

§ 201–1.300

(v) For any other purpose authorized by law.

(3) This paragraph (e) shall continue to apply to supply chain risk information referenced in paragraph (e)(1) even after the FASC issues a recommendation for exclusion or removal pursuant to 41 U.S.C. 1323.

(f) *Dissemination of information by the FASC.* The FASC may, in its sole discretion, disclose its recommendations and any supply chain risk information relevant to those recommendations to Federal or non-Federal entities if the FASC determines that such sharing may facilitate identification or mitigation of supply chain risk, and disclosure is consistent with the following paragraphs:

(1) The FASC may maintain its recommendations and any supply chain risk information as nonpublic, to the extent permitted by law, or release such information to impacted entities and appropriate stakeholders. The FASC shall have discretion to determine the circumstances under which information will be released, as well as the timing of any such release, the scope of the information to be released, and the recipients to whom information will be released.

(2) Any release by the FASC of recommendations or supply chain risk information will be in accordance title 41 U.S.C. 1323 and the provisions of this subpart.

(3) The FASC will not release a recommendation to a non-Federal entity, other than a source named in the recommendation, unless an exclusion or removal order has been issued based on that recommendation, and the named source has been notified.

(4) The FASC (including the ISA, Task Force, and any other FASC constituent bodies) shall comply with applicable limitations on dissemination of supply chain risk information submitted pursuant to this subpart, including but not limited to the following restrictions:

(i) Controlled Unclassified Information, such as Law Enforcement Sensitive, Proprietary, Privileged, or Personally Identifiable Information, may only be disseminated in compliance with the restrictions applicable to the information and in accordance with the

41 CFR Ch. 201 (7–1–23 Edition)

FASC's processes and procedures for disseminating controlled unclassified information as required by this part.

(ii) Classified Information may only be disseminated consistent with the restrictions applicable to the information and in accordance with the FASC's processes and procedures for disseminating classified information as required by this part.

Subpart C—Exclusion and Removal Orders

§ 201–1.300 Evaluation of sources and covered articles.

(a) *Referral procedure.* The FASC may commence an evaluation of a source or covered article in any of the following ways:

(1) Upon the referral of the FASC or any member of the FASC;

(2) Upon the request, in writing, of the head of an executive agency or a designee, accompanied by a submission of relevant information; or

(3) Based on information submitted to the FASC by any Federal or non-Federal entity that the FASC deems, in its discretion, to be credible.

(b) *Relevant factors.* In evaluating sources and covered articles, the FASC will analyze available information and consider, as appropriate, any relevant factors contained in the following non-exclusive list:

(1) Functionality and features of the covered article, including the covered article's or source's access to data and information system privileges;

(2) The user environment in which the covered article is used or installed;

(3) Security, authenticity, and integrity of covered articles and associated supply and compilation chains, including for embedded, integrated, and bundled software;

(4) The ability of the source to produce and deliver covered articles as expected;

(5) Ownership of, control of, or influence over the source or covered article(s) by a foreign government or parties owned or controlled by a foreign government, or other ties between the source and a foreign government, which may include the following considerations:

Fed. Acquisition Security Council

§ 201–1.301

(i) Whether a Federal agency has identified the country as a foreign adversary or country of special concern;

(ii) Whether the source or its component suppliers have headquarters, research, development, manufacturing, testing, packaging, distribution, or service facilities or other operations in a foreign country, including a country of special concern or a foreign adversary;

(iii) Personal and professional ties between the source—including its officers, directors or similar officials, employees, consultants, or contractors—and any foreign government; and

(iv) Laws and regulations of any foreign country in which the source has headquarters, research development, manufacturing, testing, packaging, distribution, or service facilities or other operations.

(6) Implications for government missions or assets, national security, homeland security, or critical functions associated with use of the source or covered article;

(7) Potential or existing threats to or vulnerabilities of Federal systems, programs or facilities, including the potential for exploitability;

(8) Capacity of the source or the U.S. Government to mitigate risks;

(9) Credibility of and confidence in available information used for assessment of risk associated with proceeding, with using alternatives, and/or with enacting mitigation efforts;

(10) Any transmission of information or data by a covered article to a country outside of the United States; and

(11) Any other information that would factor into an assessment of supply chain risk, including any impact to agency functions, and other information as the FASC deems appropriate.

(c) *Foreign Ownership.* Nothing in this section shall be construed to authorize the issuance of an exclusion or removal order based solely on the fact of the foreign ownership of a potential procurement source that is otherwise qualified to enter into procurement contracts with the Federal Government.

(d) *Due Diligence.* As part of the analysis performed pursuant to paragraph (b) of this section, the FASC will conduct appropriate due diligence. Such

due diligence may include, but need not be limited to, the following actions:

(1) Reviewing any information the FASC considers appropriate; and

(2) Assessing the reliability of the information considered.

(e) *Consultation with NIST.* NIST will participate in FASC activities as a member and will advise the FASC on NIST standards and guidelines issued under 40 U.S.C. 11331.

§ 201–1.301 Recommendation.

(a) *Content of recommendation.* The FASC shall include the following in any recommendation for the issuance of an exclusion or removal order made to the Secretary of Homeland Security, Secretary of Defense, and/or Director of National Intelligence:

(1) Information necessary to positively identify any source or covered article recommended for exclusion or removal;

(2) Information regarding the scope and applicability of the recommended exclusion or removal order, including whether the order should apply to all executive agencies or a subset of executive agencies;

(3) A summary of the supply chain risk assessment reviewed or conducted in support of the recommended exclusion or removal order, including significant conflicting or contrary information, if any;

(4) A summary of the basis for the recommendation, including a discussion of less intrusive measures that were considered and why such measures were not reasonably available to reduce supply chain risk;

(5) A description of the actions necessary to implement the recommended exclusion or removal order; and,

(6) Where practicable, in the FASC's sole and unreviewable discretion, a description of the mitigation steps that could be taken by the source that may result in the FASC's rescission of the recommendation.

(b) *Information sharing in the absence of a recommendation:* If the FASC decides not to issue a recommendation, information received and analyzed pursuant to the procedures in this section may be shared, as appropriate, in accordance with subpart B of this part.

§ 201-1.302

41 CFR Ch. 201 (7-1-23 Edition)

§ 201-1.302 Notice of recommendation to source and opportunity to respond.

(a) *Notice to source.* The FASC shall provide a notice of its recommendation to any source named in the recommendation.

(b) *Content of notice.* The notice under paragraph (a) of this section shall advise the source:

(1) That a recommendation has been made;

(2) Of the criteria the FASC relied upon and, to the extent consistent with national security and law enforcement interests, the information that forms the basis for the recommendation;

(3) That, within 30 days after receipt of the notice, the source may submit information and argument in opposition to the recommendation;

(4) Of the procedures governing the review and possible issuance of an exclusion or removal order; and

(5) Where practicable, in the FASC's sole and unreviewable discretion, a description of the mitigation steps that could be taken by the source that may result in the FASC rescinding the recommendation.

(c) *Submission of response by source and potential rescission of recommendation.* Subject to any applicable procedures or processes developed by the FASC, and in accordance with any instructions provided to the source pursuant to paragraph (b) of this section, a source may submit to the ISA information or argument in opposition to a FASC recommendation. If a source submits information or argument in opposition:

(1) The ISA will convey the source's submission to the FASC and any appropriate constituent bodies and to the Secretary of Homeland Security, the Secretary of Defense, and the Director of National Intelligence.

(2) Upon receipt of such information or argument in opposition, the FASC may rescind the recommendation if the FASC, consistent with the sole and unreviewable discretion provided in paragraph (b)(5) of this section:

(i) Determines that the source has undertaken sufficient mitigation to reduce supply chain risk to an acceptable level; or

(ii) Decides that other grounds justify rescission.

(3) In the event that the FASC rescinds its recommendation, the ISA will communicate that decision to the source. The ISA will notify Secretary of Homeland Security, the Secretary of Defense, and the Director of National Intelligence of the rescission, and provide those officials with a summary of the FASC's reasoning.

(d) *Confidentiality of notice issued to source.* U.S. Government personnel shall:

(1) Keep confidential and not make available outside of the executive branch, except to the extent required by law, any notice issued to a source under paragraph (a) of this section until an exclusion order or removal order is issued and the source has been notified; and

(2) Keep confidential and not make available outside of the executive branch, except to the extent required by law, any notice issued to a source under paragraph (a) of this section if the FASC rescinds the associated recommendation or the Secretary of Homeland Security, Secretary of Defense, and Director of National Intelligence, as applicable, decide not to issue the recommended order.

(e) *Confidentiality of information submitted by source.* Information not otherwise publicly or commercially available that is submitted to the FASC by a source pursuant to paragraph (c) of this section and marked "Confidential and Not to Be Publicly Disclosed" will not be released to the public, including pursuant to a request under 5 U.S.C. 552, except to the extent required by law. That general rule notwithstanding, such information may be released as provided in § 201-1.201(d)(2).

§ 201-1.303 Issuance of orders and related activities.

(a) *Consideration of recommendation and issuance of orders.* The Secretary of Homeland Security, the Secretary of Defense, and the Director of National Intelligence shall each review the FASC's recommendation, any accompanying information and materials provided pursuant to § 201-1.301, and any information submitted by a source pursuant to § 201-1.302, and determine

Fed. Acquisition Security Council

§ 201-1.303

whether to issue an exclusion or removal order based upon the recommendation.

(b) *Administrative record.* The administrative record for judicial review of an exclusion or removal order issued pursuant to 41 U.S.C. 1323(c)(6) shall, subject to the limitations set forth in 41 U.S.C. 1327(b)(4)(B)(ii) through (v), consist only of:

(1) The recommendation issued pursuant to 41 U.S.C. 1323(c)(2);

(2) The notice of recommendation issued pursuant to 41 U.S.C. 1323(c)(3);

(3) Any information and argument in opposition to the recommendation submitted by the source pursuant to 41 U.S.C. 1323(c)(3)(C);

(4) The exclusion or removal order issued pursuant to 41 U.S.C. 1323(c)(5), and any information or materials relied upon by the deciding official in issuing the order; and

(5) The notification to the source issued pursuant to 41 U.S.C. 1323(c)(6)(A).

(6) *Other information.* Other information or material collected by, shared with, or created by the FASC or its member agencies shall not be included in the administrative record unless the deciding official relied on that information or material in issuing the exclusion or removal order.

(d) *Issuing officials.* Exclusion or removal orders may be issued as follows:

(1) The Secretary of Homeland Security may issue removal or exclusion orders applicable to civilian agencies, to the extent not covered by paragraph (d)(2) or (3) of this section.

(2) The Secretary of Defense may issue removal or exclusion orders applicable to the Department of Defense and national security systems other than sensitive compartmented information systems.

(3) The Director of National Intelligence may issue removal or exclusion orders applicable to the Intelligence Community and sensitive compartmented information systems, to the extent not covered by paragraph (d)(2) of this section.

(4) The officials identified in paragraphs (d)(1) through (3) of this section may not delegate the authority to issue exclusion and removal orders to an official below the level one level

below the Deputy Secretary or Principal Deputy Director level, except that the Secretary of Defense may delegate authority for removal orders to the Commander of U.S. Cyber Command, who may not re-delegate such authority to an official below the level of the Deputy Commander.

(e) *Applicability of issued orders to non-Federal entities.* An exclusion or removal order may affect non-Federal entities, including as follows:

(1) An exclusion order may require the exclusion of sources or covered articles from any executive agency procurement action, including but not limited to source selection and consent for a contractor to subcontract. To the extent required by the exclusion order, agencies shall exclude the source or covered articles, as applicable, from being supplied by any prime contractor and subcontractor at any tier.

(2) A removal order may require removal of a covered article from an executive agency information system owned and operated by an agency; from an information system operated by a contractor on behalf of an agency; and from other contractor information systems to the extent that the removal order applies to contractor equipment or systems within the scope of "information technology," as defined in § 201-1.101.

(f) *Notification of order issuance.* The official who issues an exclusion or removal order:

(1) Shall, upon issuance of an exclusion or removal order pursuant to paragraph (a) of this section:

(i) Notify any source named in the order of the order's issuance, and to the extent consistent with national security and law enforcement interests, of the information that forms the basis for the order;

(ii) Provide classified or unclassified notice of the order to the appropriate congressional committees and leadership;

(iii) Provide the order to the ISA; and

(iv) Notify the Interagency Suspension and Debarment Committee of the order.

(2) May provide a copy of the order to other persons, including through public disclosure, as the official deems appropriate and to the extent consistent

with national security and law enforcement interests.

(g) *Removal from Federal supply contracts.* If the officials identified in paragraphs (d)(1) through (3) of this section, or their delegates, issue orders collectively resulting in a Government-wide exclusion, the Administrator for General Services and officials at other executive agencies responsible for management of the Federal Supply Schedules, Government-wide acquisition contracts, and multi-agency contracts shall facilitate implementation of such orders by removing the covered articles or sources identified in the orders from such contracts.

(h) *Annual review of issued orders.* The officials identified in paragraphs (d)(1) through (3) of this section shall review all issued exclusion and removal orders not less frequently than annually pursuant to procedures established by the FASC.

(i) *Modification or rescission of issued orders.* The officials identified in paragraphs (d)(1) through (3) of this section may modify or rescind an issued exclusion or removal order, provided that a modified order shall not apply more broadly than the order before the modification.

§ 201-1.304 Executive agency compliance with exclusion and removal orders.

(a) *Agency compliance.* Executive agencies shall:

(1) Comply with exclusion and removal orders issued pursuant to § 201-1.303 and applicable to their agency, as required by 41 U.S.C. 1323(c)(7) and 44 U.S.C. 3554(a)(1)(B); and

(2) Comply with handling and/or dissemination restrictions placed upon the order or its contents by the issuing official.

(b) *Exceptions to issued exclusion and removal orders.* An executive agency required to comply with an exclusion or removal order may submit to the issuing official a request to be excepted from the order's provisions. The requesting agency:

(1) May ask to be excepted from some or all of the order's requirements. The agency may ask, for example, that the order not apply to the agency, to specific actions of the agency, or to actions of the agency for a period of time before compliance with the order is practicable.

(2) Shall submit the request in writing and include in it all necessary information for the issuing official to review and evaluate it, including—

(i) Identification of the applicable exclusion order or removal order;

(ii) A description of the exception sought, including, if limited to only a portion of the order, a description of the order provisions from which an exception is sought;

(iii) The name or a description sufficient to identify the covered article or the product or service provided by a source that is subject to the order from which an exception is sought;

(iv) Compelling justification for why an exception should be granted, such as the impact of the order on the agency's ability to fulfill its mission-critical functions, or considerations related to the national interest, including national security reviews, national security investigations, or national security agreements;

(v) Any alternative mitigations to be undertaken to reduce the risks addressed by the exclusion or removal order; and

(vi) Any other information requested by the issuing official.

Subtitle E [Reserved]