

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**42 CFR PART 136**

**RIN 0917-AA02**

**Indian Child Protection and Family Violence Prevention Act; Minimum Standards of Character**

**AGENCY:** Indian Health Service, DHHS.

**ACTION:** Interim final rule with comment period.

**SUMMARY:** This is an Interim Final Rule with comment period implementing regulations as mandated by section 408 of the Indian Child Protection and Family Violence Prevention Act (the "Act"), as amended by section 814 of the Native American Laws Technical Corrections Act of 2000, that prescribe minimum standards of character and suitability of employment criteria for individuals who are employed or are being considered for employment in positions with duties and responsibilities that involve regular contact with or control over Indian children.

We will send copies of this Interim Final Rule to each Indian Tribe. The IHS welcomes comments regarding this Interim Final Rule especially from the Tribes and Tribal organizations affected by them.

**DATES:** *Effective Date:* November 22, 2002.

*Comments Due Date:* November 22, 2002.

**ADDRESSES:** Send your written comments to: Betty Gould, Regulations Officer, Division of Regulatory and Legal Affairs, IHS, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20857, Telephone 301-443-7899. (This is not a toll-free number.) Comments received will be available for inspection at the address above from 9 a.m. to 3 p.m., Monday through Friday, beginning approximately two weeks after publication.

**FOR FURTHER INFORMATION CONTACT:** Ramona Williams, Child Protection Coordinator, 12300 Twinbrook Parkway, Suite 605, Rockville, Maryland 20852, (301) 443-1539 (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On March 25, 1999, the IHS published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* (64 FR 14560) proposing regulations as mandated by section 408 of the Act, that prescribe minimum standards of character for individuals with duties and responsibilities that involve regular

contact with or control over Indian children. The IHS proposed in the NPRM that the minimum standards of character as required by section 408 of the Act have been met only after individuals in positions involving regular contact with or control over Indian children have been the subject of a satisfactory background investigation, and it has been determined that these individuals have not been found guilty of or entered a plea of nolo contendere or guilty to an offense under Federal, State, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons.

The Act requires that Tribes or Tribal organizations who receive funds under the Indian Self-Determination and Education Assistance Act (ISDEA), Pub. L. 93-638, employ individuals in positions involving regular contact with or control over Indian children only if the individuals meet standards of character no less stringent than those prescribed under these regulations. Thus, the minimum standards of character as proposed by the NPRM would be the basis for Tribes or Tribal organizations to use when developing their own minimum standards of character and suitability for employment of individuals.

The IHS presented an earlier draft of the NPRM at the 14th Annual National Indian Health Board Consumer Conference. In addition, the IHS provided a copy of the draft NPRM to the tribal leader of each federally recognized tribe for their review and comment. The NPRM was modified to reflect the Tribal comments received.

The NPRM provided interested persons until May 24, 1999 to submit written comments and on May 26, 1999, the IHS extended the comment period to July 26, 1999, in response to Tribal requests for more time to analyze the NPRM and to prepare their comments.

On December 27, 2000, Congress enacted technical amendments to section 408 of the Act, pursuant to section 814 of S. 3031, the Native American Laws Technical Corrections Act of 2000. Section 408 of the Act, as amended now reads:

The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) have been found guilty of, or entered a plea of nolo contendere or guilty to, *any felonious offense, or any of 2 or more misdemeanor offenses*, under Federal, State, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; crimes against persons; *or offenses committed against children.* [emphasis added]

The technical amendments were intended to remedy a situation where the original provision was overly broad. Federal employees with a single misdemeanor offense, possibly committed many years ago and which involved no violence or crimes against children, were being prohibited from holding positions for which they were otherwise qualified.

In developing the Interim Final Rule, the agency has revised its regulations by adopting the statutory language contained in the technical amendments. The following is a summary of changes made to the Interim Final Rule incorporating the statutory amendments. Specifically, § 136.403 contains a definition of "*offenses committed against children*" to mean any felonious or misdemeanor crime under Federal, State, or Tribal law committed against a victim that has not attained the age of eighteen years. In determining whether a crime falls within this category, reference may be made to the applicable Federal, State, or Tribal law under which the individual was convicted or pleaded guilty or nolo contendere.

The agency developed this definition based on research of definition of crimes involving children contained in Federal or State laws. The definition of "offenses against children" varies from State to State and therefore, we are proposing a general definition with reference to applicable Federal, State or Tribal law. In defining "offenses against children", we propose using the word crime in the definition to limit its application to criminal offenses not civil offenses. We believe this position is consistent with the technical amendments clarifying that any felonious offense, or any of two or more misdemeanor offenses require removal and that Congress did not intend to encompass all possible offenses but limited the applicability to crimes as evidenced by the reference to felonies and misdemeanors.

In addition, the Interim Final Rule has been amended to provide that the minimum standards of character to hold a position involving regular contact with or control over an Indian child must ensure that the individual has not been guilty of, or entered a plea of nolo contendere or guilty to *any felonious offense or any of two or more misdemeanor offenses* under Federal, State, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; *or offenses committed against children.* Specifically, §§ 136.405, 136.406(c), 136.414(e)(5) and 136.416 have been

revised to incorporate the statutory amendments.

Section 136.412, which includes the questions required by the agency as part of the background investigation, has been revised to reflect the technical amendments. Section 136.412(a)(2) has been modified to include the additional category of crimes "offenses against children". Section 136.412(a)(2) has been further modified to require individuals who are applying for, or are currently in, a position involving regular contact with or control over Indian children to answer whether they have ever been found guilty of, or entered a plea of *nolo contendere* or guilty to, any *felonious or misdemeanor* offense under Federal, State or Tribal law involving any of the enumerated crimes. The agency retains the discretion not to hire an individual applying for, or to remove an individual from, a covered position if it determines that such individual places Indian children at risk.

The agency has determined that the technical amendments to the Act were effective December 27, 2000 and the agency began implementing the amendments as of that date. The agency believes that the technical amendments are not retroactive and therefore all final determinations issued before December 27, 2000, remain unchanged.

Prior to the technical amendments being enacted, the agency was prepared to issue a Final Rule based on comments received in response to the NPRM published in March 1999. However, as a result of the technical amendments, the agency further revised its regulations to reflect the statutory language. Therefore, we believe an Interim Final Rule is appropriate to solicit public comment specifically on those portions of the Interim Final Rule that have been revised to reflect the technical amendments.

The agency received several comments from Tribes and Tribal Organizations in response to the March 1999 NPRM. We carefully analyzed the submissions by individuals, groups, Indian and non-Indian organizations. To the extent possible, the agency has, in preparing this Interim Final Rule, accommodated the comments received from Tribes and Tribal organizations. A discussion of the comments and the Secretary's response is as follows:

We received several comments in support of the regulation and the purpose of the law for which it was intended. We received several comments regarding the application of the law to conviction of crimes that occurred many years prior to employment with the IHS. We also

received several comments regarding the definitions. We received several comments regarding the financial cost and personnel time of conducting the background investigation of current and prospective employees. We received miscellaneous comments addressed more specifically below.

These comments can be organized into the following subject matters for purposes of analysis and discussion.

1. Issue of retroactivity
2. Definitions
3. Background investigations
4. Miscellaneous issues

#### Issue of retroactivity

*Comment:* The agency received several comments that the agency should not consider convictions or pleas of *nolo contendere* or guilty to crimes that occurred many years ago. Some commenters believed that section 408 of the Act should not be applied retroactively to convictions that occurred prior to enactment of the Act. Some commenters believed that the agency should not consider convictions that occurred several years prior to the person's employment with the agency, especially those convictions that occurred when the employee was young and where the employee has not had any convictions since then. Some commenters believed that the agency should consider mitigating factors surrounding the incident and/or should not consider the conviction unless there is a nexus between the conduct and the employee's performance on the job.

*Response:* Subsequent to the publication of the NPRM, the agency removed four employees who as a result of a background investigation had been determined as not meeting the minimum standards of character in section 408 of the Act, because each of the respective employees had been convicted of at least one of the enumerated crimes. Before removing these employees, the agency searched for available vacant positions to which the employees could have been reassigned; however, no such positions were available that did not have contact with Indian children. The employees appealed their removal to the Merit Systems Protection Board (MSPB). The final decision of the MSPB sustained the agency's removals of these employees and reversed the MSPB's initial decision regarding interpretation of section 408 of the Act.

The final decision of the MSPB found that the minimum standards of character in section 408 of the Act applied to both current and prospective employees and that the plain language in the statute mandated the removal

actions. The MSPB found that Congress authorized the agency to "prescribe by regulations minimum standards of character" and mandated that those standards must "ensure that none of the individuals appointed to [covered] positions \* \* \* have been found guilty of, or entered a plea of *nolo contendere* or guilty to \* \* \*" a covered crime. The MSPB determined that the only way to ensure that none of the individuals appointed to a covered position have been found guilty of, or entered into a plea of *nolo contendere* or guilty to a covered crime is to make that prohibition the base eligibility requirement for obtaining and/or retaining employment in a covered position. Therefore, under its plain meaning, the MSPB found that section 408 of the Act requires, as the minimum eligibility standard for holding a covered position, that the individual who is employed or is being considered for employment must not have been found guilty of, or entered a plea of *nolo contendere* or guilty to, a covered crime.

The MSPB also rejected the employees' claims that the penalty of removal is unreasonable and that it should be mitigated by consideration of factors in 5 CFR 731.202, otherwise known as the Douglas factors. Although the MSPB acknowledged that it could reduce a penalty imposed by an agency if certain mitigating circumstances existed under Douglas, the MSPB determined that the plain meaning of the statute prohibited individuals from holding a covered position if they have been found guilty of, or entered a plea of *nolo contendere* or guilty to, a covered crime.

The MSPB found that Congress, by enacting the mandatory language of section 408 of the Act, created a presumption of nexus between an employee's violation of the minimum standards of character and appointment to or continued service in a covered position. Even though the employees who were removed argued that a nexus could not be presumed because the convictions/violations occurred more than ten years ago, the MSPB found that the language of the statute does not limit its coverage to a specific time period. The MSPB disagreed with the employees that a nexus could not be presumed and found that the history and purpose of the statute established the vital connection between the employees' off duty conduct and the efficiency of the service.

Four of the employees appealed the MSPB's final decision to the United States Court of Appeals, Federal Circuit, see *Johnson v. Dep't of Health and Human Services*, 2001 U.S. App. LEXIS

14175, 18 Fed. Appx. 837 (2001) and *DeLong v. Dep't of Health and Human Services*, 264 F.3d 1334.<sup>1</sup> On appeal, the employees alleged that the MSPB's decision was arbitrary, capricious, and not in accordance with the law. The employees also alleged their right to substantive due process under the Fifth Amendment. On June 22, 2001, in *Johnson v. Dep't of Health and Human Services*, and on September 5, 2001 in *DeLong v. Dep't of Health and Human Services*, 264 F.3d 1334, the Federal Circuit affirmed the final decision of the MSPB finding that substantial evidence supported the MSPB's final decision and that such decision was not arbitrary, capricious, or an abuse of discretion. The Federal Circuit also found that the employees had not met their burden of establishing that there is no rational connection between their removal under section 408 of the Act and a valid interest of Congress.

Many of the comments received regarding the applicability of the Act to convictions that occurred several years ago were addressed in the MSPB and Federal Circuit decisions. As indicated above, the MSPB and the Federal Circuit have determined that the plain meaning of the statute requires mandatory removal of individuals in covered positions who have been convicted of or plead *nolo contendere* or guilty to covered crimes no matter when the conviction occurred. The MSPB found that the language of the statute does not limit its coverage to a specific time period. Further, the MSPB determined that based on the purpose and language in the statute that Congress has presumed a nexus between certain crimes committed and the efficiency of the service. To the extent that the MSPB decision has addressed these issues and upheld the agency's interpretation of section 408 of the Act, the agency does not have the discretion to revise or modify its regulations to address the concerns. However, we believe that through technical amendments to the statute, Congress has attempted to address some of these concerns. The Congress has clarified that the minimum standards of character must ensure that

those individuals who have been convicted of or have plead guilty to any felonious offense or any two or more misdemeanor offenses involving certain enumerated crimes shall not hold covered positions. By delineating any felonious offenses or two or more misdemeanor offenses, the impact of section 408 of the Act on those individuals who, as a result of youthful indiscretions, might have been convicted of or plead guilty to one misdemeanor is lessened.

*Comment:* The agency received comments regarding whether convictions or pleas of *nolo contendere* or guilty to should be considered if there has been a pardon, expungement, set aside or other court order of the conviction or plea.

*Response:* The agency has clarified these regulations by adding an additional provision at § 136.407 that explains that all convictions or pleas should be considered in making final determinations unless a pardon, expungement, set aside or other court order reaches the plea of guilty, the plea of *nolo contendere* or the finding of guilt. This means that for instance, if an individual is pardoned for political reasons, then the pardon does not reach a finding of innocence or not guilty, and thus should still be considered in making a determination under these regulations. However, if an individual is pardoned or has a conviction expunged due to new evidence, (e.g., DNA evidence), proving that the individual is innocent, then the conviction should not be considered in making a determination under these regulations. The adjudicating official could request supporting or explanatory documents from the individual. The Office of General Counsel is available to review the court's order and any proposed determination.

*Comment:* One commenter suggested that the term suitability should be deleted and replaced with the word "eligibility." The commenter explains that the term "suitability" implies that mitigating factors would apply, but section 408 of the Act has been interpreted to not allow the agency to consider mitigating factors in hiring and retention.

*Response:* We agree and we have made appropriate changes to §§ 136.409, 136.410, 136.411, and 136.414.

#### Definitions

*Comment:* Several comments were received regarding the definition of crimes, and specifically the definitions of crimes of violence and crimes against persons. Many of the commenters were concerned that the definitions were too

broad and that felonies should be included but not all misdemeanors. One commenter suggested narrowing the list of crimes under the definition of crimes and adding language to ensure that only relatively serious crimes are included. Some commenters thought that conviction of sexual crimes should be considered as prohibitive to holding a covered position but conviction of other crimes should be considered as part of an adjudicatory process to determine if an individual should be appointed to a covered position.

*Response:* The definitions in the regulations are based on the language in the statute. As indicated in the preamble to the NPRM, the agency determined it did not have discretion to consider only certain category of crimes; e.g. felonies vs. misdemeanors; and nor did it have discretion to mitigate certain categories of crimes; e.g. sexual vs. non-sexual. Since the publication of the NPRM, the Congress enacted legislative amendments and clarified that the minimum standards of character must ensure that those individuals who have been convicted of or have plead guilty to any felonious offense, or any two or more misdemeanor offenses, involving certain enumerated crimes do not hold covered positions. Thus, Congress has delineated between felonies and two or more misdemeanors and these regulations have been modified to reflect the legislative amendments.

*Comment:* Some commenters believe that the definition of crimes should be left to the discretion of the Tribes.

*Response:* There is no discretion in law for Tribes to define crimes less stringent than the definitions as defined in these regulations because the Tribes are required to establish minimum standards of character no less stringent than the Federal government. Because the minimum standards of character require that a person not be convicted or have plead guilty to certain enumerated crimes, the definition of crimes is directly related to the minimum of standards of character and such definitions cannot be less stringent than those defined in these regulations. Tribes could develop definitions of crimes that are more stringent or more encompassing than the Federal government, but not less than.

*Comment:* Some commenters were concerned about the different definitions contained in the Bureau of Indian Affairs (BIA) regulations and recommended that the definitions be consistent.

*Response:* The BIA regulations at 25 CFR part 63 state that "crimes against persons" are defined by local laws. The IHS definition of "crimes against

<sup>1</sup> The status of the two other employees; appeals are described as follows. One employee appealed to the Federal Circuit in *Case v. Department of Health and Human Services*, Fed. Cir. No: 00-3451, MSPB No: DA0752990315-I-1. His case was dismissed by the Federal Circuit for failure to pay the docket fees. The other employee appealed to the Eastern District of Oklahoma in *Daugherty v. Tommy Thompson, Secretary of Department of Health and Human Services*, and Department of Health and Human Services, No. 01-168-P (E.D. OK 2001). The federal district court judge granted the Defendant's Motion for Summary Judgment on November 30, 2001. The employee appealed to the Tenth Circuit, No. 02-7015, on January 28, 2002.

persons” was developed based on a survey of state criminal codes. Both of the IHS and BIA-definition of “crimes against persons” reference the applicable Federal, State or Tribal law and thus, are not defined inconsistently.

*Comment:* Some commenters suggested the word “offense” in the definition should be replaced by the term “crime” because the term “offense” could be interpreted to include not just criminal convictions but traffic violations or other civil offenses.

*Response:* We agree and have deleted from the definitions of crimes against person and crimes of violence, the word “offense” and replaced it with “crime”. We believe this position is consistent with the technical amendments clarifying that any felonious or two or more misdemeanor offenses require removal and that Congress did not intend to encompass all possible offenses but limited the applicability to crimes as evidenced by the reference to felonies and misdemeanors.

*Comment:* Some commenters suggest deleting the enumeration of sexual crimes in the definition of crimes against persons since those sexual crimes are listed in other provisions of the law.

*Response:* We disagree. Congress specifically enumerated sexual offenses because of potential harm to children. The definitions of crimes against person and crimes of violence inherently encompass sexual offense crimes and we believe it helps clarify Congressional intent.

*Comment:* Some commenters were concerned that the definition of crimes of violence is vague and overlaps with the definition of crimes against persons.

*Response:* The definitions follow the statute and Congressional intent to be all encompassing in order to protect Indian children.

*Comment:* One commenter suggests the definition should not include crimes involving property.

*Response:* We disagree. Crimes involving property go to a person’s moral and ethical character.

*Comment:* One commenter recommends deleting the reference to applicable Federal, State or Tribal law because it is confusing. Another commenter suggested the language referencing applicable Federal, State, or Tribal law in determining whether a crime is within the scope of these definitions of crimes might lead to inconsistent treatment of employees who have committed similar crimes in different states.

*Response:* The reference to applicable law was intended to serve as a means

for adjudicating officials conducting background investigations to verify if a person was convicted of one of the covered crimes, if otherwise unclear from the background investigation documents. The fact that convictions might vary from State to State is a result of State’s power to define crimes within its jurisdiction. In order to address any confusion regarding the reference to applicable Federal, State or Tribal law, the IHS has revised its definitions of crimes of violence, crimes against persons and offenses against children to clarify that in determining whether a crime is within the scope of these definitions the applicable Federal, State or Tribal law is controlling.

*Comment:* One commenter wrote that the term “individuals” was used inconsistently throughout the regulations and that another term such as employee would be more appropriate.

*Response:* We disagree with this comment. The term individual as defined in these regulations includes other persons than employees.

*Comment:* One commenter suggested a new definition of individuals by deleting the term individual from definition of “individuals” and using the term person in its place.

*Response:* We agree with these comments and have revised the definition of individuals consistent with these comments.

*Comment:* One commenter suggested a new definition of prostitution to include only those crimes that involve exploitation of other people and excludes prostitution crimes committed by a prostitute on the basis that many prostitutes are victims of child abuse.

*Response:* We disagree with the comment and have not included a separate definition of prostitution.

*Comment:* One commenter suggested a new definition of “regular contact with or control over Indian children” by deleting the word “access” and replacing it with the word “contact” so that a person is not covered just because they might have access but must have contact with Indian children. This same commenter suggested to delete the phrase “that could potentially place an Indian child at risk” because Congress has already determined that Indian children are at risk if minimum standards of character are not applied to individuals who have regular contact with Indian children.

*Response:* We had written the definition in such a way so that employees who might have access to children would be covered only if that access could potentially place an Indian child at risk, e.g., a janitor that has keys

to inpatient rooms occupied by children in a hospital and could access those rooms during off-peak hours. However, we agree with the commenter that individuals must have contact with children, not just “access” to children, in order to be covered under section 408 of the Act and have revised the definition consistent with these comments. Under this revised definition, the agency, depending upon the circumstances at the facility, could determine that a janitor that has keys to inpatient rooms occupied by children in a hospital, and could access those rooms during off-peak hours, has contact with children and is covered by this definition and these regulations.

*Comment:* One commenter wrote that there should be a separate definition of Tribal government agency in § 136.408(b) to clarify that Indian Tribes or Tribal organizations can access criminal records.

*Response:* We disagree that a separate definition of Tribal government agency is needed. For clarification, we have deleted the term in § 136.410 and replaced it with Tribes or Tribal organizations as defined in these regulations at § 136.403.

#### **Background Investigation**

*Comment:* One commenter indicated that gaining sufficient access to relevant background materials has proven difficult for some Tribal organizations. The commenter suggested that the regulations be amended to clarify that Federal and State agencies are permitted to provide assistance and to give Tribes and Tribal organizations access to relevant information. The commenter suggested that § 136.410(b) be amended as follows:

(b) Indian Tribes and Tribal organizations may conduct their own background investigations, contract with private firms, or request that a Federal or State agency conduct all or part of the investigations. (FBI criminal history information, however, may only be received or evaluated by governmental agencies, including Tribal organizations and Tribal governmental agencies, and may not be disseminated to private firms or other entities. The results of searches by state human service agencies may be provided to Tribal organizations and Tribal governmental agencies in summary form. The investigation should cover the past five years of the individual’s employment, education, etc.

*Response:* We have revised § 136.410(b) to include reference to state agencies so that Tribes can gain greater access and ability to conduct background investigations.

*Comment:* One commenter objected to the requirement in § 136.413(b) that Indian Tribes and Tribal organizations

comply with the privacy requirements of the Federal, State, or other Tribal agency providing the background investigations. The commenter viewed this requirement as possibly interfering with the ability of Tribes and Tribal organizations to gain access to the records they need to conduct the background investigations since they may well need to challenge the applicability of certain requirements or negotiate exceptions to certain restrictions when they are incompatible with Tribal duties under the Act. The commenter suggested that the first sentence in subparagraph (b) be deleted to preserve the ability of Tribal employers to do this.

*Response:* We disagree. The purpose of this provision is to protect the privacy rights of the applicant or employee and we cannot waive by these regulations the privacy protections that Federal, State or Tribal agencies must adhere to in conducting background investigations.

*Comment:* We received several comments regarding § 136.414(b) of the March 1999 NPRM, implementing Section 1094 of the Crime Control Act as amended by Pub. L. 102–190. Section 1094 allows the Department of Health and Human Services to provisionally hire individuals in child care related positions before the completion of a background check. However, at all times while children are in the care of that individual, the child care provider must be within sight and under the supervision of a staff person whose background check has been successfully completed. One commenter suggested that the provisional license and the safety net be removed from the regulations. The commenter believed that the IHS staff person must complete a successful background investigation before they perform work for the Tribal members. One commenter suggested language changes to specifically exclude provisional employees from the definition of individuals covered by these regulations and to define provisional employees as a separate definition.

*Response:* To address any concerns regarding this provision, we have developed a new section, *see* § 136.417, by adding a separate question that now reads “May the IHS hire individuals pending completion of a background investigation?” and by moving old § 136.414(b) as the response to this question. We disagree with the commenter that the agency should not hire staff until a complete background investigation is completed. The agency, under certain circumstances, needs the discretion to hire individuals in

positions involving regular contact with children, pending completion of a background investigation. The agency believes that children are not at risk as long as this provisional employee is in sight and under supervision of a staff person. The agency disagrees that a separate definition of provisional worker is necessary because such definition is not consistent with Federal personnel laws and regulations. However, we believe we have addressed the commenter’s concerns by revising the definition of individuals, as defined in § 136.403, to include temporary employment.

*Comment:* One commenter wrote that the proposed regulations were confusing because they appeared to combine substantive and procedural requirements and were not clear as to what provisions the Tribes were required to comply with and what provisions were at Tribal option. The commenter suggested language changes to § 136.409(c) as follows:

(c) In conducting background investigations and adjudicating suitability for employment in Tribal positions that allow regular contact with or control over Indian children, Indian Tribes or Tribal organizations may, but are not required to adopt portions of the rules in this subpart that are specifically applicable to employment within the IHS, including 42 CFR §§ 136.409–136.415.

*Response:* In the March 1999 NPRM, the agency included language in § 136.409(c) to explain that the Tribes or Tribal organizations are not required to adopt those provisions in the regulations that are specifically applicable to IHS employment. However, in response to this comment, the agency has revised old § 136.409. We have moved old § 136.409(a) to § 136.414(e)(4). We have deleted old § 136.409(b) in its entirety as the agency received comments that investigation of employees every five years is a burdensome requirement. In deleting § 136.409(b), the agency determined that employees do not have to be investigated every five years, because it receives information regarding current arrest and/or conviction records of its employees on a regular basis. We have created a new § 136.411 to clarify that the background and adjudication requirements for the IHS and Tribes or Tribal organizations are different. However, we have not included reference to specific provisions in the regulations applicable to IHS employment as the agency believes those provisions are self-evident.

*Comment:* One commenter wrote that the Act does not require a FBI fingerprint check. The commenter

believes that this is an unnecessary requirement and that the requirement should be deleted from the proposed rule. Conducting investigations will place a burden on the Tribes’ finances and resources. Some commenters questioned if there will be additional funds allocated to Tribes to perform the background investigations.

*Response:* The agency has determined that fingerprint checks are the only effective means to verify past conviction of enumerated crimes. Also, we have determined as required by Executive Order 12866 that fingerprint investigations are not a financial burden.

*Comment:* One commenter requests clarification as to which law enforcement agency will receive the background check request and what criteria determines the decision to check city, county, State, Federal or Tribal agencies. The commenter also asked for clarification as to how will the consistency of results received from one agency be evaluated against those from another agency.

*Response:* We believe the regulations address these issues. As proposed in § 136.410, the OPM conducts the background investigations for Federal employees, and Tribes are responsible for conducting background investigations of its Tribal employees. Section 136.406 outlines the requirements of a satisfactory background investigation and outlines those law enforcement agencies that should receive a background check request.

#### Miscellaneous Issues

*Comment:* One commenter requested clarification as to whether urban Indian programs funded under Title V of the Indian Health Care Improvement Act, Public Law (P.L.) 94–437, 25 U.S.C. 1601 *et seq.*, are affected by these regulations since urban Indian clinics are not funded by Public Law 93–638.

*Response:* Section 408 of the Act does not apply to urban Indian programs. However, Section 231 of the Crime Control Act of 1990, Public Law 101–647, 42 U.S.C. 13041, applies to urban Indian programs. Section 231 provides that an individual employed by a Federal agency by direct hire or under contract may be displaced from consideration or continuing employment if such individual had been convicted of a sex crime, an offense involving a child victim or a drug felony, or any crime if such conviction bears on an individual’s fitness to have responsibility for the safety or well-being of children.

*Comment:* One commenter suggested that although the Act specifically requires the IHS to compile a list of positions, this requirement does not apply to Tribes and Tribal organizations. The commenter believed there are other rational ways a Tribal employer might make these determinations, and suggested revising § 136.404 (b) to recognize that Tribal employers may develop their own procedures.

*Response:* Section 136.404(b) requires the Tribe to identify those positions having regular contact with or control over Indian children but does not require the Tribe to compile a list as in § 136.404(a). We have not amended § 136.404(b) as suggested by the commenter because we believe § 136.404(b) is consistent with the statute. However, we have amended the language in § 136.409(b) to clarify that Tribes do not have to develop a list but may develop procedures to determine which of its positions involve regular contact with children.

*Comment:* One commenter suggested that IHS include a new section in its regulations as follows:

§ 136.416 Who is responsible for ensuring IHS and other Federal employees who are detailed to Tribes and Tribal organizations pursuant to the Intergovernmental Personal Act meet minimum standards of character?

(a) The IHS will ensure that Federal employees detailed to Tribes and Tribal organizations meet the minimum character standards established in 42 CFR 36.405.

(b) A Tribe or Tribal organization is permitted, but not required, to accept the IHS determination in lieu of conducting its own investigation and making its own determination.

(c) At the request of a Tribe or Tribal organization, the IHS will either (1) apply the character standards of the particular Tribe or Tribal organization to the Federal employee to determine whether he or she meets them or (2) provide the Tribe or Tribal organization with copies of its own investigation records so that the Tribe or Tribal organization can determine for itself whether the Federal employee meets its own character standards.

*Response:* Intergovernmental Personnel Act/Memorandum of Agreement (IPA/MOA) employees are covered by the definition of individuals in § 136.403. IPA/MOA employees are Federal employees and the agency is responsible for conducting the background investigation and making a personnel decision to hire or remove an IPA/MOA employee. Thus, we cannot accept the suggested language. However a Tribe or Tribal organization has the discretion to apply more stringent standards in determining whether to place an IPA/MOA employee at a Tribally operated site.

*Comment:* Some commenters believe that the Tribes should establish the minimum standards of character to allow Tribes to adopt higher qualification standards for individuals with regular contact or control over Indian children.

*Response:* The statute provides that the Secretary shall establish minimum standards of character that ensure that no individual appointed or retained to a position, that has regular contact or control over a child, has been found guilty of or entered a plea of guilty to any felonious offense or any two or more misdemeanor offenses under Federal, State or Tribal law involving crimes of violence, sexual assault, molestation, exploitation, contact or prostitution, crimes against persons; or offenses committed against children. The Secretary has prescribed by these regulations the minimum standards of character consistent with the statute. Tribes may adopt more stringent standards such as higher qualification standards, but may not adopt less stringent standards than as prescribed by these regulations.

*Comment:* One commenter wrote that § 136.401 B Purpose B does not clearly delineate the purpose of the regulations. The commenter suggested that the statement of purpose be revised as follows:

The purpose of the regulations in this subpart is to establish minimum standards for Federal employees working in the IHS, including standards of character to ensure that individuals having regular contact with or control over Indian children have not been convicted of certain types of crimes as mandated by 25 U.S.C. 3207; fitness standards to ensure child care service employees are fit to have responsibility for the safety and well-being of children, as mandated by the Crime Control Act of 1990 (P.L. 101-647); suitability standards to ensure that individuals have not acted in a manner that places others at risk or raised questions about their trustworthiness, as mandated by 5 CFR Part 731; and efficiency standards to ensure that individuals are qualified for the positions they hold or seek, as mandated by 25 U.S.C 3207 A Character Investigation (Indian Child Protection and Family Violence Act)

*Response:* We agree and have made the suggested changes to § 136.401. In addition, we have added language to § 136.401 to clarify that a secondary purpose of these regulations will be to serve as guidance for Tribes or Tribal organizations to use when developing their own minimum standards of character that cannot be less stringent than prescribed by these regulations.

*Comment:* One commenter indicated that § 136.402—Policy inaccurately

suggests that the proposed regulations will implement only the Act.

*Response:* The agency has revised § 136.402 by moving the explanation of the minimum standards of character to § 136.405 where the minimum of standards is defined. Furthermore, the agency created an additional section in § 136.406 that includes many of the provisions from old § 136.405 that pertain more to procedure than substance.

#### **Executive Order 12866**

This Interim Final Rule is a significant regulatory action under Executive Order (E.O.) 12866 and has been reviewed by the Office of Management and Budget (OMB). Depending upon the number of positions for which determinations of suitability for employment are required, the cost of the background investigations (including the cost of each FBI fingerprint check) may have an economic effect on each Tribal government and Tribal organization under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) and require additional outlays by Tribal governments, Tribal organizations, and the Federal Government. OPM conducts background investigations of Federal employees and charges \$85.00 per background check. IHS estimates that 2,000 people apply for positions requiring background checks annually because they have regular contact with Indian children (primarily doctors, nurses and other hospital staff). The annual cost of OPM background investigation for 2,000 people is \$170,000. The cost of the background investigations by Tribes or Tribal organizations is estimated to be approximately \$20,000. Many of the Tribes receive fingerprint checks from the FBI at \$22.00 per fingerprint check. The \$20,000 annual cost estimate assumes that Tribes will offer positions to about 900 people who have regular contact with Indian children each year. Section 202 of the Unfunded Mandates Reform Act (Public Law 104-4) requires an assessment of anticipated costs and benefits before proposing any rule that may result in expenditure by State, local, and Tribal governments, in aggregate, or by the private sector, of \$110 million in any one year (adjusted annually for inflation). We have determined that this rule is consistent with the principles set forth in the Executive Order and in these statutes and find that this rule will not have an effect on the economy that exceeds \$110 million in any one year. Therefore, no further analysis is required under the Unfunded Mandates Reform Act.

**Executive Order 13132 Federalism**

The Department has determined that this Interim Final Rule does not have significant federalism effects under E.O. 12612 and will not interfere with the roles, rights and responsibilities of states. The Act requires the Tribes or Tribal organizations to develop minimum standards of character that cannot be less stringent than prescribed by these regulations. Tribes or Tribal organizations are responsible for identifying positions involving regular contact with children or control over Indian children and conducting background investigations of these individuals. In conducting background investigations and adjudicating eligibility for employment in these positions, Tribes or Tribal organizations may, but are not required to, adopt portions of the rules that are specifically applicable to Federal employment. The statutory amendments provide more reasonable minimum standards of character and thus, the Tribes have more flexibility in hiring individuals who might otherwise been ineligible for employment under the stricter standards.

**Paperwork Reduction Act**

Under the Paperwork Reduction Act (PRA) of 1995, agencies are required to provide notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the OMB for review and approval. In order to fairly evaluate whether a information collection should be approved by OMB, section 3506 (c)(2)(A) of the PRA requires that we solicit public comment on the following issues; whether the information collection is necessary and useful to carry out the proper functions of the agency, the accuracy of the agency's estimate of the information collection burden, the quality, utility, and clarity of the information to be collected, and recommendations to minimize the information collection burden on the affected public, including automated collection techniques. When the agency published a NPRM of these proposed regulations on March 25, 1999, the agency requested comments on the following proposed information collection requirements discussed below. The Office of Management and Budget (OMB) did not receive any comments. As indicated previously, Congress enacted technical amendments to section 408 of the Act by delineating between any felonious or any of two or more misdemeanor offenses of enumerated crimes. In addition, Congress added an additional category

of crimes, namely, Aoffenses against children. As a result of the technical amendments, the data collection instrument has been revised. The agency has revised the questions required by the agency as part of the background investigation to delineate between felony or misdemeanor offenses. The agency believes that the questions should require the individual to identify a conviction or a plea to any of the covered offenses, whether a felony or misdemeanor conviction or plea, because the agency retains the discretion not to hire this individual to, or to remove this individual from, a covered position if it determines that such an individual places Indian children at risk. We are soliciting public comment on these issues for the data collection instrument to be used to collect the requested information.

For respondent convenience and to limit the response burden, IHS opted to utilize item 16, "Continuation Space/ Agency Optional Questions" of the U.S. Office of Personnel Management, Optional Form 306, "Declaration for Federal Employment," (OMB approved No. 3206-0182). Through use of a one page addendum to the Declaration for Federal Employment IHS is able to receive the information and the certification required in this rule. The IHS anticipates there will be approximately 2000 respondents on an annual basis who will require no more than 15 minutes each to respond to these questions and sign the required certification. The total estimated annual burden for this collection of information is 500 hours. Emergency PRA clearance request. To implement the rule and protect American Indian children at the earliest date, IHS is submitting an emergency PRA clearance request to OMB for approval of the data collection instrument. As stated in this notice, the information collection requirements contained in the rule will be effective 60 days from the date of this publication.

*Direct Comments to OMB:* Send your written comments and suggestions regarding the information collection contained in this notice, especially regarding the estimated public burden and associated response time to: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Suite 10235, Washington, DC 20503, Attention: Allison H. Eydt, IHS Desk Officer. To help ensure timely receipt of your comments you are encouraged to fax your comments directly to Ms Allison H. Edyt at 202-395-6974 within 50 days of this publication. To request information regarding this data collection activity or to obtain a copy of

the data collection instrument(s) and/or instruction(s), contact: Mr. Lance Hodahkwen, Sr., M.P.H., IHS Reports Clearance Officer, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20852.1601. You may call non-toll free (301) 443-1116, send a FAX to (301) 443-2316 or e-mail your request for information regarding this data collection activity or to obtain a copy of the data collection instrument to [lhodahkw@hqe.ihs.gov](mailto:lhodahkw@hqe.ihs.gov).

**List of Subjects in 42 CFR Part 36**

American Indians, Alaska Natives, Children, Child health, Health, Employment.

Dated: May 8, 2002.

**Michel E. Lincoln,**

*Deputy Director.*

Dated: June 25, 2002.

**Tommy G. Thompson,**

*Secretary.*

For the reasons set out in the preamble, the Department amends 42 CFR chapter I by adding subpart K to part 136 to read as follows:

**PART 136—INDIAN HEALTH****Subpart K—Indian Child Protection and Family Violence Prevention**

Sec.

136.401 Purpose.

136.402 Policy.

136.403 Definitions.

136.404 What does the Indian Child Protection and Family Violence Prevention Act require of the Indian Health Service and Indian Tribes or Tribal organizations receiving funds under the ISDEA?

136.405 What are the minimum standards of character for individuals placed in, or applying for, a position that involves regular contact with or control over Indian children?

136.406 Under what circumstances will the minimum standards of character be considered to be met?

136.407 Under what circumstances should a conviction, or plea of nolo contendere or guilty to, be considered if there has been a pardon, expungement, set aside, or other court order of the conviction or plea?

136.408 What are other factors, in addition to the minimum standards of character, that may be considered in determining placement of an individual in a position that involves regular contact with or control over Indian children?

136.409 What positions require a background investigation and determination of eligibility for employment or retention?

136.410 Who conducts the background investigation and prepares determinations of eligibility for employment?

136.411 Are the requirements for Indian Health Service adjudication different

- from the requirements for Indian Tribes and Tribal organizations?
- 136.412 What questions must the IHS ask as part of the background investigation?
- 136.413 What protections must the IHS and Tribes or Tribal organizations provide to individuals undergoing a background investigation?
- 136.414 How does the IHS determine eligibility for placement or retention of individuals in positions involving regular contact with Indian children?
- 136.415 What rights does an individual have during this process?
- 136.416 When should the IHS deny employment or dismiss an employee?
- 136.417 May the IHS hire individuals pending completion of a background investigation?
- 136.418 What should the IHS do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?

**Authority:** 25 U.S.C. 3201—3211, 5 U.S.C. 301; 42 U.S.C. 13041.

### Subpart K—Indian Child Protection and Family Violence Prevention

#### § 136.401 Purpose.

(a) The purpose of the regulations in this subpart is to establish minimum standards for Federal employees working in the Indian Health Service (IHS), including standards of character to ensure that individuals having regular contact with or control over Indian children have not been convicted of certain types of crimes as mandated by section 408 of the Indian Child Protection and Family Violence Prevention Act (the “Act”), Public Law (Pub. L.) 101–630, 104 Stat. 4544, 25 U.S.C. 3201–3211, as amended by section 814 of the Native American Laws Technical Corrections Act of 2000. In order to implement these minimum standards of character, these regulations also address:

(1) The efficiency standards to ensure that individuals are qualified for the positions they hold or seek, as mandated by Section 408 of the Act.

(2) Fitness standards to ensure child care service employees are fit to have responsibility for the safety and well-being of children, as mandated by Section 231 of the Crime Control Act of 1990, Pub. L. 101–647, 42 U.S.C. 13041.

(3) Suitability standards to ensure that individuals have not acted in a manner that places others at risk or raised questions about their trustworthiness, as mandated by 5 CFR part 731.

(b) The Act requires that Tribes or Tribal organizations who receive funds under the Indian Self-Determination and Education Assistance Act (ISDEA), Pub. L. 93–638, employ individuals in positions involving regular contact with or control over Indian children only if

the individuals meet standards of character no less stringent than those prescribed under these regulations. Thus, the minimum standards of character as defined in these regulations will become the basis for Tribes or Tribal organizations to use when developing their own minimum standards of character that cannot be less stringent than as prescribed herein.

#### § 136.402 Policy.

In enacting the Indian Child Protection and Family Violence Prevention Act, (the “Act”) the Congress recognized there is no resource more vital to the continued existence and integrity of Indian Tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for membership in, an Indian Tribe. The minimum standards of character as prescribed by the regulations in this subpart are intended to ensure that Indian children are protected.

#### § 136.403 Definitions.

*Crimes against Persons* means a crime that has as an element the use, attempted use, or threatened use of physical force or other abuse of a person and includes, but is not limited to, homicide; assault; kidnapping; false imprisonment; reckless endangerment; robbery; rape; sexual assault, molestation, exploitation, contact, or prostitution; and other sexual offenses. In determining whether a crime falls within this category, the applicable Federal, State, or Tribal law under which the individual was convicted or pleaded guilty or nolo contendere shall be controlling.

*Crimes of violence* means a crime that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other crime that is a felony and that, by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the crime. In determining whether a crime falls within this category, reference may be made to the applicable Federal, State, or Tribal law under which the individual was convicted or pleaded guilty or nolo contendere.

*Indian* means any individual who is a member of an Indian Tribe, as defined below.

*Indian child* means any unmarried person under the age of eighteen who is either a member of an Indian Tribe or eligible for membership in an Indian

Tribe and is the biological child of a member of an Indian Tribe.

*Indian Tribe* means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq., which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Individuals* means persons with duties and responsibilities that involve regular contact with or control over Indian children and includes but is not limited to the following:

(a) Persons in the competitive or excepted service (including temporary employment), the Commissioned Corps, or the Senior Executive Service in the IHS;

(b) Persons who perform service for or under the supervision of the IHS while being permanently assigned to another IHS office or to another organization, such as a Federal agency, State, or Tribe;

(c) Persons who volunteer to perform services in IHS facilities;

(d) Persons who contract with the IHS to perform services in IHS facilities.

*Must or shall* indicates a mandatory or imperative act or requirement.

*Offenses against children* means any felonious or misdemeanor crime under Federal, State, or Tribal law committed against a victim that has not attained the age of eighteen years. In determining whether a crime falls within this category, the applicable Federal, State, or Tribal law under which the individual was convicted or pleaded guilty or nolo contendere shall be controlling.

*Regular contact with or control over an Indian child* means responsibility for an Indian child(ren) within the scope of the individual’s duties and responsibilities or contact with an Indian child(ren) on a recurring and foreseeable basis.

*Tribal Organization* as defined in the ISDEA, means the recognized governing body of any Indian Tribe or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

**§ 136.404 What does the Indian Child Protection and Family Violence Prevention Act require of the IHS and Indian Tribes or Tribal organizations receiving funds under the ISDEA?**

(a) The IHS must compile a list of all authorized positions with duties and responsibilities that involve regular contact with or control over Indian children; investigate the character of each individual who is employed or is being considered for employment in such a position; and prescribe minimum standards of character that each individual must meet to be appointed or employed in such positions.

(b) All Indian Tribes or Tribal organizations receiving funds under the authority of the ISDEA must identify those positions that permit regular contact with or control over Indian children; conduct an investigation of the character of each individual who is employed or is being considered for employment in a position that involves regular contact with or control over Indian children; and employ only individuals who meet standards of character that are no less stringent than those prescribed by regulations in this subpart.

**§ 136.405 What are the minimum standards of character for individuals placed in, or applying for, a position that involves regular contact with or control over Indian children?**

The minimum standards of character shall mean a benchmark of moral, ethical, and emotional strengths established by character traits and past conduct to ensure that the individual is competent to complete his/her job without harm to Indian children. In order to protect Indian children, the IHS has established minimum standards of character requiring completion of a satisfactory background investigation that ensures that no individuals who have been found guilty of, or entered a plea of nolo contendere or guilty to, any felonious offense or any of two or more misdemeanor offenses under Federal, State, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; or offenses committed against children, are placed in positions involving regular contact with or control over Indian children.

**§ 136.406 Under what circumstances will the minimum standards of character be considered to be met?**

The minimum standards of character shall be considered met only after the individual has been the subject of a satisfactory background investigation. The background investigation shall include a review of:

(a) The individual's trustworthiness, through inquiries with the individual's references and places of employment and education;

(b) A criminal history background check, which includes a fingerprint check through the Criminal Justice Information Services Division of the Federal Bureau of Investigation (FBI), under procedures approved by the FBI, and inquiries to State and Tribal law enforcement agencies for the previous five years of residence listed on the individual's application; and

(c) A determination as to whether the individual has been found guilty of or entered a plea of nolo contendere or guilty to any felonious offense or any of two or more misdemeanor offenses under Federal, State, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; or offenses committed against children.

**§ 136.407 Under what circumstances should a conviction, or plea of nolo contendere or guilty to, be considered if there has been a pardon, expungement, set aside, or other court order of the conviction or plea?**

All convictions or pleas of nolo contendere or guilty to should be considered in making a determination unless a pardon, expungement, set aside or other court order reaches the plea of guilty, plea of nolo contendere, or the finding of guilt.

**§ 136.408 What are other factors, in addition to the minimum standards of character, that may be considered in determining placement of an individual in a position that involves regular contact with or control over Indian children?**

(a) All Federal employees are subject to suitability criteria contained in 5 CFR part 731 as a condition of employment.

(b) Section 231 of the Crime Control Act of 1990, Pub. L. 101-647, 42 U.S.C. 13041, provides that an individual may be disqualified from consideration or continuing employment if such individual has been convicted of a sex crime, an offense involving a child victim or a drug felony, or any other crime if such conviction bears on an individual's fitness to have responsibility for the safety and well-being of children.

(c) Tribes or Tribal organizations may but are not required to apply additional criteria in determining whether an individual is suitable for a position with duties and responsibilities that involve regular contact with or control over Indian children. Any additional suitability criteria established by Tribes or Tribal organizations beyond the

minimum standards of character described in § 136.405 and § 136.406 would be determined by each individual Tribe or Tribal organization in accordance with its own personnel policies and procedures.

**§ 136.409 What positions require a background investigation and determination of eligibility for employment or retention?**

(a) All positions that allow an individual regular contact with or control over Indian children are subject to a background investigation and determination of eligibility for employment. The IHS has compiled a list of positions within the agency in which the duties and responsibilities could involve regular contact with or control over Indian children. The list will be periodically updated and made available at all IHS Personnel Offices upon request. Positions should be reviewed on a case-by-case basis to determine whether the individual in that position has regular contact with or control over Indian children.

(b) Tribes and Tribal organizations may use the list compiled by the IHS or develop their own procedures to determine within their program those positions that involve regular contact with or control over Indian children.

**§ 136.410 Who conducts the background investigation and prepares determinations of eligibility for employment?**

(a) The IHS must use the Office of Personnel Management (OPM) to conduct background investigations for Federal employees. The IHS must designate qualified security personnel to adjudicate the results of background investigations.

(b) Indian Tribes and Tribal organizations may conduct their own background investigations, contract with private firms, or may request that a Federal or State agency conduct investigations. (FBI criminal history record information, however, may only be received or evaluated by governmental agencies, including Tribes or Tribal organizations as defined in these regulations at § 136.403, and may not be disseminated to private entities.)

**§ 136.411 Are the requirements for IHS adjudication different from the requirements for Indian Tribes and Tribal organizations?**

Yes, in conducting background investigations and adjudicating eligibility for employment in Tribal positions that allow regular contact with or control over Indian children, Indian Tribes or Tribal organizations may, but are not required to, adopt portions of the

rules in this subpart that are specifically applicable to employment with the IHS.

**§ 136.412 What questions must the IHS ask as part of the background investigation?**

(a) Applications for employment with the IHS must include the following questions:

(1) Has the individual been arrested or charged with a crime involving a child? If yes, the individual must provide the date, explanation of the violation, disposition of the arrest or charge, place of occurrence, and the name and address of the police department or court involved.

(2) Has the individual ever been found guilty of, or entered a plea of nolo contendere or guilty to, any felonious or misdemeanor offense, under Federal, State, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; or offenses committed against children? If yes, the individual must provide an explanation of the violation, place of occurrence, date and disposition of the court proceeding, and the name and address of the police department or court involved.

(b) The IHS must require that the individual sign, under penalty of perjury, a statement verifying the truth of all information provided in the employment application and acknowledging that knowingly falsifying or concealing a material fact is a felony that may result in fines up to \$10,000 or five years imprisonment, or both.

(c) The IHS must inform the individual that a criminal history record check is a condition of employment and require the individual to consent in writing to a criminal history record check.

**§ 136.413 What protections must the IHS and Tribes or Tribal organizations provide to individuals undergoing a background investigation?**

(a) The IHS must comply with all policies, procedures, criteria, and guidance contained in other appropriate guidelines, such as the OPM policies, procedures, criteria, and guidance. Questions asked in § 136.412 will be added as an addendum to item #16 of the OPM Optional Form 306, "Declaration for Federal Employment." The information is collected as part of the OPM Optional Form 306 and is safeguarded in accordance with Privacy Act provisions.

(b) Indian Tribes and Tribal organizations must comply with the privacy requirements of the Federal, State, or other Tribal agency providing

the background investigations. Indian Tribes and Tribal organizations may establish their own procedures that safeguard information derived from background investigations.

**§ 136.414 How does the IHS determine eligibility for placement or retention of individuals in positions involving regular contact with Indian children?**

(a) Adjudication is the process IHS uses to determine eligibility for placement or retention of individuals in positions involving regular contact with Indian children. The adjudication process protects the interests of the employer and the right of applicants and employees. Adjudication requires uniform evaluation to ensure fair and consistent judgment.

(b) Each case is judged on its own merits. All available information, both favorable and unfavorable, should be considered and assessed in terms of accuracy, completeness, relevance, seriousness, overall significance, and how similar cases have been handled in the past.

(c) The adjudicating official who conducts the adjudication must first have been the subject of a favorable background investigation.

(d) Each adjudicating official must be thoroughly familiar with all laws, regulations, and criteria involved in making a determination for eligibility.

(e) The adjudicating official must review the background investigation to determine the character, reputation, and trustworthiness of the individual. At a minimum, the background investigation must:

(1) Review each security investigation form and employment application and compare the information provided.

(2) Review the results of written record searches requested from local law enforcement agencies, former employers, former supervisors, employment references, and schools.

(3) Review the results of the fingerprint charts maintained by the FBI or other law enforcement information maintained by other agencies.

(4) Review any other information obtained through a background investigation, including the results of searches by State human services agencies, the OPM National Agency Check and Inquiries, the OPM Security/Suitability Investigations Index, and the Defense Clearance and Investigations Index.

(5) Determine whether the individual has been found guilty of, or entered a plea of nolo contendere or guilty to, any felonious offense, or any of two or more misdemeanor offenses under Federal, State, or Tribal law, involving crimes of

violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; or offenses committed against children.

(f) After an opportunity has been afforded the individual to respond, pursuant to § 136.415, and it is adjudicated that the individual has been found guilty of or entered a plea of nolo contendere or guilty to an enumerated offense under paragraph (e)(5) of this section, that individual shall not be placed or retained in a position involving regular contact with or control over Indian children.

(g) For individuals who have been determined to be ineligible for employment in positions having regular contact with or control over Indian children, the IHS may use Federal adjudicative standards to certify that an individual is suitable for employment in a position, if available, that does not involve regular contact with or control over Indian children. The adjudicating official must determine that the individual's prior conduct will not interfere with the performance of duties and will not create a potential risk to the safety and well-being of any Indian children after consideration of the following factors:

(1) The nature and seriousness of the conduct in question.

(2) The recency and circumstances surrounding the conduct in question.

(3) The age of the individual at the time of the incident.

(4) Societal conditions that may have contributed to the nature of the conduct.

(5) The probability that the individual will continue the type of behavior in question.

(6) The individual's commitment to rehabilitation and a change in the behavior in question.

(7) The degree of public trust and the possibility the public would be placed at risk if the individual is appointed to the position.

**§ 136.415 What rights does an individual have during this process?**

(a) The individual must be provided an opportunity to explain, deny, or refute unfavorable and incorrect information gathered in an investigation, before the adjudication is final. He/she should receive a written summary of all derogatory information and be informed of the process for explaining, denying, or refuting unfavorable information.

(b) The adjudicating officials must not release the actual background investigative report to an individual. However, they may issue a written summary of the derogatory information.

(c) The individual who is the subject of a background investigation may

request, to the extent permissible by law, a copy of the reports from the originating (Federal, State, or other Tribal) agency and challenge the accuracy and completeness of any information maintained by that agency.

(d) The results of an investigation cannot be used for any purpose other than to determine eligibility for employment in a position that involves regular contact with or control over Indian children.

(e) Investigative reports contain information of a highly personal nature and must be maintained confidentially and secured in locked files. Investigative reports must be seen only by those officials who, in performing their official duties, need to know the information contained in the report.

**§ 136.416 When should the IHS deny employment or dismiss an employee?**

The IHS must deny employment to an individual or dismiss an employee, when the duties and responsibilities of the position the individual person would hold or holds involve regular contact with or control over Indian children, and it has been adjudicated, pursuant to § 136.414 and § 136.415, that the individual has been found guilty of, or entered a plea of guilty or nolo contendere to, any felonious offense, or any of two or more misdemeanor offenses, under Federal, State or Tribal law involving a crime of violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; or offenses committed against children. The IHS has the discretion to place such an individual in a position, if available, that does not involve regular contact with or control over Indian children, if a determination has been made that such placement would not put Indian children at risk and the individual would be able to perform the duties and responsibilities of this position.

**§ 136.417 May the IHS hire individuals pending completion of a background investigation?**

Pursuant to section 231 of the Crime Control Act of 1990, Pub. L. 101-647, 42 U.S.C. 13041, as amended by Pub. L. 102-190, the IHS may hire provisionally individuals as defined in these regulations, prior to the completion of a background investigation if, at all times prior to receipt of the background investigation during which children are in the care of the individual, the individual is within the sight and under the supervision of a staff person and a satisfactory background investigation has been completed on that staff person.

**§ 136.418 What should the IHS do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?**

(a) The IHS may deny the applicant employment until the charge has been resolved. (b) The IHS may deny the employee any on-the-job contact with children until the charge is resolved.

(c) The IHS may detail or reassign the employee to other duties that do not involve regular contact with children.

(d) The IHS may place the employee on indefinite suspension, in accordance with statutory and regulatory requirements, until the court has disposed of the charge.

[FR Doc. 02-23943 Filed 9-20-02; 8:45 am]

BILLING CODE 4160-16-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 020819200-2200-01; I.D. 021202A]

RIN 0648-AP93

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** The NMFS is amending the regulations that implement the Atlantic Large Whale Take Reduction Plan (ALWTRP), specifically with regard to the straight set of gillnets in the southeast U.S. restricted area in waters off the coasts of Georgia and Florida. This final rule prohibits straight sets of gillnets at night from November 15 through March 31, annually, to reduce the risk of entanglement of large whales, including the western North Atlantic right whale (right whale).

**DATES:** This final rule is effective October 23, 2002.

**ADDRESSES:** Copies of the Environmental Assessment (EA), the Regulatory Impact Review (RIR), and the Regulatory Flexibility Act (RFA) analysis are available from Protected Resources Division, NMFS /Southeast Region, 9721 Executive Center Drive North, St. Petersburg, FL 33702-2432. ALWTRP Compliance guide, Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and a

progress report on implementation of the ALWTRP may be obtained by writing to Diane Borggaard, NMFS /Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930 or to Katie Moore, NMFS/Southeast Region, 9721 Executive Center Dr., St. Petersburg, FL 33702-2432. Copies of the EA, the RIR, and the RFA analysis can also be obtained from the ALWTRP Web site listed under the Electronic Access portion of this document. A copy of the most recent Stock Assessment Report (SAR) can be obtained by writing to Richard Merrick, 166 Water St., Woods Hole, MA 02543 or can be downloaded from the NMFS Protected Resources Web site listed under the Electronic Access portion of this document.

**FOR FURTHER INFORMATION CONTACT:**

Katie Moore, NMFS, Southeast Region, 727-570-5312; Diane Borggaard, NMFS, Northeast Region, 978-281-9145; or Patricia Lawson, NMFS, Office of Protected Resources, 301-713-2322. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

Several of the background documents for this final rule and the take reduction planning process can be downloaded from the ALWTRP Web site: <http://www.nero.nmfs.gov/whaletrp/>. Copies of the most recent SARs may be downloaded from the Internet at <http://www.nefsc.nmfs.gov/psb/assesspdfs.htm>. Information on disentanglement events is available on the Web page of NMFS' whale disentanglement contractor, the Center for Coastal Studies, <http://www.coastalstudies.org/>.

**Background**

This final rule implements approved modifications contained in the ALWTRP recommended by the ALWTRT to satisfy the requirements of the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). Details concerning the justification for and development of this rule were provided in the preamble to the proposed rule (66 FR 14690, March 27, 2002) and are not repeated here.

The proposed rule provided a 60-day public comment period to provide feedback to NMFS via postmarked mail or via facsimile. NMFS also issued a press release announcing the availability of the proposed rule and