

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF MANAGEMENT AND BUDGET

### 5 CFR Part 1305

RIN 0348-AB35

#### Release of Official Information, and Testimony by OMB Personnel as Witnesses in Litigation

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Management and Budget (OMB) seeks public comment on a proposed rule that would set forth the procedures to be followed when, in litigation (including administrative proceedings), a subpoena, order or other demand of a court or other authority is issued for the production or disclosure of: Any material contained in the files of OMB; any information relating to materials contained in the files of OMB; or any information or material acquired by any person while such person was an employee of OMB as a part of the performance of the person's official duties or because of the person's official status. Many agencies have issued regulations of this kind in the past in order to establish procedures to respond to such demands in an orderly and consistent manner.

**DATES:** Comments must be received no later than February 18, 1997.

**ADDRESSES:** Comments on the proposed rule should be addressed to: Steven Aitken, Assistant General Counsel, Office of Management and Budget, Room 464, Old Executive Office Building, Washington, D.C. 20503. Comments up to three pages in length may be submitted via facsimile to (202) 395-7294. Electronic mail comments may be submitted via Internet to TOUHYREG@A1.EOP.GOV. Please include the full body of electronic mail comments in the text and not as an attachment. Please include the name,

title, organization, postal address, and E-mail address in the text of the message.

Comments regarding collection of information requirements contained in the proposed rule should be addressed to Mr. Aitken at the address above and to: Edward Springer, OMB Desk Officer, Office of Information and Regulatory Affairs, OMB, Room 10236, New Executive Office Building, Washington, D.C. 20503.

#### FOR FURTHER INFORMATION CONTACT:

Steven Aitken, Assistant General Counsel, Office of Management and Budget, at (202) 395-4728.

**SUPPLEMENTARY INFORMATION:** As have many agencies over the years, OMB is proposing to issue a "Touhy" regulation regarding the production or disclosure of OMB materials and information in response to a subpoena, order or other demand of a court or other authority. Such regulations were upheld by the Supreme Court in its decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

The proposed OMB "Touhy" regulation, which is set forth below, would be placed in a new Part 1305 in OMB's regulations, which are found at 5 CFR Chapter III. OMB invites comments on the proposed regulation.

#### Paperwork Reduction Act

This proposed rule contains collection of information requirements subject to the Paperwork Reduction Act. The requirement in § 1305.3(a), for a person receiving a demand to notify the OMB General Counsel that the demand has been made, is estimated to take 5 minutes; this can be satisfied by a phone call relating the demand and/or by a facsimile transmission of the demand. The requirement in § 1305.3(b), for the person making the demand to submit an affidavit or statement summarizing the information or material sought and its relevance to the proceeding, is estimated to take 15 minutes; a demand for documents will generally already specify the documents sought, the person making a demand for testimony should already know what information is sought (and therefore needs only to describe that information), and in each case the person making the demand should already know the relevance of the documents or testimony to the proceeding (and therefore needs only to

state that relevance). To the extent that any disclosure is required under § 1305.4, it is estimated to take 5 minutes; the only additional disclosure that might result from this provision would be for a person to state, when declining to comply with a demand, that he or she is doing so pursuant to this regulation. Based on previous experience with demands for OMB information and materials, it is estimated that there will generally be not more than 10 respondents/year subject to the above requirements.

Comments are solicited concerning the proposed collection of information requirements to: (1) Evaluate whether the proposed collection of information is necessary for the proper functions of OMB, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden on those who are to respond, such as using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Comments should be sent to the persons specified above (see ADDRESSES).

Regulatory Flexibility Act, Unfunded Mandates Reform Act, and Executive Orders 12866 and 12875

For purposes of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the proposed rule will not, if promulgated, have a significant economic effect on a substantial number of small entities; the proposed rule addresses only the procedures to be followed in the production or disclosure of OMB materials and information in litigation. For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Orders No. 12866 and 12875, the proposed rule would not significantly or uniquely affect small governments, and would not result in increased expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more.

Issued in Washington, D.C., December 9, 1996.  
 Franklin D. Raines,  
*Director.*

For the reasons set forth in the preamble, OMB proposes to amend 5 CFR Chapter III by adding a new part 1305 to read as follows:

**PART 1305—RELEASE OF OFFICIAL INFORMATION, AND TESTIMONY BY OMB PERSONNEL AS WITNESSES, IN LITIGATION**

Sec.

- 1305.1 Purpose and scope.
- 1305.2 Production prohibited unless approved.
- 1305.3 Procedures in the event of a demand for disclosure.
- 1305.4 Procedure in the event of an adverse ruling.
- 1305.5 No private right of action.

Authority: 31 U.S.C. 502.

**§ 1305.1 Purpose and scope.**

This part contains the regulations of the Office of Management and Budget (OMB) concerning procedures to be followed when, in litigation (including administrative proceedings), a subpoena, order or other demand (hereinafter in this part referred to as a "demand") of a court or other authority is issued for the production or disclosure of:

- (a) Any material contained in the files of OMB;
- (b) Any information relating to materials contained in the files of OMB; or
- (c) Any information or material acquired by any person while such person was an employee of OMB as a part of the performance of the person's official duties or because of the person's official status.

**§ 1305.2 Production prohibited unless approved.**

No employee or former employee of OMB shall, in response to a demand of a court or other authority, produce any material contained in the files of OMB, disclose any information relating to materials contained in the files of OMB, or disclose any information or produce any material acquired as part of the performance of the person's official duties, or because of the person's official status, without the prior approval of the General Counsel.

**§ 1305.3 Procedures in the event of a demand for disclosure.**

(a) Whenever a demand is made upon an employee or former employee of OMB for the production of material or the disclosure of information described in § 1305.2, he shall immediately notify

the General Counsel. If possible, the General Counsel shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If information or material is sought by a demand in any case or matter in which OMB is not a party, an affidavit (or, if that is not feasible, a statement by the party seeking the information or material, or by his attorney) setting forth a summary of the information or material sought and its relevance to the proceeding, must be submitted before a decision is made as to whether materials will be produced or permission to testify or otherwise provide information will be granted. Any authorization for testimony by a present or former employee of OMB shall be limited to the scope of the demand as summarized in such statement.

(c) If response to a demand is required before instructions from the General Counsel are received, an attorney designated for that purpose by OMB shall appear, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the General Counsel. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the General Counsel.

**§ 1305.4 Procedure in the event of an adverse ruling.**

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 1305.3(c) pending receipt of instructions from the General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand (United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

**§ 1305.5 No private right of action.**

This part is intended only to provide guidance for the internal operations of OMB, and is not intended to, and does not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

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**DEPARTMENT OF AGRICULTURE**

**Food and Consumer Service**

**7 CFR Part 273**

**[Amendment No. 376]**

**RIN 0584-AB57**

**Food Stamp Program; Anticipating Income and Reporting Changes**

**AGENCY:** Food and Consumer Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes revisions in Food Stamp Program procedures for reporting and acting on changes in earned income. The changes are designed to increase State agency flexibility and improve procedures for determining the eligibility and benefits of households whose income fluctuates unpredictably. Under this proposal, State agencies would choose from three different reporting requirements for households with earned income. The reporting requirement a State agency selects would replace the current requirement that households report a change of more than \$25 in earned income. In addition to reporting a change in source of income, households would be required to report one of the following: A change in wage rate or salary and a change in part-time or full-time status, provided the household is certified for no more than 3 months; a change in wage rate or salary and a change of more than 5 hours a week that is expected to continue for more than a month; or a change in the amount earned of more than \$80 a month.

**DATES:** Comments must be received on or before February 18, 1997 to be assured of consideration.

**ADDRESSES:** Comments should be submitted to Margaret Werts Batko Assistant Branch Chief, Certification Policy Branch, Program Development Division, Food and Consumer Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302, (703) 305-2516. Comments may also be datafaxed to the attention of Ms. Batko at (703) 305-2486. The internet address is: Margaret\_Batko@FCS.USDA.GOV. All written comments will be open for public inspection at the office of the Food and Consumer Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia, Room 720.

**FOR FURTHER INFORMATION CONTACT:**  
 Questions regarding the proposed rulemaking should be addressed to Ms.