions of section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605), and the amount of any interest, administrative charge, or penalty charge shall be subject to the limitations, if any, contained in the contract out of which the claim arose.

(c) Claims based in whole or in part on conduct in violation of the antitrust laws, or in regard to which there is an

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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 (DOJ) as only the DOJ has authority to compromise, suspend, or terminate collection action on such claims.

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

§ 1450.3 Use of procedures.

Procedures authorized by this regulation (including, but not limited to, disclosure to a consumer reporting agency, contracting for collection services, administrative offset and salary offset) may be used singly or in combination, so long as the requirements of applicable law and regulation are satisfied.

§ 1450.4 Conformance to law and regulations.

The requirements of applicable law (31 U.S.C 3701-3719 and 5 U.S.C. 5514 as amended by Pub. L. 97-365, 96 Stat. 1749) have been implemented in Governmentwide standards:

(a) The Regulations of the Office of Personnel Management (5 CFR part 550),

(b) The Federal Claims Collection Standards issued jointly by the General Accounting Office and the Department of Justice (4 CFR parts 101-105), and

(c) The procedures prescribed by the Office of Management and Budget in Circular A-129 of May 9, 1985.

Not every item in the above described standards has been incorporated or referenced in this regulation. To the extent, however, that circumstances arise which are not covered by the terms stated in this regulation, FMCS will proceed in any actions taken in accordance with applicable requirements found in the sources referred to in paragraphs (a), (b), and (c) of this section.

§ 1450.5 Other procedures.

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

§ 1450.6 Informal action.

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

§ 1450.7 Return of property.

Nothing contained in this regulation is intended to deter FMCS from demanding the return of specific property or from demanding, the return of the property or the payment of its value.

§ 1450.8 Omissions not a defense.

The failure of FMCS to comply with any provision in this regulation shall not serve as a defense to the debt.

**Subpart B—Administrative Offset—
Consumer Reporting Agencies—Contracting for Collection**

§ 1450.9 Demand for payment.

Prior to making an administrative offset, demand for payment will be made as stated below:

(a) Written demands shall be made promptly upon a debtor in terms which inform the debtor of the consequences of failure to cooperate. A total of three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that a further demand would be futile and the debtor's response does not require rebuttal. In determining the timing of demand letters, FMCS will give due regard to the need to act promptly so that, as a general rule, if necessary to refer the debt to the Department of Justice for litigation, such referral can be made within one year of the agency's final determination of the fact and the amount of the debt. When necessary to protect the Government's interest (for example, to prevent the statute of limitations, 28 U.S.C. 2415, from expiring), written demand may be preceded by other appropriate actions under this subpart including immediate referral for litigation.

(b) The initial demand letter will inform the debtor of:

(1) The basis for the indebtedness and the right of the debtor to request review within the agency;

(2) The applicable standards for assessing interest, penalties, and administrative costs (subpart D of this regulation) and

(3) The date by which payment is to be made, which normally should be not more than 30 days from the date that the initial demand letter was mailed or hand-delivered. FMCS will exercise care to insure that demand letters are mailed or hand-delivered on the same day that they are actually dated. Apart from this, there is no prescribed format for the demand letters.

(c) As appropriate to the circumstances, FMCS may include either in the initial demand letter or in subsequent letters, matters relating to alternative methods of payment, policies with respect to use of consumer reporting agencies and collection services, the agency's intentions with respect to referral of the debt to the Department of Justice for litigation, and, depending on applicable statutory authority, the debtor's entitlement to consideration of waiver.

(d) FMCS will respond promptly to communications from the debtor, within 30 days whenever feasible, and will advise debtor who dispute the debt that they must furnish available evidence to support their contentions.

(e) If, either prior to the initiations of, at any time during, or after completion of the demand cycle, FMCS determines to pursue administrative offset, then the requirements specified in §§1450.10 and 1450.11, as applicable, will be met. The availability of funds for offset and the agency determination to pursue it release the agency from the necessity of further compliance with paragraphs (a), (b), and (c) of this section. If the agency has not already sent the first demand letter, the agency's written notification of its intent to offset must give the debtor the opportunity to make voluntary payment, a requirement which will be satisfied by compliance with the notice requirements of §§1450.10 and 1450.11 as applicable.

§ 1450.10 Collection by administrative offset.

(a) Collection by administrative offset will be undertaken in accordance with these regulations on all claims

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which are liquidated or certain in amount, in every instance in which such collection is determined to be feasible and not otherwise prohibited.

(1) For purposes of this section, the term "administrative offset" is the same as stated in 31 U.S.C. 3716(a)(1).

(2) Whether collection by administrative offset is feasible is a determination to be made by the agency on a case-by-case basis, in the exercise of sound discretion. FMCS will consider not only whether administrative offset can be accomplished practically, but also whether offset is best suited to further and protect all of the Government's interests. In appropriate circumstances, FMCS may give due consideration to the debtor's financial condition and is not required to use offset in every instance in which there is an available source of funds. FMCS may also consider whether offset would tend to substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated. For example, under a grant program in which payments are made in advance of the grantee's performance, offset will normally be inappropriate. This concept generally does not apply, however, where payment is in the form of reimbursement.

(b) Before the offset is made, a debtor shall be provided with the following: Written notice of the nature and amount of the debt, and the agency's intention to collect by offset; opportunity to inspect and copy agency records pertaining to the debt; opportunity to obtain review within the agency of the determination of indebtedness; and opportunity to enter into a written agreement with the agency to repay the debt. FMCS may also make requests for offset to other agencies holding funds payable to the debtor, and process requests for offset that are received from other agencies.

(1) FMCS will exercise sound judgment in determining whether to accept a repayment agreement in lieu of offset. The determination will weigh the Government's interest in collecting the debt against fairness to the debtor. If the debt is delinquent and the debtor has not disputed its existence or amount, FMCS will normally accept a

repayment agreement in lieu of offset only if the debtor is able to establish that offset would result in undue financial hardship or would be against equity and good conscience.

(2) In cases where the procedural requirements specified in paragraph (b) of this section have previously been provided to the debtor in connection with the same debt under §1450.9, or some other regulatory or statutory authority, such as pursuant to a notice of audit allowance, the agency is not required to duplicate those requirements before taking administrative offset.

(3) FMCS may not initiate administrative offset to collect a debt under 31 U.S.C. 3716 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 or officials of the Government who were charged with the responsibility to discover and collect such debts. When the debt first accrued is to be determined according to existing law, regarding the accrual of debts, such as 28 U.S.C. 2415.

(4) FMCS is not authorized by 31 U.S.C. 3716 to use administrative offset with respect to:

(i) Debts owed by any State or local Governments;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) Any case in which collection of the type of debt involved by administrative offset is explicitly provided for or prohibited by another statute. However, unless otherwise provided by contract or law, debts or payments which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(5) FMCS may effect administrative offset against a payment to be made to a debtor prior to completion of the procedures required by paragraph (b) of this section if:

(i) Failure to take the offset would substantially prejudice the Government's ability to collect the debt, and

(ii) The time before the payment is to be made does not reasonably permit the completion of those procedures.

Such prior offset must be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the Government shall be promptly refunded.

(6) FMCS will obtain credit reports on delinquent accounts to identify opportunities for administrative offset of amounts due to a delinquent debtor when other collection techniques have been unsuccessful.

(c) Type of hearing or review: (1) For purposes of this section, whenever FMCS is required to provide a hearing or review within the agency, the agency shall provide the debtor with a reasonable opportunity for an oral hearing when:

(i) An applicable statute authorizes or requires the agency to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or

(ii) The debtor requests reconsideration of the debt and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity.

Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although the FMCS will carefully document all significant matters discussed at the hearing.

(2) This section does not require an oral hearing with respect to debt collection systems in which determinations of indebtedness or waiver rarely involve issues of credibility or veracity and the agency has determined that review of the written record is ordinarily an adequate means to correct prior mistakes. In administering such a system, the agency is not required to sift through all of the requests received in order to accord oral hearings in those few cases which may involve issues of credibility or veracity.

(3) In those cases where an oral hearing is not required by this section, the agency will make its determination on

the request for waiver or reconsideration based upon a "paper hearing" that is, a review of the written record.

(d) Appropriate use will be made of the cooperative efforts of other agencies in effecting collection by administrative offset. Generally, FMCS will not refuse to comply with requests from other agencies to initiate administrative offset to collect debts owed to the United States, unless the requesting agency has not complied with the applicable provisions of these standards or the offset would be otherwise contrary to law.

(e) Collection by offset against a judgment obtained by a debtor against the United States shall be accomplished in accordance with 31 U.S.C. 3728.

(f) Whenever the creditor agency is not the agency which is responsible for making the payment against which administrative offset is sought, the latter agency shall not initiate the requested offset until it has been provided by the creditor agency with an appropriate written certification that the debtor owes a debt (including the amount) and that full compliance with the provisions of this section has taken place.

(g) When collecting multiple debts by administrative offset, FMCS will apply the recovered amounts to those debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations.

§ 1450.11 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

(a) Unless otherwise prohibited by law, FMCS may request that moneys which are due and payable to a debtor from the Civil Service Retirement and Disability Fund be administratively offset in reasonable amounts in order to collect in one full payment, or a minimal number of payments, debts owed to the United States by the debtor. Such requests shall be made to the appropriate officials of the Office of Personnel Management in accordance with such regulations as may be prescribed by the Director of that Office.

(b) When making a request for administrative offset under paragraph (a)

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of this section, FMCS shall include a written certification that:

(1) The debtor owes the United States a debt, including the amount of the debt;

(2) The FMCS has complied with the applicable statutes, regulations, and procedures of the Office of Personnel Management; and

(3) The FMCS has complied with the requirements of §1450.10 of this subpart, including any required hearing or review.

(c) Once FMCS decides to request administrative offset under paragraph (a) of this section, it will make the request as soon as practical after completion of the applicable procedures in order that the Office of Personnel Management may identify and “flag” the debtor’s account in anticipation of the time when the debtor requests or become eligible to receive payments from the Fund. This will satisfy any requirement that offset be initiated prior to expiration of the applicable statute of limitations. At such time as the debtor makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor should be permitted to offer a satisfactory payment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust.

(d) If FMCS collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, FMCS shall act promptly to modify or terminate its request for offset under paragraph (a) of this section.

(e) This section does not require or authorize the Office of Personnel Management to review the merits of the FMCS determination with respect to the amount and validity of the debt, its determination as to waiver under an applicable statute, or its determination to provide or not provide a hearing.

§ 1450.12 Collection in installments.

(a) Whenever feasible, and except as otherwise provided by law, debts owed to the United States, together with interest, penalties, and administrative costs as required by this regulation should be collected in full in one lump sum. This is true whether the debt is

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being collected by administrative 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. FMCS will obtain financial statements from debtors who represent that they are unable to pay the debt in one lump sum. If FMCS agrees to accept payment in regular installments it will obtain a legally enforceable written agreement from the debtor which 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 installment payments should bear a reasonable relation to the size of the debt and the debtor’s ability to pay. If possible, the installment payments should be sufficient in size and frequency to liquidate the Government’s claim in not more than 3 years. Installment payments of less than \$50 per month will be accepted only if justifiable on the grounds of financial hardship or some other reasonable cause.

(b) If the debtor owes more than one debt and designates how a voluntary installment payment is to be applied as among those debts, that designation must be followed. If the debtor does not designate the application of the payment, FMCS will apply payments to various debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations.

§ 1450.13 Exploration of compromise.

FMCS may attempt to effect compromise, preferably during the course of personal interviews, in accordance with the standards set forth in part 103 of the Federal Claims Collection Standards (4 CFR part 103).

§ 1450.14 Suspending or termination collection action.

The suspension or termination of collection action shall be made in accordance with the standards set forth in part 104 of the Federal Claims Collection Standards (4 CFR part 104).

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§ 1450.15 Referrals to the Department of Justice or the General Accounting Office.

Referrals to the Department of Justice or the General Accounting Office shall be made in accordance with the standards set forth in part 105 of the Federal Claims Collection Standards (4 CFR part 105).

§ 1450.16 Use of consumer reporting agencies.

(a) The term *individual* means a natural person, and the term “consumer reporting agency” has the meaning provided in the Federal Claims Collection Act, as amended, at 31 U.S.C. 3701(a)(3) or the Fair Credit Reporting Act, at 15 U.S.C. 1681a(f).

(b) FMCS may disclose to a consumer reporting agency, from a system of records, information that an individual is responsible for a claim if—

(1) Notice required by section 5 U.S.C. 552(a)(e)(4) indicates that information in the system may be disclosed to a consumer reporting agency;

(2) The claim has been reviewed and it is decided that the claim is valid and overdue;

(3) FMCS has notified the individual in writing—

(i) That payment of the claim is overdue;

(ii) That, within not less than 60 days after sending the notice, FMCS intends to disclose to a consumer reporting agency that the individual is responsible for that claim;

(iii) Of the specific information to be disclosed to the consumer reporting agency; and

(iv) Of the rights the individual has to a complete explanation of the claim, to dispute information in the records of the agency about the claim, and to administrative appeal or review of the claim; and

(4) The individual has not—

(i) Repaid or agreed to repay the claim under a written repayment plan that the individual has signed and the agency has agreed to; or

(ii) Filed for review of the claim under paragraph (g) of this section;

(c) FMCS will also—(1) Disclose promptly, to each consumer reporting agency to which the original disclosure

was made, a substantial change in the condition or amount of the claim;

(2) Verify or correct promptly information about the claim, on request of a consumer reporting agency for verification of information disclosed; and

(3) Get satisfactory assurances from each consumer reporting agency that they are complying with all laws of the United States related to providing consumer credit information; and assure that

(d) The information disclosed to the consumer reporting agency is limited to (1) Information necessary to establish the identity of the individual, including name, address, and taxpayer identification number;

(2) The amount, status, and history of the claim; and

(3) The agency or program under which the claim arose.

(e) All accounts in excess of \$100 that have been delinquent more than 31 days will normally be referred to a consumer reporting agency.

(f) Before disclosing information to a consumer reporting agency FMCS shall take reasonable action to locate an individual for whom the head of the agency does not have a current address to send the notice.

(g) Before disclosing information to a consumer reporting agency FMCS shall provide, on request of an individual alleged by the agency to be responsible for the claim, a review of the obligation of the individual including an opportunity for reconsideration of the initial decision on the claim.

(h) Under the same provisions as described above in this section, FMCS may disclose to a credit reporting agency, information relating to a debtor other than a natural person. Such commercial debt accounts are not covered, however, by the Privacy Act.

§ 1450.17 Contracting for collection services.

(a) FMCS has authority to contract for collection services to recover delinquent debts, provided that the following conditions are satisfied;

(1) The authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the

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matter for litigation is retained by the agency;

(2) The contractor shall be subject to the Privacy Act of 1974, as amended to the extent specified in 5 U.S.C. 552a(m), and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(3) The contractor must be required to account strictly for all amounts collected;

(4) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable FMCS to determine whether to pursue collection through litigation or to terminate collection efforts, and

(5) The contractor must agree to provide any data contained in its files relating to paragraphs (a) (1), (2), and (3) of §105.2 of the Federal Claims Collection Standards (4 CFR part 105) upon returning an account to FMCS for subsequent referral to the Department of Justice for litigation.

(b) Funding of collection service contracts: (1) FMCS may fund a collection service contract on a fixed-fee basis, that is, payment of a fixed fee determined without regard to the amount actually collected under the contract. Payment of the fee under this type of contract must be charged to available agency appropriations.

(2) FMCS may also fund a collection service contract on a contingent-fee basis, that is, by including a provision in the contract permitting the contractor to deduct its fee from amounts collected under the contract. The fee should be based on a percentage of the amount collected, consistent with prevailing commercial practice.

(3) FMCS may enter into a contract under paragraph (b)(1) of this section only if and to the extent provided in advance in its appropriation acts or other legislation, except that this requirement does not apply to the use of a revolving fund authorized by statute.

(4) Except as authorized under paragraph (b)(2) of this section, or unless the receipt qualifies as a refund to the appropriation, or unless otherwise specifically provided by law, FMCS must deposit all amounts recovered under

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collection service contracts (or by agency employees on behalf of the agency) in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. 3302.

(c) FMCS will consider the use of collection agencies at any time after the account is 61 days past due. In all cases accounts that are six months or more past due shall be turned over to a collection agency unless referred for litigation or unless arrangements have been made for a workout procedure, or the agency has exercised its authority to write off the debt pursuant to §1450.14.

(d) FMCS will generally not use a collection agency to collect a delinquent debt owed by a currently employed or retired Federal employee, if collection by salary or annuity offset is available.

Subpart C—Salary Offset

§ 1450.18 Purpose.

This subpart provides the standards to be followed by FMCS in implementing 5 U.S.C. 5514 to recover a debt from the pay account of an FMCS employee, and establishes procedural guidelines to recover debts when the employee's creditor and paying agencies are not the same.

§ 1450.19 Scope.

(a) *Coverage.* This subpart applies to agencies and employees as defined by §1450.20.

(b) *Applicability.* This subpart and 5 U.S.C. 5514 apply in recovering certain debts by offset, except where the employee consents to the recovery, from the current pay account of that employee. Because it is an administrative offset, debt collection procedures for salary offset which are not specified in U.S.C. 5514 and these regulations should be consistent with the provisions of the Federal Claims Collection Standards (4 CFR parts 101-105).

(1) *Excluded debts or claims.* The procedures contained in this subpart do not apply to debts or claims arising under the Internal Revenue Code of 1954 as amended (26 U.S.C. 1 *et seq.*), the Social Security Act (42 U.S.C. 301 *et seq.*) or the tariff laws of the United States, or to any case where collection of a debt

by salary offset is explicitly provided for or prohibited by another statute (e.g., travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108).

(2) *Waiver requests and claims to the General Accounting Office.* This subpart does not preclude an employee from requesting waiver of a salary overpayment under 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, or in any way questioning the amount or validity of a debt by submitting a subsequent claim to the General Accounting Office in accordance with procedures prescribed by the General Accounting Office. Similarly, in the case of other types of debts, it does not preclude an employee from requesting waiver, if waiver is available under any statutory provision pertaining to the particular debt being collected.

(c) *Time limit.* Under 4 CFR 102.3(b)(3), offset may not be initiated more than 10 years after the Government's right to collect the debt first accrued, unless an exception applies as stated in § 102.3(b)(3).

§ 1450.20 Definitions.

For purposes of this subpart—

Agency means the Federal Mediation and Conciliation Service (FMCS) or means any other agency of the U.S. Government as defined by section 105 of title 5 U.S.C., including the U.S. Postal Service, and the U.S. Postal Rate Commission, a military department as defined by section 102 of title 5 U.S.C., an agency or court of the judicial branch, and an agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives.

Creditor agency means the agency to which the debt is owed.

Debt means an amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interests, fines and forfeitures (except those arising under the Uniform Code Military Justice), and all other similar sources.

Disposable pay means that part of 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 the deduction of any amount required by law to be withheld. FMCS will exclude deductions described in 5 CFR 581.105 (b) through (f) to determine disposable pay subject to salary offset.

Employee means a current employee of FMCS or of another agency, including a current member of the Armed Forces or a Reserve of the Armed Forces

FCCS means the Federal Claims Collection Standards jointly published by the Justice Department and the General Accounting Office at 4 CFR parts 101–105.

Paying agency means the agency employing the individual and authorizing the payment of his or her current pay.

Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

Waiver means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as permitted or required by 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 710, 5 U.S.C. 8346(b), or any other law.

§ 1450.21 Notification.

(a) Salary offset deductions shall not be made unless the Director of the Financial Management Staff of FMCS, or such other official as may be named in the future by the Director of FMCS, provides to the employee—at least 30 days before any deduction—a written notice stating at a minimum:

(1) The agency's determination that a debt is owed, including the origin, nature, and amount of the debt;

(2) The agency's intention to collect the debt by means of deduction from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date, and duration of the intended deductions;

(4) An explanation of the agency's policy concerning interest, penalties,

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and administrative costs (subpart D of this regulation), a statement that such assessment must be made unless excused in accordance with the FCCS;

(5) The employee's right to inspect and copy Government records relating to the debt or, if the employee or his or her representative cannot personally inspect the records, to request and receive a copy of such records;

(6) If not previously provided, the opportunity (under terms agreeable to the agency) to establish a schedule for the voluntary repayment of the debt or to enter into a written agreement to establish a schedule for repayment of the debt in lieu of offset. The agreement must be writing, signed by both the employee and the Director of the Financial Management Staff of FMCS, and documented in agency files (4 CFR 102.11).

(7) The employee's right to a hearing conducted by an official arranged by the agency (an administrative law judge or alternatively, a hearing official not under the control of the head of the agency) if a petition is filed as prescribed by § 1450.22.

(8) The method and time period for petitioning for a hearing;

(9) That the timely filing of a petition for hearing will stay the commencement of collection proceedings;

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

(11) That any knowingly false, misleading, or frivolous statements, representations, or evidence may subject the employee to:

(i) Disciplinary procedures appropriate under chapter 75 of title 5, U.S.C., part 752 of title 5, CFR, or any other applicable status or regulations;

(ii) Penalties under the False Claims Act sections 3729-3731 of title 31, U.S.C., or any other applicable statutory authority; or

(iii) Criminal penalties under sections 286, 287, 1001, and 1002 of title 18, U.S.C., or any other applicable statutory authority.

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

(13) Unless there are applicable contractual or statutory provisions to the contrary, that amounts paid on or deducted for the debt which are later waived or found not owned to the United States will be promptly refunded to the employee.

(b) Notifications under this section shall be hand delivered with a record made of the date and time of delivery, or shall be mailed by certified mail return receipt requested.

(c) No notification, hearing, written responses or final decisions under this regulation are required of FMCS for any adjustment to pay arising out of an employee's election of coverage under a Federal benefit program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

§ 1450.22 Hearing.

(a) *Petition for hearing.* (1) A hearing may be requested by filing a written petition with the Director, Financial Management Staff of FMCS, or such other official as may be named in the future by the Director of FMCS, stating why the employee believes the determination of the agency concerning the existence or the amount of the debt is in error.

(2) The employee's petition must be signed by the employee and fully identify and explain with reasonable specificity all the facts, evidence and witnesses, if any, which the employee believes support his or her position.

(3) The petition must be filed no later than fifteen (15) calendar days from the date that the notification was hand delivered or the date of delivery by certified mail, return receipt requested.

(4) If a petition is received after the fifteen (15) calendar day deadline referred to above, FMCS will nevertheless accept the petition 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 time limit (unless otherwise aware of it).

(5) If a petition is not filed within the time limit specified in paragraph (a)(3) of this section, and is not accepted pursuant to paragraph (a)(4) of this section, the employee's right to hearing will be considered waived, and salary offset will be implemented by FMCS.

(b) *Type of hearing.* (1) The form and content of the hearing will be determined by the hearing official who shall be a person outside the control or authority of FMCS. In determining the type of hearing, the hearing officer will consider the nature and complexity of the transaction giving rise to the debt. The hearing may be conducted as an informal conference or interview, in which the agency and employee will be given a full opportunity to present their respective positions, or as a more formal proceeding involving the presentation of evidence, arguments and written submissions.

(2) The employee may represent himself or herself, or may be represented by an attorney.

(3) The hearing official shall maintain a summary record of the hearing.

(4) The decision of the hearing officer will be in writing, and will state:

(i) The facts purported to evidence the nature and origin of the alleged debt;

(ii) The hearing official's analysis, findings, and conclusions, in the light of the hearing, as to—

(A) The employee's and/or agency's grounds,

(B) The amount and validity of the alleged debt and,

(C) The repayment schedule, if applicable.

(5) The decision of the hearing official shall constitute the final administrative decision of the agency.

§ 1450.23 Deduction from pay.

(a) Deduction by salary offset, from an employee's current disposable pay, shall be subject to the following conditions:

(1) Ordinarily, debts to the United States should be collected in full, in one lump-sum. This will be done when funds are available. However, if funds are unavailable for payment in one lump sum, or if the amount of the debt exceeds 15 percent of disposable pay for an officially established pay interval,

collection will normally be made in installments.

(2) The installments shall not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount.

(3) Deduction will generally commence with the next full pay interval (ordinarily the next biweekly pay period) following written consent by the employee to salary offset, waiver of hearing, or the decision issued by the hearing officer.

(4) Installment deductions must be made over a period not greater than the anticipated period of employment except as provided in § 1450.24.

§ 1450.24 Liquidation from final check or recovery from other payment.

(a) If the employee retires or resigns or if his or her employment or period of active duty ends before collection of the debt is completed, offset of the entire remaining balance on the debt may be made from a final payment of any nature, including but not limited to, final salary payment or lump-sum leave due to the employee as of the date of separation.

(b) If the debt cannot be liquidated by offset from a final payment, offset may be made from later payments of any kind due from the United States, including, but not limited to, the Civil Service Retirement and Disability Fund, pursuant to § 1450.11 of this regulation.

§ 1450.25 Non-waiver of rights by payments.

An employee's involuntary payment of all or any portion of a debt being collected under 5 U.S.C. 5514 shall not be construed as a waiver of any rights which the employee may have under 5 U.S.C. 5514 or any other provision of contract or law, unless statutory or contractual provisions provide to the contrary.

§ 1450.26 Refunds.

(a) Refunds shall promptly be made when—

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

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(2) The employee's paying agency is directed by an administrative or judicial order to refund amounts deducted from his or her current pay.

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

§ 1450.27 Interest, penalties, and administrative costs.

The assessment of interest, penalties and administrative costs shall be in accordance with subpart D of this regulation.

§ 1450.28 Recovery when paying agency is not creditor agency.

(a) *Responsibilities of creditor agency.* Upon completion of the procedures established under 5 U.S.C. 5514, the creditor agency must do the following:

(1) The creditor agency must certify, in writing, that the employee owes the debt, the amount and basis of the debt, the date on which payment(s) is due, the date the Government's right to collect the debt first accrued, and that the creditor agency's regulations implementing 5 U.S.C. 5514 have been approved by OPM.

(2) If the collection must be made in installments, the creditor agency also must advise the paying agency of the number of installments to be collected, the amount of each installment, and the commencing date of the first installment (if a date other than the next officially established pay period is required).

(3) Unless the employee has consented to the salary offset in writing or signed a statement acknowledging receipt of the required procedures, and the written consent or statement is forwarded to the paying agency, the creditor agency also must advise the paying agency of the action(s) taken under 5 U.S.C. 5514(b) and give the date(s) the action(s) was taken.

(4) Except as otherwise provided in this paragraph, the creditor agency must submit a debt claim containing the information specified in paragraphs (a) (1) through (3) of this section and an installment agreement (or other instruction on the payment schedule), if applicable to the employee's paying agency.

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(5) If the employee is in the process of separating, the creditor agency must submit its claim to the employee's paying agency for collection pursuant to §1450.24. The paying agency must certify the total amount of its collection and provide copies to the creditor agency and the employee as stated in paragraph (c)(1) of this section. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the provisions of this section have been fully compiled with. However, the creditor agency must submit a properly certified claim to the agency responsible for making such payments before collection can be made.

(6) If the employee is already separated and all payments from his or her former paying agency have been paid, the creditor agency may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801 *et seq.*), or other similar funds, be administratively offset to collect the debt. (31 U.S.C. 3716 and 102.4 FCCS.)

(b) *Responsibilities of paying agency—*
(1) *Complete claim.* When the paying agency receives a properly certified debt claim from a creditor agency, deductions should be scheduled to begin prospectively at the next officially established pay interval. The employee must receive written notice that the paying agency has received a certified debt claim from the creditor agency (including the amount) and written notice of the date deductions from salary will commence and of the amount of such deductions.

(2) *Incomplete claim.* When the paying agency receives an incomplete debt claim from a creditor agency, the paying agency must return the debt claim with a notice that procedures under 5 U.S.C. 5514 and this subpart must be provided, and a properly certified debt claim received, before action will be taken to collect from the employee's current pay account.

(3) *Review.* The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(c) *Employees who transfer from one paying agency to another.* (1) If, after the creditor agency has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates must certify the total amount of the collection made on the debt. One copy of the certification must be furnished to the employee, another to the creditor agency along with notice of employee's transfer. However, the creditor agency must submit a properly certified claim to the new paying agency before collection can be resumed.

(2) When an employee transfers to another paying agency, the creditor agency need not repeat the due process procedures described by 5 U.S.C. 5514 and this subpart to resume the collection. However, the creditor agency is responsible for reviewing the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

Subpart D—Interest, Penalties, and Administrative Costs

§ 1450.29 Assessment.

(a) Except as provided in paragraph (h) of this section, or §1450.30, FMCS shall assess interest, penalties and administrative costs on debts owed to the United States pursuant to 31 U.S.C. 3717. Before assessing these charges, FMCS will mail or hand-deliver a written notice to the debtor. This notice shall include a statement of the agency's requirements concerning these charges. (Sections 1450.9 and 1450.21).

(b) Interest shall accrue from the date on which notice of the debt and the interest requirements is first mailed or hand-delivered to the debtor, using the most current address that is available to the agency. If FMCS should use an "advance billing" procedure—that is, if it mails a bill before

the debt is actually owed—it can include the required interest notification in the advance billing, but interest may not start to accrue before the debt is actually owed. FMCS will exercise care to insure that the notices required by this section are dated and mailed or hand-delivered on the same day.

(c) The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate), as prescribed and published by the Secretary of the Treasury in the FEDERAL REGISTER and the Treasury Fiscal Requirements Manual Bulletins annually or quarterly, in accordance with 31 U.S.C. 3717. FMCS may assess a higher rate of interest if it reasonably determines that a higher rate is necessary to protect the interests of the United States. The rate of interest, as initially assessed, shall remain fixed for the duration of the indebtedness except that where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement, FMCS may set a new interest rate which reflects the current value of funds to the Treasury at the time the new agreement is executed. Interest will not be assessed on interest, penalties, or administrative costs required by this section. However, if the debtor defaults on a previous repayment agreement, charges which accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under a new repayment agreement.

(d) FMCS shall assess against a debtor charges to cover administrative costs incurred as a result of a delinquent debt—that is, the additional costs incurred in processing and handling the debt because it became delinquent. Calculation of administrative costs shall be based upon actual costs incurred or upon cost analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors in similar stages of delinquency. Administrative costs may include costs incurred in obtaining a credit report or in using a private debt collector, to the extent they are attributable to delinquency.

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(e) FMCS shall assess a penalty charge, not to exceed 6 percent a year, on any portion of a debt that is delinquent for more than 90 days. This charge need not be calculated until the 91st day of delinquency, but shall accrue from the date that the debt became delinquent.

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

(g) FMCS will waive the collection of interest on the debt or any portion of the debt which is paid within 30 days after the date on which interest began to accrue. FMCS may extend this 30-day period, on a case-by-case basis, if it reasonably determines that such action is appropriate. Also, FMCS may waive, in whole or in part, the collection of interest, penalties, and/or administrative costs assessed under this section under the criteria specified in part 103 of the Federal Claims Collection Standards (4 CFR part 103) relating to the compromise of claims (without regard to the amount of the debt), or if the agency determines that collection of these charges would be against equity and good conscience, or not in the best interests of the United States. Waiver under the first sentence of this paragraph (g) is mandatory. Under the second and third sentences, it may be exercised under the following circumstances:

(1) Waiver of interest pending consideration of a request for reconsideration, administrative review, or waiver of the underlying debt under a permissive statute, and

(2) Waiver of interest where FMCS has accepted an installment plan, there is no indication of fault or lack of good faith on the part of the debtor, and the amount of interest is large enough in relation to the size of the installments that the debtor can reasonably afford to pay, that the debt will never be repaid.

(h) Where a mandatory waiver or review statute applies, interest and related charges may not be assessed for those periods during which collection action must be suspended under

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§104.2(c)(1) of the Federal Claims Collection Standards (4 CFR part 104).

§ 1450.30 Exemptions.

(a) The provisions of 31 U.S.C. 3717 to not apply:

(1) To debts owed by any State or local government;

(2) To debts arising under contracts which were executed prior to, and were in effect on (i.e., were not completed as of), October 25, 1982;

(3) To debts where an applicable statute, regulation required by statute, loan agreement, or contract either prohibits such charges or explicitly fixes the charges that apply to the debts arising under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

(b) However, FMCS is authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

§ 1450.31 Other sanctions.

The sanctions stated in this subpart are not intended to be exclusive. Other sanctions which may be imposed by the Director of FMCS include placement of the debtor's name on a list of debarred, suspended or ineligible contractors or grantees; conversion of method of payment under a grant from an advance payment method to a reimbursement method; or revocation of a letter of credit. Notice will be given by FMCS to the debtor regarding the imposition of such other sanctions.

PART 1470—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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Subpart E—Entitlements [Reserved]

AUTHORITY: 29 U.S.C. 175a.

SOURCE: 53 FR 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§ 1470.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 1470.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 1470.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For non-construction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and

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the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to

the grantee for the use of the funds provided.

Supplies means all tangible personal property other than *equipment* as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount

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of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 1470.4 Applicability.

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 1470.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under title V, subtitle D, chapter 2, section 583—the Secretary's discretionary grant program) and titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and part C of title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 1470.4(a) (3) through (8) are subject to subpart E.

§ 1470.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 1470.6.

§ 1470.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

Subpart B—Pre-Award Requirements

§ 1470.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two

copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 1470.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

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(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 1470.12 Special grant or subgrant conditions for “high-risk” grantees.

(a) A grantee or subgrantee may be considered “high risk” if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed

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and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 1470.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant

or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 1470.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1)

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Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §1470.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501

et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

§ 1470.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institutions.	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular.	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 1470.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

§ 1470.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions—(1) Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in §1470.25, shall not count to-

wards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in §1470.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

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(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.*

(1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 1470.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal

funds, only the non-Federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 1470.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See §1470.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§1470.31 and 1470.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award

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period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 1470.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends \$300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months

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after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, §1470.36 shall be followed.

[53 FR 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45942, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

§ 1470.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see §1470.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes—(1) Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a non-construction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct

payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and non-construction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from non-construction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subcontracting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §1470.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget form as the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see §1470.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 1470.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency.

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The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 1470.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First pref-

erence for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §1470.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed

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for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow §1470.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an

amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 1470.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 1470.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 1470.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§ 1470.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will

follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- (i) The employee, officer or agent,
- (ii) Any member of his immediate family,
- (iii) His or her partner, or
- (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of pro-

posed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

- (i) After a determination that no other contract is suitable, and
- (ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 1470.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §1470.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the

items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types

of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

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(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §1470.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or in-

creases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is

one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of \$2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2000, and in excess of \$2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

[53 FR 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19643, Apr. 19, 1995]

§ 1470.37 Subgrants.

(a) *States.* States shall follow State law and procedures when awarding and administering subgrants (whether on a

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cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with §1470.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 1470.10;

(2) Section 1470.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in §1470.21; and

(4) Section 1470.50.

REPORTS, RECORDS RETENTION, AND ENFORCEMENT

§ 1470.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees

must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 1470.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report—(1) Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all non-construction grants and for construction grants when required in accordance with § 1470.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be

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required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report—*

(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the “Remarks” section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days’ needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15

working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement—*(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §1470.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs—*(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in §1470.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §1470.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and

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due date shall be governed by §1470.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in §1470.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §1470.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §1470.41(b)(2).

§ 1470.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see §1470.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess

long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

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(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 1470.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 1470.35).

§ 1470.44 Termination for convenience.

Except as provided in § 1470.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the

case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either §1470.43 or paragraph (a) of this section.

Subpart D—After-The-Grant Requirements

§ 1470.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

- (1) Final performance or progress report.
- (2) Financial Status Report (SF-269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).
- (3) Final request for payment (SF-270) (if applicable).
- (4) Invention disclosure (if applicable).
- (5) Federally-owned property report:

In accordance with §1470.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 1470.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in §1470.42;

(d) Property management requirements in §§1470.31 and 1470.32; and

(e) Audit requirements in §1470.26.

§ 1470.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR chapter II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

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**PART 1471—GOVERNMENTWIDE
DEBARMENT AND SUSPENSION
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APPENDIX TO PART 1471—COVERED TRANSACTIONS

AUTHORITY: E.O. 12549, 3 CFR 1986 Comp., p. 189; E.O. 12698, 3 CFR 1989 Comp., p. 235; sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 29 U.S.C. 175a.

SOURCE: 68 FR 66544, 66603, 66604, Nov. 26, 2003, unless otherwise noted.

§ 1471.25 How is this part organized?

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

In subpart . . .	You will find provisions related to . . .
A	general information about this rule.
B	the types of FMCS transactions that are covered by the Governmentwide nonprocurement suspension and debarment system.
C	the responsibilities of persons who participate in covered transactions.
D	the responsibilities of FMCS officials who are authorized to enter into covered transactions.
E	the responsibilities of Federal agencies for the <i>Excluded Parties List System</i> (Disseminated by the General Services Administration).
F	the general principles governing suspension, debarment, voluntary exclusion and settlement.
G	suspension actions.
H	debarment actions.
I	definitions of terms used in this part.
J	[Reserved]

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

If you are . . .	See subpart(s) . . .
(1) a participant or principal in a nonprocurement transaction.	A, B, C, and I.
(2) a respondent in a suspension action	A, B, F, G and I.

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If you are . . .	See subpart(s) . . .
(3) a respondent in a debarment action	A, B, F, H and I.
(4) a suspending official	A, B, D, E, F, G and I.
(5) a debaring official	A, B, D, E, F, H and I.
(6) a (n) FMCS official authorized to enter into a covered transaction.	A, B, D, E and I.
(7) Reserved	J.

§ 1471.50 How is this part written?

(a) This part uses a “plain language” format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as “I” and “you,” change from subpart to subpart depending on the audience being addressed. The pronoun “we” always is the Federal Mediation and Conciliation Service.

(c) The “Covered Transactions” diagram in the appendix to this part shows the levels or “tiers” at which the Federal Mediation and Conciliation Service enforces an exclusion under this part.

§ 1471.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded*, which refers only to discretionary actions taken by a suspending or debaring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified*, which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible*, which generally refers to a person who is either excluded or disqualified.

Subpart A—General**§ 1471.100 What does this part do?**

This part adopts a governmentwide system of debarment and suspension for FMCS nonprocurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549, “Debarment and Suspension” (3 CFR 1986 Comp., p. 189), Executive Order 12689, “Debarment and Suspension” (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103–355, 108 Stat. 3327).

§ 1471.105 Does this part apply to me?

Portions of this part (see table at §1471.25(b)) apply to you if you are a(n)—

(a) Person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction;

(b) Respondent (a person against whom the Federal Mediation and Conciliation Service has initiated a debarment or suspension action);

(c) FMCS debarring or suspending official; or

(d) FMCS official who is authorized to enter into covered transactions with non-Federal parties.

§ 1471.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

§ 1471.115 How does an exclusion restrict a person’s involvement in covered transactions?

With the exceptions stated in §§1471.120, 1471.315, and 1471.420, a person who is excluded by the Federal Mediation and Conciliation Service or any other Federal agency may not:

(a) Be a participant in a(n) FMCS transaction that is a covered transaction under subpart B of this part;

(b) Be a participant in a transaction of any other Federal agency that is a covered transaction under that agency’s regulation for debarment and suspension; or

(c) Act as a principal of a person participating in one of those covered transactions.

§ 1471.120 May we grant an exception to let an excluded person participate in a covered transaction?

(a) The Agency Director may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Agency Director grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549.

(b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

§ 1471.125 Does an exclusion under the nonprocurement system affect a person’s eligibility for Federal procurement contracts?

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an exclusion under this part has reciprocal effect in Federal procurement transactions.

§ 1471.130 Does exclusion under the Federal procurement system affect a person’s eligibility to participate in nonprocurement transactions?

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this

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part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

§ 1471.135 May the Federal Mediation and Conciliation Service exclude a person who is not currently participating in a nonprocurement transaction?

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction.

§ 1471.140 How do I know if a person is excluded?

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 1471.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?

Except if provided for in subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS*; and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) FMCS transactions for which a disqualified person is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification;

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

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Subpart B—Covered Transactions

§ 1471.200 What is a covered transaction?

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

§ 1471.205 Why is it important if a particular transaction is a covered transaction?

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under § 1471.310 or § 1471.415; or

(2) A(n) FMCS official obtains an exception from the Agency Director to allow you to be involved in the transaction, as permitted under § 1471.120.

§ 1471.210 Which nonprocurement transactions are covered transactions?

All nonprocurement transactions, as defined in § 1471.970, are covered transactions unless listed in § 1471.215. (See appendix to this part.)

§ 1471.215 Which nonprocurement transactions are not covered transactions?

The following types of nonprocurement transactions are not covered transactions:

- (a) A direct award to—
 - (1) A foreign government or foreign governmental entity;
 - (2) A public international organization;
 - (3) An entity owned (in whole or in part) or controlled by a foreign government; or
 - (4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.
- (b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 *et seq.*, those benefits are not covered transactions and, therefore, are not affected if the person is excluded.
- (c) Federal employment.
- (d) A transaction that the Federal Mediation and Conciliation Service needs to respond to a national or agency-recognized emergency or disaster.
- (e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the Federal Mediation and Conciliation Service specifically designates it to be a covered transaction.
- (f) An incidental benefit that results from ordinary governmental operations.
- (g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

§ 1471.220 Are any procurement contracts included as covered transactions?

- (a) Covered transactions under this part—
 - (1) Do not include any procurement contracts awarded directly by a Federal agency; but
 - (2) Do include some procurement contracts awarded by non-Federal partici-

pants in nonprocurement covered transactions (see appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

- (1) The contract is awarded by a participant in a nonprocurement transaction that is covered under § 1471.210, and the amount of the contract is expected to equal or exceed \$25,000.
- (2) The contract requires the consent of a(n) FMCS official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.
- (3) The contract is for federally-required audit services.

§ 1471.225 How do I know if a transaction in which I may participate is a covered transaction?

As a participant in a transaction, you will know that it is a covered transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

Subpart C—Responsibilities of Participants Regarding Transactions**DOING BUSINESS WITH OTHER PERSONS****§ 1471.300 What must I do before I enter into a covered transaction with another person at the next lower tier?**

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

- (a) Checking the *EPLS*; or
- (b) Collecting a certification from that person if allowed by this rule; or
- (c) Adding a clause or condition to the covered transaction with that person.

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§ 1471.305 May I enter into a covered transaction with an excluded or disqualified person?

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the Federal Mediation and Conciliation Service grants an exception under § 1471.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

§ 1471.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Federal Mediation and Conciliation Service grants an exception under § 1471.120.

§ 1471.315 May I use the services of an excluded person as a principal under a covered transaction?

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the Federal Mediation and Con-

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ciliation Service grants an exception under § 1471.120.

§ 1471.320 Must I verify that principals of my covered transactions are eligible to participate?

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS*.

§ 1471.325 What happens if I do business with an excluded person in a covered transaction?

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

§ 1471.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § 1471.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

§ 1471.335 What information must I provide before entering into a covered transaction with the Federal Mediation and Conciliation Service?

Before you enter into a covered transaction at the primary tier, you as the participant must notify the FMCS office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in §1471.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in §1471.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

§ 1471.340 If I disclose unfavorable information required under § 1471.335, will I be prevented from participating in the transaction?

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under §1471.335 will not necessarily cause us to deny your participation in the covered transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

§ 1471.345 What happens if I fail to disclose information required under § 1471.335?

If we later determine that you failed to disclose information under §1471.335 that you knew at the time you entered into the covered transaction, we may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 1471.350 What must I do if I learn of information required under § 1471.335 after entering into a covered transaction with the Federal Mediation and Conciliation Service?

At any time after you enter into a covered transaction, you must give immediate written notice to the FMCS office with which you entered into the transaction if you learn either that—

(a) You failed to disclose information earlier, as required by §1471.335; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in §1471.335.

DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS

§ 1471.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?

Before you enter into a covered transaction with a person at the next higher tier, you as a lower tier participant must notify that person if you know that you or any of the principals are presently excluded or disqualified.

§ 1471.360 What happens if I fail to disclose the information required under § 1471.355?

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

§ 1471.365 What must I do if I learn of information required under § 1471.355 after entering into a covered transaction with a higher tier participant?

At any time after you enter into a lower tier covered transaction with a person at a higher tier, you must provide immediate written notice to that person if you learn either that—

(a) You failed to disclose information earlier, as required by §1471.355; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in §1471.355.

Subpart D—Responsibilities of FMCS Officials Regarding Transactions

§ 1471.400 May I enter into a transaction with an excluded or disqualified person?

(a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under §1471.120.

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(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 1471.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under § 1471.120.

§ 1471.410 May I approve a participant's use of the services of an excluded person?

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as a principal under that transaction, unless you obtain an exception under § 1471.120.

§ 1471.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 1471.120.

§ 1471.420 May I approve a transaction with an excluded or disqualified person at a lower tier?

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

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(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under § 1471.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 1471.425 When do I check to see if a person is excluded or disqualified?

As an agency official, you must check to see if a person is excluded or disqualified before you—

(a) Enter into a primary tier covered transaction;

(b) Approve a principal in a primary tier covered transaction;

(c) Approve a lower tier participant if agency approval of the lower tier participant is required; or

(d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required.

§ 1471.430 How do I check to see if a person is excluded or disqualified?

You check to see if a person is excluded or disqualified in two ways:

(a) You as an agency official must check the *EPLS* when you take any action listed in § 1471.425.

(b) You must review information that a participant gives you, as required by § 1471.335, about its status or the status of the principals of a transaction.

§ 1471.435 What must I require of a primary tier participant?

You as an agency official must require each participant in a primary tier covered transaction to—

(a) Comply with subpart C of this part as a condition of participation in the transaction; and

(b) Communicate the requirement to comply with subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

§ 1471.440 What method do I use to communicate those requirements to participants?

To communicate the requirement you must include a term or condition

in the transaction requiring the participants' compliance with subpart C of this part and requiring them to include a similar term or condition in lower-tier covered transactions.

[68 FR 66604, Nov. 26, 2003]

§ 1471.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

§ 1471.450 What action may I take if a primary tier participant fails to disclose the information required under § 1471.335?

If you as an agency official determine that a participant failed to disclose information, as required by § 1471.335, at the time it entered into a covered transaction with you, you may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 1471.455 What may I do if a lower tier participant fails to disclose the information required under § 1471.355 to the next higher tier?

If you as an agency official determine that a lower tier participant failed to disclose information, as required by § 1471.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

Subpart E—Excluded Parties List System

§ 1471.500 What is the purpose of the Excluded Parties List System (EPLS)?

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

§ 1471.505 Who uses the EPLS?

(a) Federal agency officials use the *EPLS* to determine whether to enter into a transaction with a person, as required under § 1471.430.

(b) Participants also may, but are not required to, use the *EPLS* to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under § 1471.320; or

(2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.

(c) The *EPLS* is available to the general public.

§ 1471.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 1471.515 What specific information is in the EPLS?

(a) At a minimum, the *EPLS* indicates—

(1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for the action;

(6) The agency and name and telephone number of the agency point of contact for the action; and

(7) The Dun and Bradstreet Number (DUNS), or other similar code approved

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by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

§ 1471.520 Who places the information into the EPLS?

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS*:

(a) Information required by § 1471.515(a);

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, generally within five working days, after—

- (1) Taking an exclusion action;
- (2) Modifying or rescinding an exclusion action;
- (3) Finding that a person is disqualified; or
- (4) Finding that there has been a change in the status of a person who is listed as disqualified.

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§ 1471.525 Whom do I ask if I have questions about a person in the EPLS?

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

§ 1471.530 Where can I find the EPLS?

(a) You may access the *EPLS* through the Internet, currently at *http://epls.arnet.gov*.

(b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783-3238.

Subpart F—General Principles Relating to Suspension and Debarment Actions

§ 1471.600 How do suspension and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

§ 1471.605 How does suspension differ from debarment?

Suspension differs from debarment in that—

A suspending official . . .	A debarring official . . .
(a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings.	Imposes debarment for a specified period as a final determination that a person is not presently responsible.
(b) Must— (1) Have <i>adequate evidence</i> that there may be a cause for debarment of a person; and (2) Conclude that <i>immediate action</i> is necessary to protect the Federal interest.	Must conclude, based on a <i>preponderance of the evidence</i> , that the person has engaged in conduct that warrants debarment.
(c) Usually imposes the suspension <i>first</i> , and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted.	Imposes debarment <i>after</i> giving the respondent notice of the action and an opportunity to contest the proposed debarment.

§ 1471.610 What procedures does the Federal Mediation and Conciliation Service use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

§ 1471.615 How does the Federal Mediation and Conciliation Service notify a person of a suspension or debarment action?

(a) The suspending or debaring official sends a written notice to the last known street address, facsimile number, or e-mail address of—

(1) You or your identified counsel; or
 (2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

§ 1471.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

§ 1471.625 What is the scope of a suspension or debarment?

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or
 (2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debaring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

§ 1471.630 May the Federal Mediation and Conciliation Service impute conduct of one person to another?

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

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§ 1471.635 May the Federal Mediation and Conciliation Service settle a debarment or suspension action?

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

§ 1471.640 May a settlement include a voluntary exclusion?

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

§ 1471.645 Do other Federal agencies know if the Federal Mediation and Conciliation Service agrees to a voluntary exclusion?

(a) Yes, we enter information regarding a voluntary exclusion into the *EPLS*.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

Subpart G—Suspension

§ 1471.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under §1471.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under §1471.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

§ 1471.705 What does the suspending official consider in issuing a suspension?

(a) In determining the adequacy of the evidence to support the suspension, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative

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agreements, loan authorizations, contracts, and other relevant documents.

(b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

§ 1471.710 When does a suspension take effect?

A suspension is effective when the suspending official signs the decision to suspend.

§ 1471.715 What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

(a) That you have been suspended;
(b) That your suspension is based on—

- (1) An indictment;
- (2) A conviction;
- (3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or
- (4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;

(c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) upon which we relied under §1471.700 for imposing suspension;

(e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;

(f) Of the applicable provisions of this subpart, subpart F of this part, and any other FMCS procedures governing suspension decision making; and

(g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

§ 1471.720 How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

§ 1471.725 How much time do I have to contest a suspension?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the suspending official within 30 days after you receive the Notice of Suspension.

(b) We consider the notice to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§ 1471.730 What information must I provide to the suspending official if I contest a suspension?

(a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local

agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the Federal Mediation and Conciliation Service may seek further criminal, civil or administrative action against you, as appropriate.

§ 1471.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—

(1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;

(3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or

(4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.

(b) You will have an opportunity to challenge the facts if the suspending official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.

(c) If you have an opportunity to challenge disputed material facts

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under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

§ 1471.740 Are suspension proceedings formal?

(a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

(b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

§ 1471.745 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Federal Mediation and Conciliation Service agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 1471.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?

(a) The suspending official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the suspending official's initial decision to suspend you;

(2) Any further information and argument presented in support of, or opposition to, the suspension; and

(3) Any transcribed record of fact-finding proceedings.

(b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be ar-

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bitrary, capricious, or clearly erroneous.

§ 1471.755 When will I know whether the suspension is continued or terminated?

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause.

§ 1471.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

Subpart H—Debarment

§ 1471.800 What are the causes for debarment?

We may debar a person for—

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

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(2) Violation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under § 1471.120;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 1471.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

§ 1471.805 What notice does the debarring official give me if I am proposed for debarment?

After consideration of the causes in § 1471.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to § 1471.615, advising you—

(a) That the debarring official is considering debarring you;

(b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;

(c) Of the cause(s) under § 1471.800 upon which the debarring official relied for proposing your debarment;

(d) Of the applicable provisions of this subpart, subpart F of this part, and any other FMCS procedures governing debarment; and

(e) Of the governmentwide effect of a debarment from procurement and non-procurement programs and activities.

§ 1471.810 When does a debarment take effect?

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

§ 1471.815 How may I contest a proposed debarment?

If you as a respondent wish to contest a proposed debarment, you or your representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

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§ 1471.820 How much time do I have to contest a proposed debarment?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§ 1471.825 What information must I provide to the debarring official if I contest a proposed debarment?

(a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in § 1471.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the Federal Mediation and Conciliation Service may seek further criminal, civil or administrative action against you, as appropriate.

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§ 1471.830 Under what conditions do I get an additional opportunity to challenge the facts on which a proposed debarment is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—

(1) Your debarment is based upon a conviction or civil judgment;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or

(3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.

(b) You will have an additional opportunity to challenge the facts if the debarring official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.

(c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

§ 1471.835 Are debarment proceedings formal?

(a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

§ 1471.840 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Federal Mediation and Conciliation Service agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 1471.845 What does the debarring official consider in deciding whether to debar me?

(a) The debarring official may debar you for any of the causes in § 1471.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at § 1471.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

§ 1471.850 What is the standard of proof in a debarment action?

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

§ 1471.855 Who has the burden of proof in a debarment action?

(a) We have the burden to prove that a cause for debarment exists.

(b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that

you are presently responsible and that debarment is not necessary.

§ 1471.860 What factors may influence the debarring official's decision?

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

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(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

§ 1471.865 How long may my debarment last?

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is

based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in § 1471.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed five years.

§ 1471.870 When do I know if the debarring official debars me?

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.

(b) The debarring official sends you written notice, pursuant to § 1471.615 that the official decided, either—

(1) Not to debar you; or

(2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates; and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

§ 1471.875 May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

§ 1471.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

- (a) Newly discovered material evidence;
- (b) A reversal of the conviction or civil judgment upon which your debarment was based;
- (c) A bona fide change in ownership or management;
- (d) Elimination of other causes for which the debarment was imposed; or
- (e) Other reasons the debarring official finds appropriate.

§ 1471.885 May the debarring official extend a debarment?

- (a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.
- (b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.
- (c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures in this subpart, and subpart F of this part, to extend the debarment.

Subpart I—Definitions**§ 1471.900 Adequate evidence.**

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

§ 1471.905 Affiliate.

Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways we use to determine control include, but are not limited to—

- (a) Interlocking management or ownership;
- (b) Identity of interests among family members;
- (c) Shared facilities and equipment;
- (d) Common use of employees; or

(e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

§ 1471.910 Agency.

Agency means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered “agencies” for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

§ 1471.915 Agent or representative.

Agent or representative means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

§ 1471.920 Civil judgment.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).

§ 1471.925 Conviction.

Conviction means—

- (a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of *nolo contendere*; or
- (b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

§ 1471.930 Debarment.

Debarment means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal

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Acquisition Regulation (48 CFR chapter 1). A person so excluded is debarred.

§ 1471.935 Debarring official.

(a) *Debarring official* means an agency official who is authorized to impose debarment. A debarring official is either—

- (1) The agency head; or
 - (2) An official designated by the agency head.
- (b) [Reserved]

§ 1471.940 Disqualified.

Disqualified means that a person is prohibited from participating in specified Federal procurement or non-procurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

- (a) The Davis-Bacon Act (40 U.S.C. 276(a));
- (b) The equal employment opportunity acts and Executive orders; or
- (c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

§ 1471.945 Excluded or exclusion.

Excluded or exclusion means—

- (a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or
- (b) The act of excluding a person.

§ 1471.950 Excluded Parties List System

Excluded Parties List System (EPLS) means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, “List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs,” so long as published.

§ 1471.955 Indictment.

Indictment means an indictment for a criminal offense. A presentment, infor-

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mation, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

§ 1471.960 Ineligible or ineligibility.

Ineligible or ineligibility means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

§ 1471.965 Legal proceedings.

Legal proceedings means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

§ 1471.970 Nonprocurement transaction.

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

- (1) Grants.
- (2) Cooperative agreements.
- (3) Scholarships.
- (4) Fellowships.
- (5) Contracts of assistance.
- (6) Loans.
- (7) Loan guarantees.
- (8) Subsidies.
- (9) Insurances.
- (10) Payments for specified uses.
- (11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

§ 1471.975 Notice.

Notice means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See § 1471.615.)

§ 1471.980 Participant.

Participant means any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.

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§ 1471.985 Person.

Person means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

§ 1471.990 Preponderance of the evidence.

Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

§ 1471.995 Principal.

Principal means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

§ 1471.1000 Respondent.

Respondent means a person against whom an agency has initiated a debarment or suspension action.

§ 1471.1005 State.

(a) *State* means—

(1) Any of the states of the United States;

(2) The District of Columbia;

(3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

§ 1471.1010 Suspending official.

(a) *Suspending official* means an agency official who is authorized to impose suspension. The suspending official is either:

(1) The agency head; or

(2) An official designated by the agency head.

(b) [Reserved]

§ 1471.1015 Suspension.

Suspension is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

§ 1471.1020 Voluntary exclusion or voluntarily excluded.

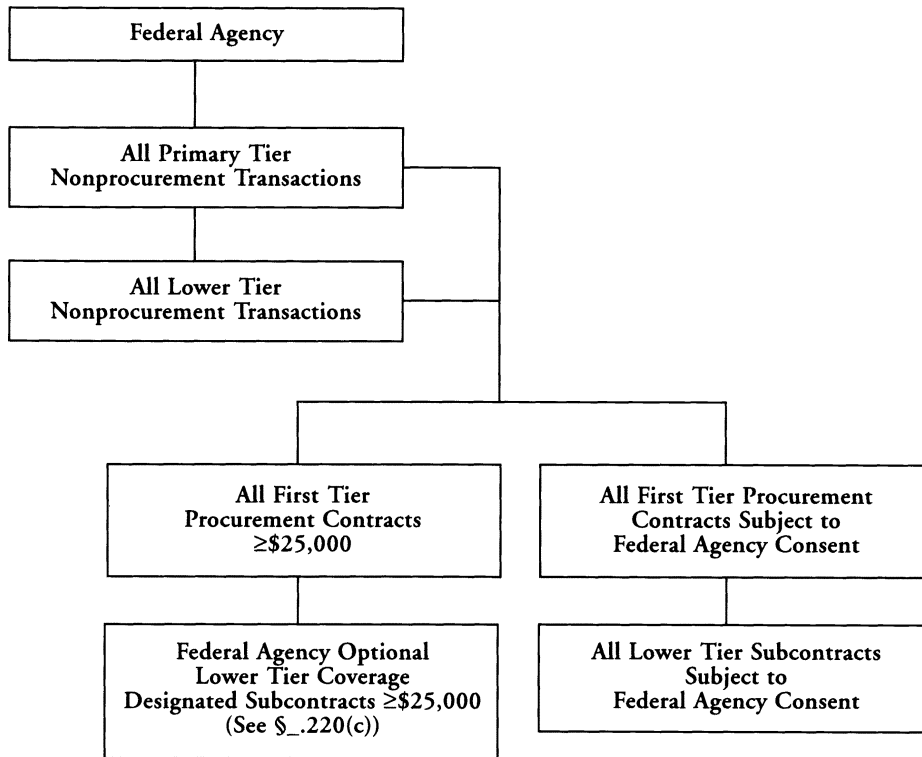
(a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.

(b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

Subpart J [Reserved]

APPENDIX TO PART 1471—COVERED TRANSACTIONS

COVERED TRANSACTIONS



PART 1472—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

Subpart A—Purpose and Coverage

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- 1472.110 Are any of my Federal assistance awards exempt from this part?
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- 1472.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?
- 1472.230 How and when must I identify workplaces?

Subpart C—Requirements for Recipients Who Are Individuals

- 1472.300 What must I do to comply with this part if I am an individual recipient?
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Subpart D—Responsibilities of FMCS Awarding Officials

1472.400 What are my responsibilities as an FMCS awarding official?

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- 1472.500 How are violations of this part determined for recipients other than individuals?
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- 1472.630 Debarment.
- 1472.635 Drug-free workplace.
- 1472.640 Employee.
- 1472.645 Federal agency or agency.
- 1472.650 Grant.
- 1472.655 Individual.
- 1472.660 Recipient.
- 1472.665 State.
- 1472.670 Suspension.

AUTHORITY: 41 U.S.C. 701, *et seq.*

SOURCE: 68 FR 66557, 66604, 66605, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 1472.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

§ 1472.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

- (1) A recipient of an assistance award from the Federal Mediation and Conciliation Service; or
- (2) A(n) FMCS awarding official. (See definitions of award and recipient in §§ 1472.605 and 1472.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual.	A, B and E.
(2) A recipient who is an individual.	A, C and E.
(3) A(n) FMCS awarding official.	A, D and E.

§ 1472.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Agency Director determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

§ 1472.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 1472.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

Subpart B—Requirements for Recipients Other Than Individuals

§ 1472.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

- (1) Publish a drug-free workplace statement and establish a drug-free

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awareness program for your employees (see §§ 1472.205 through 1472.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 1472.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 1472.230).

§ 1472.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

§ 1472.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 1472.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 1472.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

§ 1472.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 1472.205 and an ongoing awareness program as described in § 1472.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more . . .	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the FMCS awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

§ 1472.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 1472.205(c)(2), or you otherwise learn

of the conviction. Your notification to the Federal agencies must—

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to

every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either—

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

§ 1472.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each FMCS award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces—

(1) To the FMCS official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by FMCS officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (*e.g.*, all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the FMCS awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the FMCS awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 1472.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) FMCS award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the FMCS awarding official or other designee for each award that you currently have, unless §1472.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

§ 1472.301 [Reserved]

Subpart D—Responsibilities of FMCS Awarding Officials

§ 1472.400 What are my responsibilities as a(n) FMCS awarding official?

As a(n) FMCS awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

Subpart E—Violations of this Part and Consequences

§ 1472.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the Agency Director determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

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(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

§ 1472.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the Agency Director determines, in writing, that—

- (a) The recipient has violated the requirements of subpart C of this part; or
- (b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

§ 1472.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 1472.500 or § 1472.505, the Federal Mediation and Conciliation Service may take one or more of the following actions—

- (a) Suspension of payments under the award;
- (b) Suspension or termination of the award; and
- (c) Suspension or debarment of the recipient under 29 CFR part 1471, for a period not to exceed five years.

§ 1472.515 Are there any exceptions to those actions?

The Agency Director may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the Agency Director determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 1472.605 Award.

Award means an award of financial assistance by the Federal Mediation

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and Conciliation Service or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 29 CFR part 1470 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

§ 1472.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

§ 1472.615 Conviction.

Conviction means a finding of guilt (including a plea of *nolo contendere*) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

§ 1472.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 1472.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

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§ 1472.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

§ 1472.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

§ 1472.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 1472.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 1472.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 1472.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 1472.655 Individual.

Individual means a natural person.

§ 1472.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 1472.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 1472.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may

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ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Non-procurement), that implements Execu-

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tive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PARTS 1473-1499 [RESERVED]