

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**42 CFR Part 73**

**Office of Inspector General**

**42 CFR Part 1003**

**RIN 0920-AA08**

**Possession, Use, and Transfer of Select Agents and Toxins**

**AGENCY:** Centers for Disease Control and Prevention, Office of Inspector General, HHS.

**ACTION:** Interim final rule.

**SUMMARY:** This document establishes requirements regarding possession and use in the United States, receipt from outside the United States, and transfer within the United States, of select agents and toxins. This includes requirements concerning registration, security risk assessments, safety plans, security plans, emergency response plans, training, transfers, record keeping, inspections, and notifications. This document also contains delegations of authority to the Office of Inspector General concerning civil money penalties. The interim final rule implements provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 and is designed to provide protection against misuse of select agents and toxins whether inadvertent or the result of terrorist acts against the United States homeland (such as the recent terrorist acts involving anthrax) or other criminal acts. In addition and in accordance with the Agricultural Bioterrorism Protection Act of 2002, the Department of Agriculture is establishing, by separate regulation, standards and procedures governing the possession, use, and transfer of biological agents and toxins that have been determined to have the potential to pose a severe threat to both human and animal health, to animal health, to plant health, or to animal and plant products. This action is necessary to protect animal and plant health, and animal and plant products.

**DATES:** The interim final rule is effective as of February 7, 2003. However, for dates of specific applicability see § 73.0. Written comments must be submitted on or before February 11, 2003. The final rule will be published after consideration of the comments.

**ADDRESSES:** Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Rd., E-79, Atlanta, GA 30333. Comments may be e-mailed to: [SAPcomments@CDC.GOV](mailto:SAPcomments@CDC.GOV).

**FOR FURTHER INFORMATION CONTACT:**

Minh Thomas, Select Agent Program, Centers For Disease Control and Prevention, 1600 Clifton Rd., MS E-79, Atlanta Ga. 30333. (404) 498-2259.

**SUPPLEMENTARY INFORMATION:** This document establishes requirements regarding possession and use in the United States, receipt from outside the United States, and transfer within the United States, of certain biological agents and toxins (referred to below as select agents and toxins). This includes requirements concerning registration, security risk assessments, safety plans, security plans, emergency response plans, training, transfers, record keeping, inspections, and notifications. The Act requires an interim final rule and mandates its effective date and transition provisions. The new regulations are set forth in a new 42 CFR part 73 (referred to below as the part 73 regulations).

The part 73 regulations implement provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107-188 (referred to below as the Act).

In general, the entities regulated under the part 73 regulations are academic institutions and biomedical centers; commercial manufacturing facilities (the pharmaceutical industry); federal, state, and local laboratories, including clinical and diagnostic laboratories; and research facilities.

Based on provisions of the Act (42 U.S.C. 262a, note), the part 73 regulations supersede the regulations at 42 CFR 72.6 (referred to below as the § 72.6 regulations). The § 72.6 regulations, which became effective April 15, 1997, established certain shipping and handling requirements on laboratory facilities that send or receive "select agents." In addition to regulating transfers, the part 73 regulations, among other things, cover the "possession and use" of select agents and toxins and include requirements for security risk assessments conducted by Department of Justice. The Act bolstered the authority to protect against misuse of select agents and toxins whether inadvertent or the result of terrorist acts against the United States homeland (such as the recent terrorist acts involving anthrax) or other criminal acts.

The Act gives the Department of Agriculture (referred to below as USDA) the authority and responsibility for regulating activities regarding select agents and toxins to protect animal and plant health and animal and plant products. The Act gives the Department of Health and Human Services (referred

to below as HHS) the authority and responsibility for regulating activities regarding select agents and toxins to protect the public health and safety. Some of the select agents and toxins regulated under this part are also regulated by USDA under 9 CFR part 121. The select agents and toxins subject to regulation by both agencies are identified as "overlap" select agents and toxins and those regulated solely by HHS are identified as HHS select agents and toxins. The Act provides for interagency coordination between the two departments regarding overlap select agents and toxins.

**Purpose and Scope—§ 73.2**

In addition to explaining information discussed above, § 73.2 explains that the part 73 regulations do not apply in two types of situations. Paragraph (b) states that the part 73 regulations do not set requirements for the exportation of select agents or toxins. The Department of Commerce has primary responsibility for regulating the exportation of microorganisms and toxins at 15 CFR. Paragraph (c) states that the part 73 regulations do not set requirements for the transportation in commerce of select agents or toxins. The Department of Transportation has primary responsibility for regulating the transportation of such select agents and toxins as hazardous materials under 49 CFR parts 171 through 180. Other agencies may also have authority over microorganisms that are exported or transported. For example, FDA regulates unapproved products used in clinical trials and such products would be subject to FDA's provisions as well as the provisions of the Department of Commerce or the Department of Transportation. The regulation only lists the agencies with primary authority over transportation and exports.

**General Prohibition—§ 73.3**

The provisions of § 73.3, consistent with the intent of the Act, provide that entities and individuals are allowed to conduct activities regulated by the part 73 regulations only if they are conducted for a lawful purpose and in accordance with the part 73 regulations.

**List of Select Agents and Toxins—§§ 73.4 and 73.5**

The HHS select agents and toxins are listed in § 73.4 and the overlap select agents and toxins are listed in § 73.5.

In a notice of intent to issue regulations published in the **Federal Register** on August 23, 2002, we specified those agents and toxins that we were considering for inclusion in the HHS and overlap lists and requested

comments regarding whether changes should be made. The comment period closed September 17, 2002. We received 22 comments. The select agents and toxins specified in §§ 73.4 and 73.5 are the same as those listed in the notice of intent to issue regulations, except for changes made based on comments, including changes to reflect current taxonomic classification and nomenclature. A number of commenters simply agreed with entries on the list. Those comments requesting substantive changes to the list are discussed below.

We prepared the list for the notice of intent to issue regulations after receiving extensive input from a group of scientists from 21 Federal government entities. We made all of the determinations discussed below in response to the comments based on recommendations from the same group of scientists.

The Act (42 U.S.C. 262a (a)(1)(B)) provides the following criteria that the HHS Secretary must consider for establishing the list:

- The effect on human health of exposure to the agent or toxin;
- The degree of contagiousness of the agent or toxin and the methods by which the agent or toxin is transferred to humans;
- The availability and effectiveness of pharmacotherapies and immunizations to treat and prevent any illness resulting from infection by the agent or toxin; and
- Any other criteria, including the needs of children and other vulnerable populations that the HHS Secretary considers appropriate.

The interim final rule does not make distinctions concerning children or other specific populations because we are unaware of any basis for making such distinctions.

The notice did not include “viruses causing hantavirus pulmonary syndrome” and “yellow fever virus” on the list of select viruses. One commenter, without providing reasons, asserted that they should be included on the list. We have not included them on the list in the interim final rule. “Viruses causing hantavirus pulmonary syndrome” are difficult to propagate and there is a lack of data establishing laboratory acquired infections. Also, there is an available and effective vaccine for “Yellow fever virus.”

The notice included “Monkeypox virus” on the list of select viruses. One commenter indicated that it is not easily transmissible to humans, there is no indication that this agent has ever been chosen as a potential bioweapon, and this agent has not been demonstrated to result in high levels of mortality. We have included “Monkeypox virus” on

the list of non-overlap viruses. Monkeypox has similarities with smallpox virus in that monkeypox has a similar clinical presentation, causes similar mortality rates as observed in recent outbreaks, is highly infectious when aerosolized, and is reported to have chains of transmission for several generations.

The notice included “Herpes B virus” on the list of select viruses. Six commenters indicated that it should be deleted based on assertions that there is no indication that this agent has ever been chosen as a potential bioweapon, the agent has not been shown to be easily transmissible to humans, the agent has not been demonstrated to result in high levels of mortality, and there is little evidence in the literature of true aerosol transmission of the naturally occurring virus. With changes to reflect current taxonomic classification and nomenclature, we have included it on the list of HHS agents and toxins as “Cercopithecine herpesvirus 1 (Herpes B virus)” based on the scientific data that it is lethal to humans, can be replicated in large concentrations, and can cause infection via the aerosol route.

The notice did not include “Camelpox” on the list of select viruses. One commenter asserted that “Camelpox” should be included on the list based on the assertion that recent publications have raised concerns about its potential use as a biological weapon. We have not included “Camelpox” on the list because it has not been associated with human illness or disease.

The notice included “Variola major (smallpox)” on the list of select viruses. One commenter requested that we change “Variola major (smallpox)” to “Variola major and variola minor associated viruses including alastrim.” We have made this change by including “Variola major virus (Smallpox virus) and Variola minor (Alastrim)” on the list of HHS select agents and toxins. “Variola minor virus,” also known as “Variola Alastrim,” is another virus that causes smallpox and like “Variola major virus” is highly infectious and lethal and can be spread by inhalation.

The notice included “*Coccidioides immitis*” and “*Coccidioides posadasii*” on the list of select fungi. One commenter indicated that both should be deleted based on the assertion that neither species of “*Coccidioides*” presented a risk for use as biological weapons. Another commenter asserted that “*Coccidioides immitis*” should be deleted based on the assertion that most infections with “*Coccidioides immitis*” do not cause severe illness. We have

included “*Coccidioides immitis*” on the overlap list and “*Coccidioides posadasii*” on the HHS list because they are highly infectious when aerosolized and sporulate easily in culture.

The notice did not include “*Histoplasma capsulatum*” or “*Blastomyces species*” in the list of select fungi. One commenter asserted that these organisms should be included on the list since they easily can be spread by aerosol. We have not included them on the list because they are difficult to cultivate and do not sporulate readily.

The notice did not include “aflatoxins” on the list of select toxins. One commenter asserted, without reasons, that these organisms should be included on the list. We have not included them on the list because the acute toxicity is too low to pose a significant mass casualty threat.

The notice included “Shigatoxin and Shiga-like toxins” on the list of select toxins. One commenter asserted that a change is needed in the reference to “Shiga-like toxins” to clarify that it does not include analogous proteins that are not toxic, and another commenter similarly asserted that the same term should identify or at least quantify the specific “Shiga-like toxins” to be included. We agree with the commenters and clarified the list of select toxins to include “Shigatoxin and Shiga-like ribosome inactivating proteins.”

In the notice, certain toxins were on the list of select toxins only if the aggregate amount were more than a specified amount. Three commenters argued in favor of the principle that a toxin should be listed without distinctions regarding amounts. One commenter asserted that the aggregate amounts for toxins are too low and do not take into account the vastly different toxicities of these listed materials. We made no changes based on these comments. The Act (42 U.S.C. 262a (a)(1)(A)) states that the list is to include those toxins that have the potential to pose a severe threat to public health and safety. We believe that the specified toxins at levels below the threshold levels do not meet the Act’s criteria for inclusion. Further, as evidenced by the different amounts for certain toxins, we did take into account the different toxicities of toxins.

One commenter recommended that the list of toxins include only those with an LD<sub>50</sub> for vertebrates of less than 100 nanograms per kilogram body weight and two other commenters recommended that the list of toxins include only those that would theoretically contain one million LD<sub>50</sub>’s

for vertebrates for each listed toxin. No changes were made based on these comments. These comments do not take into account the potential threat of large quantities of the toxins.

One commenter asserted that the "Botulinum neurotoxins" should be included only if quantities are greater than 13 milligrams and the listing for "*Clostridium perfringens* epsilon toxin" should be included only if quantities are greater than 68 milligrams. No changes are made based on this comment. The comment does not take into account that even the specified amounts could cause significant numbers of mortalities.

With respect to the listing in the notice of "full-length" nucleic acids, commenters raised concern that the deletion of one nucleic acid would not constitute "full-length" even though capable of causing harm similar to a "full-length." We agree with the commenters and changed the listings to exclude only those forms that are not capable of yielding infectious and/or replication-competent forms of any of the viruses listed (accordingly, forms such as microarrays are not on the list).

Regarding the proposed regulation of "Nucleic acids (synthetic or naturally derived) of Variola major virus (smallpox virus) and Variola minor virus (Alastrim) that are 100 nucleotides or more in length," one commenter noted that Variola virus shares many conserved nucleic acid sequences with other Orthopoxviruses (*e.g.*, vaccinia virus). Thus, the proposed requirement could result in the unintentional regulation of nucleic acids from other viruses. Because nucleic acids from Variola major virus and Variola minor virus that are capable of infection or replication are already listed as select agents in § 73.4 (d)(1), this requirement is being deleted.

The provisions of §§ 73.4 and 73.5 include procedures for excluding attenuated strains of select agents and toxins upon a determination that they do not meet the Act's criteria for inclusion, *i.e.*, they do not pose a severe threat to the public health and safety. The procedures also include provisions for providing notice for determinations. A written decision to an applicant granting the request for an exclusion will apply to all others.

#### **Exemption Regarding Diagnosis, Verification, or Proficiency Testing—§ 73.6(a)**

Paragraph (a) of § 73.6 states that an entity is exempt from the provisions of this part, other than § 73.14 (transfer), if all of the following apply:

- The only activities conducted by the entity that are subject to the part 73

regulations concern select agents or toxins that are contained in specimens or in isolates from the specimens presented for diagnosis, verification, or proficiency testing;

- Upon identification as the result of diagnosis or verification, the entity immediately reports to HHS any of the following: Variola major virus (Smallpox virus) and Variola minor (Alastrim), *Bacillus anthracis*, *Yersinia pestis*, Botulinum neurotoxins, *Francisella tularensis*, Ebola viruses, Marburg virus, Lassa fever virus, and South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito);

- The entity reports as required under Federal, State, or local law, to appropriate authorities;

- After diagnosis, verification, or proficiency testing, the entity either transfers the specimens or isolates from the specimens to a facility eligible for receiving them, or destroys them on-site by autoclaving, incineration, or by means of a sterilization or neutralization process sufficient to cause inactivation;

- The entity transfers or destroys those select agents or toxins used for diagnosis or verification within seven calendar days after identification, unless directed otherwise by the Federal Bureau of Investigation or other law enforcement entity after consultation with the HHS Secretary;

- The entity transfers or destroys those select agents or toxins used for proficiency testing within 90 calendar days after receipt; and

- The entity prepares a record of the identification and transfer or destruction on CDC Form 0.1318, submits the completed form to the HHS Secretary within seven calendar days after the transfer or destruction, and maintains a copy of the record for a period of three years.

The provisions of this exemption meet the requirements of the Act (42 U.S.C. 262a (g)(1)). The Act mandates such an exemption for diagnosis, verification, or proficiency testing regarding select agents and toxins. It also requires reporting to HHS and when required under Federal, State, or local law, to other appropriate authorities, and further requires the agents or toxins to be transferred or destroyed after use.

This requirement that the entity immediately reports to HHS upon identification of any of biological agents listed in § 73.6 (a)(2) is warranted because HHS has determined that these pose the greatest risk to public health and safety and national security.

Allowing seven calendar days for transfer or destruction for select agents

or toxins identified through diagnosis or verification and 90 calendar days for transfer or destruction of select agents or toxins used for proficiency testing will provide sufficient time to accomplish the intended purpose.

The requirements that the entity must notify HHS within seven calendar days after identification and maintain the record of notification, provide a means for documenting that the transfer or destruction actually occurred. We request comment on the sufficiency of the 7-day and 90-day requirements for the transfer or destruction of the select agent or toxin after identification.

#### **Exemption Regarding Products Cleared, Approved, Licensed, or Registered Under Certain Laws—§ 73.6(b)**

Paragraph (b) of § 73.6 states that unless the HHS Secretary issues an order to an entity making specific provision of this part applicable to protect the public health and safety, products that are, bear, or contain listed select agents or toxins that are cleared, approved, licensed, or registered under any of the following laws are exempt from the provisions of the part 73 regulations insofar as their use is only for the approved purposes and meets the requirements of such laws:

- (1) The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*);
- (2) Section 351 of the Public Health Service Act pertaining to biological products (42 U.S.C. 262);
- (3) The Act commonly known as the Virus-Serum-Toxin Act (21 U.S.C. 151–159); or
- (4) The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*).

This exemption is mandated by the Act (42 U.S.C. 262a (g)(2)).

#### **Exemption Regarding Investigational Products—§ 73.6(c)**

Paragraph (c) of § 73.6 states that the HHS Secretary may exempt on a case-by-case basis an investigational product that is, bears, or contains a listed select agent or toxin from the requirements of the regulations when such product is being used in an investigation authorized under a Federal Act referred to above in the discussion concerning § 73.6 (b) and additional regulation under this part is not necessary to protect public health and safety. Paragraph (c) also sets forth application provisions and requires the HHS Secretary to make a determination within 14 calendar days after receipt of the application if the application meets certain requirements.

The Act specifically provides for this exemption, including the time frame for

making a decision (42 U.S.C. 262a (g)(2)). We limited the exemption to investigational products authorized under those Acts specified in § 73.6 (b) because we are unaware of any other acts that could be used to meet the specified criteria. There is a requirement that applicant notify the HHS Secretary when authorization is no longer in effect (e.g., IND is put on clinical hold). An exemption granted under this paragraph continues in effect only so long as the investigation continues in accordance with the authorization under a Federal Act referred to in paragraph (b) of this section.

#### **Exemption Regarding Domestic or Foreign Public Health Emergency § 73.6(d)**

Paragraph (d) of § 73.6 states that the HHS Secretary may temporarily exempt an entity from the requirements of the regulations, in whole or in part, based on a determination that the exemption is necessary to provide for the timely participation of the entity in response to a domestic or foreign public health emergency. Paragraph (d) further provides that the exemption may not exceed 30 calendar days, except that the HHS Secretary may grant one extension of an additional 30 calendar days. In addition, it sets forth application provisions.

The Act specifically provides for this exemption, including the time limits (42 U.S.C. 262a (g)(3)).

#### **Exemption Based on Agricultural Emergency § 73.6(e)**

Paragraph (e) of § 73.6 states that upon request of the USDA Secretary, after the granting by the USDA Secretary of an exemption under section 212(g)(1)(D) of the Agricultural Bioterrorism Protection Act of 2002 based on a finding that there is an agricultural emergency, the HHS Secretary may temporarily exempt an entity from the applicability of the requirements of this part, in whole or in part, to provide for the timely participation of the entity in response to the agricultural emergency. Paragraph (e) further provides that the exemption may not exceed 30 calendar days, except that upon the request of the USDA Secretary, the HHS Secretary may grant one extension of an additional 30 calendar days.

The Act specifically provides for this exemption, including the time limits (42 U.S.C. 262a (g)(4)).

#### **Registration—§ 73.7**

Paragraph (a) of § 73.7 states that an entity may not possess or use in the United States, receive from outside the

United States, or transfer within the United States, any select agent or toxin unless the entity has been granted a certificate of registration by HHS or USDA. This reflects requirements in the Act (42 U.S.C. 262a (d)).

Paragraph (b) contains information concerning the submission of an application for a certificate of registration to HHS or USDA and sets forth the information required to be included in the application. The requested information is needed to determine whether an applicant is eligible for a certificate of registration by meeting the requirements of the part 73 regulations. The requested information is necessary to make a preliminary determination if the entity meets the requirements of this part. We are requesting comments on the information required in the application for registration.

Paragraph (c) explains that an application that covers any HHS select agent or toxin (regardless of whether it also covers overlap select agents or toxins) must be submitted to HHS and an application that covers only overlap select agents or toxins may be submitted either to HHS or USDA. This reflects the intent of the Act to provide joint jurisdiction over activities and avoid unnecessary burden regarding overlap select agents and toxins (7 U.S.C. 8411). Regardless of which agency receives the application regarding an overlap select agent or toxin, both agencies will provide input before a determination is made to grant or deny a certificate of registration.

Paragraph (d) provides that a certificate of registration will be valid only for the specific select agents and toxins and the specified activities and locations consistent with the information upon which the certificate of registration or amendment was granted. This requirement reflects the conclusion that each situation for conducting activities involving select agents and toxins is unique, and HHS or USDA can only issue a certificate of registration based on the information submitted.

Paragraph (d) also provides that the Responsible Official of an agency must get prior approval by promptly notifying the HHS Secretary in writing in accordance with § 73.21, if any change occurs in any information submitted in the application for the certificate of registration or amendments. This includes modifications to the list of individuals approved under § 73.8, changes in area of work, or changes in protocols or objectives of studies. This requirement is necessary to enable HHS to ensure that the entity continues to

meet the requirements of the part 73 regulations.

Paragraph (d) contains provisions for obtaining amendments to a certificate of registration to add select agents or toxins or to change specified activities or locations.

Paragraph (e) contains provisions for granting a certificate of registration if the requirements of the part 73 regulations are met. Paragraph (e) also notes, consistent with the discussion above, that HHS will issue a certificate of registration or amendment for an HHS overlap select agent or toxin only if the USDA Secretary concurs that the requirements for obtaining a certificate of registration or amendment under 9 CFR part 121 have been met.

Paragraph (f) provides that a certificate of registration will cover activities at only one general physical location (a building or a complex of buildings at a single mailing address). This is designed to ensure that the Responsible Official is not over-extended and will be able to perform the activities required under § 73.9.

Paragraph (g) provides that a certificate of registration will be valid for up to three years. This will allow for varied expiration dates and thereby lessen the subsequent administrative burden regarding the processing of renewals. We are seeking comments on this time period for renewal of a registration.

Paragraph (h) provides that an entity must provide notice in writing to the HHS Secretary in accordance with § 73.21 at least five business days before destroying a select agent or toxin, if the destruction is for the purpose of discontinuing activities with an agent or toxin covered by a certificate of registration. This will allow the HHS Secretary to observe the destruction or take other action as appropriate.

#### **Security Risk Assessments—§ 73.8**

Paragraph (a) of § 73.8 states that an entity may not possess or use in the United States, receive from outside the United States, or transfer within the United States, any select agent or toxin unless the entity and any individual who owns or controls the entity are approved by the HHS Secretary or the USDA Secretary based on security risk assessments by the Attorney General. Paragraph (b) of § 73.8 states that an individual may not have access to a select agent or toxin unless approved by the HHS Secretary or the USDA Secretary based on a security risk assessment by the Attorney General. These security risk assessments are required by the Act (42 U.S.C. 262a (e)).

Based on specific authority in the Act, paragraph (a) provides that the security risk assessment requirements do not apply to Federal, State, or local governmental agencies (42 U.S.C. 262a (e)), but the security risk assessments do apply to the Responsible Official and other individuals working for such agencies.

Paragraph (c) sets forth procedures for obtaining the security risk assessments.

Paragraph (d) restates the criteria in the Act for disapproving entities and individuals (42 U.S.C. 262a (e)). The Act states that "restricted persons," as defined in 18 U.S.C. 175b, may not be granted access to select agents and toxins (42 U.S.C. 262a (e)). A restricted person is a person who:

- Is under indictment for a crime punishable by imprisonment for a term exceeding 1 year;
- Has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;
- Is a fugitive from justice;
- Is an unlawful user of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- Is an alien illegally or unlawfully in the United States;
- Has been adjudicated as a mental defective or has been committed to any mental institution;
- Is an alien (other than an alien lawfully admitted for permanent residence) who is a national of a country as to which the Secretary of State has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism; or
- Has been discharged from the Armed Services of the United States under dishonorable conditions.

In addition, the HHS Secretary may deny or limit access if the individual is reasonably suspected by any Federal law enforcement or intelligence agency of: Committing a crime set forth in section 2332b(g)(5) of title 18 U.S.C.; knowing involvement with an organization that engages in domestic or international terrorism (as defined in section 2331 of such title 18) or with any other organization that engages in intentional crimes of violence; or being an agent of a foreign power (as defined in section 1801 of title 50 U.S.C.

Consistent with specific provisions in the Act, paragraph (e) also allows for limited approvals (42 U.S.C. 262a (e)).

Paragraph (f) provides that unless a shorter period is granted under paragraph (e), an approval for an entity or individual will be valid for three years unless terminated sooner at the

request of the entity or individual, or terminated for cause.

Paragraph (g) implements specific provisions of the Act for requesting the Attorney General to expedite the security risk assessment process and for expediting the HHS Secretary's review process (42 U.S.C. 262a (e)). The Act allows expedited processing only for individuals (not entities). Expedited processing will be given to those cases showing good cause (e.g., public health or agricultural emergencies, national security, impending expiration of a research grant, a short-term visit by a prominent researcher).

#### **Responsible Official—§ 73.9**

Under § 73.9, an entity conducting regulated activities must identify and authorize an individual as the Responsible Official. The Responsible Official must:

- Be approved for access to biological agents and toxins under § 73.8;
- Be familiar with the requirements of the part 73 regulations, and
- Have authority and responsibility to ensure that the requirements of the part 73 are met, on behalf of the entity.

These requirements regarding a Responsible Official are necessary to ensure management oversight of the implementation of the part 73 regulations and to establish a point of contact.

This section also provides for the designation of Alternate Responsible Officials to conduct the duties of the Responsible Official. The Responsible Official may identify one or more individuals, any of whom may serve as the Alternate Responsible Official when the Responsible Official is unavailable. The Responsible Official and all individuals identified to serve as the Alternate Responsible Official must meet all of the qualifications for a Responsible Official.

We recommend that the Responsible Official and Alternate Responsible Officials be either biosafety officers or senior management officials of the entity, or both. Although we understand that some entities have limited staff, to help foster objectivity we strongly recommend where feasible that the Responsible Official should not be an individual actually using, working with, or transferring or receiving the select agents and toxins.

#### **Safety—§ 73.10**

Paragraph (a) of § 73.10 states that an entity subject to the provisions of the part 73 regulations must develop and implement a safety plan that:

- Considers the biosafety standards and requirements appropriate for BSL2, 3, or 4 operations, as those standards and requirements pertain to the respective select agents. Guidance for biosafety standards for BSL2, 3, or 4 operations is contained in the CDC/NIH publication, "Biosafety in Microbiological and Biomedical Laboratories," including all appendices except Appendix F.

- Meets the specific requirements for handling toxins found in 29 CFR 1910.1450, Occupational Exposure to Hazardous Chemicals in Laboratories' and/or 29 CFR 1910.1200, "Hazard Communication," whichever applies.

- Considers the requirements for handling toxins found in Appendix I in the CDC/NIH publication, "Biosafety in Microbiological and Biomedical Laboratories."

- Considers the requirements for handling genetic elements, recombinant nucleic acids, and recombinant organisms found in "NIH Guidelines for Research Involving Recombinant DNA Molecules." This includes, among other things, provisions regarding security assessments, physical containment, biological containment, and local review.

These provisions are designed to implement the mandate in the Act to establish safety provisions commensurate with the risk the biological agent or toxin poses to the public health and safety (42 U.S.C. 262a (b)). Both BMBL and the NIH Guidelines provide for graded requirements based on the level of hazard posed by the specific agents and toxins. The work with these agents and toxins are classified into biosafety levels (BSL 1 through 4) based on their hazards and the quantities being handled. As the level of risk increases, the guidelines impose more stringent requirements for safety practices. These guidelines are accepted standards in the biomedical sector. In addition, grants that are awarded for funding improvements to public health agencies mandate compliance with the NIH Guidelines. Similarly, new grants from NIH to fund research on select agents and toxins mandate compliance with the NIH guidelines. Consequently, we expect that entities subject to this rule either are complying with these guidelines or are making provisions to comply. Further, these are essentially the same requirements imposed on entities under the § 72.6 regulations. We are seeking comments on the incorporation of these guidelines as requirements.

Paragraph (b) of § 73.10 states that:

- The Responsible Official must conduct regular inspections of the laboratory where select agents and toxins are stored or used to ensure compliance with all of the procedures and protocols of the safety plan,

- The results of these inspections must be documented, and
- Any problems identified during inspections must be addressed.

These provisions are added to help ensure that the safety provisions are met.

The concerns that prompted this rule and its authorizing statute are not limited to the Select Agents listed herein. Laboratory manipulation of microbes can alter their characteristics, either intentionally or inadvertently, so as to increase their virulence, pathogenicity, or host range or alter their mode of transmission or route of exposure in ways that increase risks to human, animal, or plant health. In particular, the resulting modified organisms could present risks equal to or even greater than the current select agents and toxins.

In recognition of this prospect, and to protect public health and safety and ensure security, paragraph (c) states that an entity may not conduct the following experiments unless approved by the HHS Secretary, after consultation with experts:

- Experiments utilizing recombinant DNA that involve the deliberate transfer of a drug resistance trait to select agents that are not known to acquire the trait naturally, if such acquisition could compromise the use of the drug to control disease agents in humans, veterinary medicine, or agriculture.

- Experiments involving the deliberate formation of recombinant DNA containing genes for the biosynthesis of select toxins lethal for vertebrates at an LD<sub>50</sub> < 100 ng/kg body weight.

This is to ensure that these categories of experiments with select agents and toxins involving recombinant DNA (as defined in the NIH Guidelines) are conducted only if safe to do so.

Also, we have reserved paragraph (d) for possible future specification of additional types of experiments that might warrant stringent scrutiny in the interest of safety; and we hereby request comments concerning what additional experiments, regardless if regulated under the part 73 regulations, might warrant such attention. In particular, we request comments addressing issues concerning experiments with biological agents that could possibly increase their virulence or pathogenicity; change their natural mode of transmission, route of exposure, or host range in ways adverse

to human, animal, or plant health; result in the deliberate transfer of a drug resistant trait or a toxin-producing capability to a microorganism by means that do not involve recombinant DNA techniques; or involve research with Variola major virus and Variola minor virus (e.g., experiments involving the transfer of Variola nucleic acid sequences into any other orthopoxvirus). In light of the deletion from the select agent list of Variola nucleic acids that are 100 nucleotides or more in length, we request comments on whether a less restrictive, but scientifically sound threshold is needed. We also request comments regarding the form such special oversight should take; for example, the rule could require that, whenever laboratory manipulation of a microorganism increases its risk profile significantly, whether intentionally or inadvertently, the Responsible Official report such to the HHS Secretary and discontinue work with the modified organism until the HHS Secretary has made recommendations regarding appropriate safety practices.

#### **Security—§ 73.11**

The provisions of § 73.11 require entities subject to the provisions of the part 73 regulations to develop and implement a security plan establishing policy and procedures that ensure the security of areas containing select agents and toxins. The provisions of § 73.11 are designed to meet these objectives and the Act's mandate to establish security requirements for the purpose of protecting the public health and safety (42 U.S.C.262a (e)). We invite comments on these provisions, and are particularly interested in views on whether the provisions are sufficient to meet the purposes stated above.

#### **Emergency Response—§ 73.12**

The provisions of § 73.12 state that entities required to register under the part 73 regulations must develop and implement an emergency response plan. The requirements for the plan are designed to ensure that entities plan ahead to be ready to take appropriate action to deal with any hazard that could arise.

We also note that if the entity has prepared and implemented an emergency response plan or is part of a larger institution's plan developed under other Federal, State, or local emergency response planning laws (e.g., OSHA's hazardous waste operations and emergency response standard), that plan, with any necessary amendments, may be used to meet the requirements of § 73.12.

#### **Training—§ 73.13**

The provisions of § 73.13 state that an entity required to register under this part must provide information and training on safety and security for working with select agents or toxins on a timely basis to each individual approved for access under § 73.8 and each unapproved individual working in, or visiting, areas where select agents and toxins are handled or stored. The criteria in § 73.13 are designed, consistent with the Act's mandate concerning training (42 U.S.C. 262a (b)), to ensure that individuals understand the hazards and how to deal with them.

We also note that if the entity has an existing training program under OSHA or other government or entity programs, that training program, with any necessary amendments, may be used to meet the requirements of § 73.13.

#### **Transfers—§ 73.14**

The transfer provisions in § 73.14, consistent with specific provisions of the Act (42 U.S.C. 262a (b)), state that a select agent or toxin may not be transferred from one entity to another entity within the United States (regardless of whether the transfer is interstate or intrastate), or received by an entity in the United States from an entity outside the United States, unless the transfer meets specified requirements. The transfer provisions are designed to ensure that select agents and toxins are shipped only to recipients that have authority to use or possess them. Also, the transfer provisions are designed to ensure that HHS and the participants monitor the shipments and that any problems are quickly reported to HHS so that any required action could be taken.

#### **Records—§ 73.15**

The provisions of § 73.15 set forth record keeping requirements concerning the list of approved individuals, inventories, access to agents and toxins, and areas where agents are used. These requirements are designed to allow determinations concerning compliance with the requirements of the part 73 regulations and to help assign what action should be taken if an emergency were to arise. Some of the requirements concerning quantities apply only to toxins since quantity data concerning replicating organisms may not be meaningful. We invite comments on these requirements.

#### **Inspections—§ 73.16**

The part 73 regulations at § 73.16 set forth inspection provisions that apply during the time an application is pending and any time when a certificate

of registration is in effect. This allows the HHS Secretary, without prior notification and with or without cause, to inspect any site at which activities regulated by part 73 are conducted and to inspect and copy any records relating to the activities covered by this part. This section implements the provisions of the Act that authorize inspections as necessary to ensure compliance with the part 73 regulations (42 U.S.C. 262a (f)).

#### **Notification for Theft, Loss, or Release—§ 73.17**

Consistent with the mandate in the Act, § 73.17 sets forth requirements for reporting thefts, losses, or releases of select agents or toxins (42 U.S.C. 262a (g)(8) and (j)). This is intended to determine responsibility for reporting and to help ensure that the appropriate information is reported so that effective and timely responses can be made.

#### **Administrative Review—§ 73.18**

To implement requirements of the Act (42 U.S.C. 262a (e)(7)), § 73.18 provides that an entity may obtain review of a decision denying or revoking a certificate of registration under 73.7 and the affected entity or individual may obtain review of a decision denying or revoking approval under 73.8. To help ensure timely resolution of disputes, the request for such review must be submitted in writing within 30 calendar days after the adverse decision. Under this section, the request for review must state the factual basis for the review, which will be carried out in accordance with 42 U.S.C. 262a(e)(7). Where the adverse decision is in whole or in part based upon notification by the Attorney General under 42 U.S.C. 262a(e)(3), the request for review will be forwarded to the Attorney General for the Attorney General's review and final notification to the HHS Secretary.

#### **Civil Money Penalties—§ 73.19**

A discussion regarding the authority for, and the implementation of, civil money penalties by the Office of Inspector General is set forth below under the heading "Civil money penalties."

#### **Criminal Penalties—§ 73.20**

The provisions of § 73.20 are informational. They note that the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107-188) provides specific criminal penalties for violation of provisions of the part 73 regulations. They also note that other criminal penalties may apply for violation of the part 73 regulations.

#### **Submissions and Forms—§ 73.21**

Paragraphs (a), (b), and (c) of § 73.21 explain how to obtain forms and how to submit applications, requests, notifications, and other information under the part 73 regulations.

To help ensure the timely resolution of matters, paragraph (d) of § 73.21 sets forth a mechanism for considering applications or requests to be abandoned if the applicant or requester fails to respond within 30 calendar days (or within such time period agreed upon by the applicant or requester and the HHS Secretary) to an HHS request for additional information.

#### **Applicability and Related Requirements—§ 73.0**

The provisions of § 73.0 include a phase-in period for certain requirements to allow entities to comply without causing disruption or termination of research or educational projects.

The phase-in for entities that on February 7, 2003, already were conducting activities under a certificate of registration issued under § 72.6 of this chapter or already were lawfully possessing select agents and toxins are as follows:

1. On and after February 7, 2003, the following provisions of part 73 are applicable: § 73.1 Definitions; § 73.2 Purpose and scope; § 73.3 General prohibition; § 73.4 HHS select agents and toxins; § 73.5 Overlap select agents and toxins; § 73.6 Exemptions from requirements under this part; § 73.9 Responsible Official; § 73.10 Safety; § 73.12 Emergency response; § 73.13 Training, but only those training provisions relating to safety and emergency response; § 73.15 Records; § 73.16 Inspections; § 73.17 Notification for theft, loss, or release; § 73.18 Administrative review; § 73.19 Civil money penalties; § 73.20 Criminal penalties; and § 73.21 Submissions and forms.

2. Before conducting activities subject to the interim final during the period from March 12, 2003, through November 11, 2003, such an entity must have submitted to HHS or USDA an application package under § 73.7 certifying compliance with the provisions referred to in (1) above.

3. Before conducting activities subject to the interim final during the period from March 12, 2003, through April 11, 2003, such an entity must have submitted applications for security risk approvals under § 73.8 to the Attorney General for the entity, the Responsible Official, and any individual who owns or controls the entity.

4. On and after March 12, 2003, such an entity must comply with the transfer requirements in § 73.14.

5. On and after April 12, 2003, such an entity must comply with the requirement to obtain security risk approvals under § 73.8 for the entity, the Responsible Official, and any individual who owns or controls the entity.

6. Before conducting activities subject to the interim final during the period from April 12, 2003, through June 11, 2003, such an entity must have submitted applications for security risk approvals under § 73.8 for all individuals with access to select agents and toxins.

7. On and after June 12, 2003, such an entity must comply with the requirement to obtain security risk approvals under § 73.8 for all individuals with access to select agents and toxins.

8. Before conducting activities subject to the interim final during the period from June 12, 2003, through September 11, 2003, such an entity must comply with the requirement in § 73.11 to develop a security plan.

9. On and after September 12, 2003, such an entity must fully comply with the provisions of § 73.11, including the provisions regarding the implementation of a security plan, and must fully comply with the provisions of § 73.13, including the training provisions relating to security.

10. On and after November 12, 2003, such an entity must comply with the requirement in § 73.7 to obtain a certificate of registration.

11. Such an entity also remains:

- Subject to the registration provisions of the § 72.6 regulations until November 12, 2003, when superseded by § 73.7;

- Subject to the security provisions regarding development of a security plan until June 12, 2003, when superseded by the requirement to develop a security plan under § 73.11;

- Subject to the security provisions of the § 72.6 regulations regarding implementation of a security plan until September 12, 2003, when superseded by the requirement to fully comply with § 73.11;

- Subject to the training provisions of the § 72.6 regulations related to security until September 12, 2003, when superseded by the requirement to fully comply with § 73.13; and

- Subject to the transfer provisions of the § 72.6 regulations until March 12, 2003, when superseded by § 73.14.

The following is a timeline of the registration phase-in period that is described in the previous paragraph:

2/7/03 Rule effective	3/12/03 Application due	4/12/03 DOJ review
73.1 Definitions 73.2 Purpose and scope 73.3 General prohibition 73.4 Non-overlap select biological agents and toxins 73.5 Overlap select biological agents and toxins 73.6 Exemptions from requirements under this part 73.9 Responsible Official 73.10 Safety 73.12 Emergency Response 73.13 Training (Safety and Emergency Response Provisions) 73.15 Records 73.16 Inspections 73.17 Notification for theft, loss, or release 73.18 Appeals 73.19 Civil money penalties 73.20 Criminal penalties 73.21 Submissions and forms	—Application certifies compliance with effective sections. 73.8—Certifies that applications for DOJ review for entity and RO submitted. 73.14—Transfer section effective .....	73.8 Application for DOJ review for individuals submitted. —Entity and RO DOJ review completed.
6/12/03 DOJ review/security	9/12/03 Security/Training plan	11/12/03 Full compliance
73.8—Individual DOJ review complete 73.11—Development of security plan	73.11 Security plan implemented ..... 73.13 Training (security provisions) .....	73.7—Registration section effective —Entity must be in full compliance with Part 73

We have also provided a more limited phase-in for entities that on February 7, 2003, were not already conducting activities under a certificate of registration issued under § 72.6 of this chapter and were not already lawfully possessing select agents as follows:

(1) On and after February 7, 2003, the following sections are applicable: §§ 73.1 through 73.6 (definitions, purpose and scope, general prohibition, HHS select agents and toxins, overlap select agents and toxins, exemptions from requirements under this part); §§ 73.8 through 73.10 (Security risk assessments, Responsible Official, Safety); §§ 73.12 through 73.21 (emergency response, training, transfers, records; inspections; notification for theft, loss, or release; administrative review; civil money penalties; criminal penalties; and submissions and forms) and must hold a valid permit under 9 CFR part 122 and/or 42 CFR part 71.54.

(2) On and after September 12, 2003, the provisions of § 73.11 (security) are applicable.

(3) On and after November 12, 2003, the provisions of § 73.7 (registration) are applicable.

(4) During the period from February 7, 2003, through November 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted to HHS or USDA an application package under § 73.7 certifying compliance with the

provisions referred to in paragraph (b)(2) of this section.

**Civil Money Penalties**

In 1981, Congress enacted the civil money penalty statute, section 1128A of the Social Security Act (42 U.S.C. 1320a–7a), as one of several administrative remedies to combat increases in fraud and abuse. The civil money penalty law authorized the HHS Secretary and the Inspector General to impose civil money penalties and program exclusions on individuals and entities whose wrongdoing caused injury to HHS programs or their beneficiaries. Since 1981, the civil money penalty provisions have been expanded to apply by reference to numerous types of fraudulent and abusive activities.

The Act specifically authorized civil money penalties against any individual or other person violating the part 73 regulations (42 U.S.C. 262a (i)). The Act incorporates by reference many of the provisions of section 1128A of the Social Security Act. As a result, and in accordance with section 1128A(j)(2) of the Social Security Act, the Office of the Inspector General may impose a civil money penalty in an amount not exceeding \$250,000 in the case of an individual, and up to \$500,000 in the case of any other person, who violates the Act. Accordingly, to address this new civil money penalty authority, we added provisions to the part 73

regulations at § 73.19 and are amending 42 CFR parts 1003 as follows:

- In § 1003.100, Basis and purpose, we are revising paragraph (a), redesignating paragraph (b)(3) to read as (b)(4), and adding a new paragraph (b)(3), stating the broad purpose of this new civil money penalty authority.
- In § 1003.101, Definitions, we are adding a definition for the term “Select agents and toxins” consistent with the definition in the part 73 regulations.
- In § 1003.102, Basis for CMPs and assessments, we are redesignating existing paragraphs (d) and (e) to read respectively as paragraphs (e) and (f), and adding a new paragraph (d) to cross-reference the implementing regulations and the OIG’s authority to impose penalties for determined violations.
- In § 1003.103, Amount of penalty, we are adding a new paragraph (l) to address the \$250,000/\$500,000 maximum penalty amounts.

The OIG specifically seeks public comments on the possible inclusion of specific mitigating and aggravating factors in considering penalty amounts.

**Disclosure Provisions**

The Act (42 U.S.C. 262a (h)) prohibits the disclosure under the Freedom of Information Act (5 U.S.C. 552) of certain information concerning registrations; transfer documentation; safeguard and security measures; notifications of



releases; and evaluations and reports of inspections.

#### Authority for Interim Final Rule

The Act requires this document to be published as an interim final rule (42 U.S.C. 262a, note).

#### Paperwork Reduction Act

The Centers for Disease Control and Prevention (referred to below as the CDC) has determined that the Paperwork Reduction Act (44 U.S.C. Chapter 35) applies to the data collection activities in this Interim Final Rule. In compliance with the Paperwork Reduction Act, CDC publishes a list of information collection requests under review by the Office of Management and Budget (OMB). To request more information on the proposed data collection or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer at (404) 498-1210.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. CDC is requesting an emergency clearance from OMB to collect data under the Interim Final Rule. Written comments should be received within 30 days of this notice. Send written comments to Anne O'Connor, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS D-24, Atlanta, Georgia 30333. OMB is expected to act on this request within 60 days of publication of this notice.

*Proposed Project:* Possession, Use, and Transfer of Select Agents and Toxins—New—Office of the Director (OD), Centers for Disease Control and Prevention. As explained above, the Act specifies that the HHS Secretary shall provide for the establishment and enforcement of standards and procedures governing the possession and use of Select Agents. Also as explained above, the part 73 regulations provide that facilities that possess or use within the United States, receive from outside the United States, or transfer within the United States, select agents or toxins must register with the HHS Secretary. The HHS Secretary has designated CDC as the agency

responsible for collecting this information.

CDC is proposing to collect this information through the use of five separate forms. These forms are: (1) Application for Registration; (2) Facility Notification Form; (3) Request for Exemption; (4) Transfer of Select Agent Form; and (5) Clinical and Diagnostic Laboratory Reporting Form.

The Application for Registration (CDC Form 0.1319) will be used by facilities to register with CDC. The Application for Registration requests facility information, a list of select agents and toxins in use, possession, or for transfer by the facility, characterization of the select agent, and laboratory information. This form is a modification of an existing form approved under OMB Control No. 0920-0199. Estimated average time to complete this form is 3 hours, 45 minutes for an entity with one principal investigator working with one select agent. CDC estimates that entities will need an additional 45 minutes for each additional investigator or select agent. This is an increase of 1 hour, 45 minutes over the previous form due to new reporting requirements for security and identification of those individuals the entity has designated to have a legitimate need to handle or use select agents or toxins.

Facilities must amend their registration if certain changes occur in the information submitted to the HHS Secretary. To apply for an amendment to a certificate of registration, an entity must obtain the relevant portion of the application package and submit the information requested in the package to CDC. Estimated time to amend a registration package is 60 minutes.

The Facility Notification Form (CDC Form 0.1316) must be completed by facilities whenever there is release of a select agent or theft or loss of a select agent. This is a new form. Estimated average time to complete this form is 60 minutes.

The Request for Exemption Form (CDC Form 0.1317) will be used by facilities that are using select agents or toxins in investigational new drug testing or in cases of public health emergency. This is a new form. Estimated average time to complete this form is 70 minutes.

The Transfer of Select Agent Form (CDC Form EA-101) will be used by facilities requesting transfer of a select agent or toxin to their facilities and by the facility transferring the agent. This is a modification of an existing form approved under OMB Control No. 0920-0199. Estimated average time to complete this form is 1 hour, 45

minutes. This is an increase of 75 minutes due to procedural changes.

The Clinical and Diagnostic Laboratory Exemption Report (CDC Form 0.1318) will be used by clinical and diagnostic laboratories to notify the HHS Secretary that select agents or toxins identified as the result of diagnosis or proficiency testing have been properly disposed of. This is a new form. Estimated average time to complete this form is 60 minutes.

In addition to the standardized forms, the part 73 regulations also outline situations in which an entity must notify or make a request of the HHS Secretary in writing and CDC is requesting OMB approval to collect this information. The regulation states that an entity must notify the HHS Secretary in writing at least five business days before destroying select agents or toxins. The estimated time to gather the information and submit this notification is 30 minutes. An entity may also apply to the HHS Secretary for an expedited review of an individual by the Attorney General. To apply for this expedited review, an entity must submit a request in writing to the HHS Secretary establishing the need for such action. The estimated time to gather the information and submit this request is 30 minutes. Entities should be aware that CDC is not developing standardized forms to use in these situations. Rather, the entity should provide the information as requested in the appropriate section of the regulation.

As part of the safety requirements of this regulation, the Responsible Officer is required to conduct regular inspections (at least annually) of the laboratory where the select agents and toxins are stored. The results of these inspections must be documented. CDC estimates that, on the average, such documentation will take one hour.

Finally, as part of the safety requirements of this regulation, the entity is required to record the identity of the individual trained, the date of training, and the means used to verify that the employee understood the training. Estimated time for this documentation is 2 hours per principal investigator.

An entity or an individual may request administrative review of a decision denying or revoking certification of registration in writing within 30 calendar days after the adverse decision. This request should include a statement of the factual basis for the review. CDC estimates the time to prepare and submit such a request is four hours.

Finally, an entity must implement a system to ensure that certain records

and databases are accurate and that the authenticity of records may be verified.

The time to implement such a system is estimated to average four hours.

The total annualized burden for this data collection is 30,777 hours.

CFR reference	Data collection	Number of respondents	Responses per respondent	Average hourly burden
73.7(b)	Registration Application .....	817	1	3.75
73.7(d)	Amendment to Registration Application .....	817	2	1
73.17(a)(e)	Notification Form .....	10	1	1
73.6(c-e)	Request for Exemption .....	17	1	70/60
73.14	Transfer of Select Agent .....	1,000	5	1.75
73.6(a)(2)	Clinical and Diagnostic Laboratory Exemption Report .....	1,000	4	1
73.7(h)	Notification of inactivation .....	6	1	30/60
73.9(g)	Request expedited review .....	6	1	30/60
73.10(b)	Documentation of Self-Inspection .....	817	1	1
73.13(f)	Documentation of training .....	817	1	2
73.18	Administrative Review .....	14	1	4
73.15(d)	Ensure secure Recordkeeping System .....	817	1	4

### Executive Order 12866 and Regulatory Flexibility Act

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

In the course of developing the rule, CDC considered the rule's costs and benefits. CDC's analysis is summarized below.

**Affected Entities.** At least 1,653 entities have indicated that they possess select agents or toxins. Of these, 1,167 entities are expected to have HHS select agents or toxins or overlap select agents or toxins used in non-agricultural research. Of these 1,167 entities, only 817 are expected to register under the rule. The remaining 350 entities perform only diagnostic work and would be exempted from most of the provisions of the rule, thereby avoiding most of the regulatory burden associated with the rule.

The entities generally fall into one of four categories: academic institutions and biomedical centers; commercial manufacturing facilities (the pharmaceutical industry); federal, state, and local laboratories, including clinical and diagnostic laboratories; and research facilities. Based on the initial notifications, academic institutions and commercial facilities comprise 81 percent of the registered entities.

The expected registered entities are estimated to have about 20,000 staff that will be required to submit information to the Attorney General for approval. In general, entities limit access to select agents or toxins to a far smaller population than their overall workforce. In most cases, this smaller population is composed of scientific staff. The number of employees directly handling select agents or toxins typically ranges from approximately three individuals at smaller commercial and state entities to more than one hundred researchers at some large academic institutions. On

average, commercial entities authorize approximately 12 individuals to work with select agents or toxins. Similarly, at state entities the average number of authorized employees is estimated at about 15. Authorized populations at research institutes and at federal entities are larger, with approximately 25 employees handling select agents or toxins on average. Academic institutions have the largest staff directly working with select agents or toxins, averaging almost 40 authorized persons per entity.

**Costs.** To determine the burden that the interim final rule will impose, CDC contacted a number of entities to discuss existing practices. To protect staff as well as the public, entities using select agents or toxins already employ a variety of laboratory safety practices. In general, entities are adhering to guidance in the "Biosafety in Microbiological and Biomedical Laboratories (BMBL)," 4th Edition, as applicable to their specific biosafety level category (e.g., BSL2, BSL3, BSL4) category. Biosafety levels range from BSL1 through BSL4, although BSL2 represents the minimum level at which laboratories might reasonably work with limited quantities of certain select agents. The analysis assumes that only a relatively small number of laboratories (52 laboratories, or 6.4 percent of the 817 expected to register) use safety practices that are inadequate for appropriate handling of select agents.

There is wide variation in current security practices, although there is a correlation between BSL levels and security levels. For example, BSL-3 laboratories tend to have more security than BSL-2 laboratories. Nevertheless, even for laboratories of the same type or BSL level, some variation exists. There also appears to be systematic variation across laboratories of different types. In general, security is relatively strong at

federal laboratories, research institutes, and commercial laboratories; security practices at academic institutions and state laboratories are more variable.

Most entities (approximately 70 percent) have a training program in place that addresses the safety of staff that is in proximity to or handling select agents. Of the remaining entities (that do not have a standard safety training program in place), some of them train people on the job as necessary for the employee to learn some skills or improve his or her proficiency. All commercial entities have a standardized safety training program in place—at the very least for the technical staff that work in the laboratories. The vast majorities of entities (85 percent) have a system in place to record and monitor the inventory of select agents or toxins.

Because many of the laboratories that will register under this rule are already substantially in compliance with the practices required, the costs of the rule are limited. The median annualized cost of the rule is estimated to range from \$9,300 to \$201,000 (annualized over 20 years). The estimated first year cost of the rule ranges from \$23,400 for a small commercial entity with a BSL 3 lab to \$730,400 for a medium university with a BSL2-3 lab. The total annualized cost of the rule is estimated to be \$41 million.

Most of the cost of the rule (over 60 percent) is attributable to four initial activities: limiting access to select agents and work areas; developing and implementing a security plan; developing and implementing a safety plan; and obtaining risk assessments for existing staff.

**Benefits.** The benefits to public health and safety from implementation of the rule are clear, although difficult to quantify. The benefits of the interim final rule result from the strengthened prevention that the rules provide against

either accidental or intentional release of a select agent or toxin. The cost of such an event in human life could be very high. A release caused by one of the select agents or toxins would require a complicated and expensive emergency response effort. This effort could include extensive public health measures, such as quarantine, preventative treatment and health testing for large numbers of potentially exposed persons, and extensive decontamination. Substantial costs could be incurred by hospitals and other medical facilities and institutions of government at all levels. A release, or widespread fear of one, also would create significant secondary effects. It could disrupt business, transportation, and many other aspects of normal behavior, on both a short-term and potentially a long-term basis.

The impacts resulting from the October 2001 anthrax attacks provide an example of the costs that a limited release could incur. The anthrax attacks caused five fatalities and 17 illnesses, disrupted business and government activities, closed substantial parts of the postal service, and caused widespread apprehension and changes in behavior. Costs included more than \$23 million to decontaminate one Senate office building; approximately \$2 billion in revenues lost to the postal service, and as much as \$3 billion in additional costs to the postal service for cleanup of contamination and procurement of mail-sanitizing equipment. Substantial costs due to lost productivity throughout the economy and from ongoing costs of the investigations into the incident are additional impacts.

Implementation of the interim final rule will provide a means of determining where select agents and toxins are located; ensure that their transfer, storage, and use can be tracked; provide for the screening of personnel with access to such agents or toxins; and require that entities in possession of such agents or toxins develop and implement effective means of biosafety and physical security. The benefit of these provisions is a reduced likelihood of either an accidental or intentional release of select agents and toxins and the consequent avoidance of costs associated with such a release.

In large part, the rule establishes common sense rules that already should be followed by entities conducting activities under the rule. Moreover, any costs of compliance should not be significant. The annualized cost on small entities would not exceed one percent of sales or revenue stream and the initial cost would not exceed three percent of sales or revenue stream. A

copy of the economic analysis, "Regulatory Impact Analysis, 42 CFR part 73, Select Biological Agents and Toxins, Interim Final Rule," is available from on the CDC Web site at <http://www.cdc.gov>.

Therefore, the HHS Secretary hereby certifies that the interim final rule will not have a significant economic impact on a substantial number of small entities.

#### Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532 that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

#### List of Subjects in 42 CFR Part 73

Biologics, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Transportation.

#### List of Subjects in 42 CFR Part 1003

Administrative practice and procedure, Fraud, Grant programs—health, Health facilities, Health professions, Maternal and child health, Medicaid, Medicare, Penalties, Social security.

Dated: December 4, 2002.

**Tommy G. Thompson,**  
*Secretary.*

For the reasons stated in the preamble, 42 CFR Chapters I and V are amended as follows:

1. Part 73 is added to 42 CFR chapter I to read as follows:

#### **PART 73—SELECT AGENTS AND TOXINS**

- 73.0 Applicability and related requirements.
- 73.1 Definitions.
- 73.2 Purpose and scope.
- 73.3 General prohibition.
- 73.4 HHS select agents and toxins.
- 73.5 Overlap select agents and toxins.
- 73.6 Exemptions from requirements under this part.
- 73.7 Registration.
- 73.8 Security risk assessments.
- 73.9 Responsible Official.
- 73.10 Safety.
- 73.11 Security.
- 73.12 Emergency response.
- 73.13 Training.
- 73.14 Transfers.
- 73.15 Records.
- 73.16 Inspections.
- 73.17 Notification for theft, loss, or release.
- 73.18 Administrative review.
- 73.19 Civil money penalties.

73.20 Criminal penalties.

73.21 Submissions and forms.

**Authority:** 42 U.S.C. 262a; sections 201–204, 221 and 231 of Title II of Public Law 107–188, 116 Stat. 637 (42 U.S.C. 262a)

#### **§ 73.0 Applicability and related requirements.**

(a) For those entities that on February 7, 2003, were conducting activities under a certificate of registration issued under § 72.6 of this chapter, or were lawfully possessing select agents and toxins, the provisions of part 73 and § 72.6 of this chapter are applicable as follows:

(1) On and after February 7, 2003, the following sections are applicable: §§ 73.1 through 73.6 (definitions, purpose and scope, general prohibition, HHS select agents and toxins, overlap select agents and toxins, exemptions from requirements under this part); § 73.9 (Responsible Official); § 73.10 (Safety); § 73.12 (emergency response); and §§ 73.15 through 73.21 (records; inspections; notification for theft, loss, or release; administrative review; civil money penalties; criminal penalties; and submissions and forms).

(2) On and after February 7, 2003, the provisions of § 73.13 concerning training related to safety and emergency response are applicable; and on and after September 12, 2003, the remaining provisions of § 73.13, including those concerning training related to security, are applicable.

(3) On and after March 12, 2003, the provisions of § 73.14 (transfers) are applicable.

(4) On and after April 12, 2003, the provisions of § 73.8 regarding security risk assessments for the entity, the Responsible Official, and any individual who owns or controls the entity are applicable; and on and after June 12, 2003, the remainder of § 73.8 (including the provisions regarding individual risk assessments for other than the Responsible Official or any individual who owns or controls the entity) is applicable.

(5) On and after June 12, 2003, the provisions of § 73.11 regarding the development of a security plan are applicable, and on and after September 12, 2003, the remainder of the provisions of § 73.11, including the provisions regarding the implementation of a security plan, is applicable.

(6) On and after November 12, 2003, the provisions of § 73.7 (registration) are applicable.

(b) The following also applies to those entities that on February 7, 2003, already were conducting activities under a certificate of registration issued

under § 72.6 of this chapter or already were lawfully possessing select agents and toxins:

(1) During the period from March 12, 2003, through November 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted to HHS or USDA an application package under § 73.7 certifying compliance with the provisions referred to in paragraph (a)(1) of this section and the provisions in § 73.13 concerning training related to safety and emergency response.

(2) During the period from March 12, 2003, through April 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted applications for approval under § 73.8 (security risk assessment) to the Attorney General for the entity, the Responsible Official, and any individual who owns or controls the entity.

(3) During the period from April 12, 2003, through June 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted applications for approval under § 73.8 (security risk assessments) to the Attorney General for all individuals (other than the Responsible Official and any individual who owns or controls the entity) with access to select agents and toxins.

(4) Such an entity remains:

(i) Subject to the registration provisions of § 72.6 of this chapter until November 12, 2003, when superseded by § 73.7;

(ii) Subject to the security provisions of § 72.6 of this chapter regarding development of a security plan until June 12, 2003, when superseded by the requirement to develop a security plan under § 73.11;

(iii) Subject to the security provisions of § 72.6 of this chapter regarding implementation of a security plan until September 12, 2003, when superseded by the requirement to fully comply with § 73.11;

(iv) Subject to the training provisions of § 72.6 of this chapter related to security until September 12, 2003, when superseded by the training provisions of § 73.13 relating to security; and

(v) Subject to the transfer provisions of § 72.6 of this chapter until March 12, 2003, when superseded by § 73.14.

(c) For those entities that on February 7, 2003, were not already were conducting activities under a certificate of registration issued under § 72.6 of this chapter and were not already lawfully possessing select agents and toxins, the provisions of part 73 are applicable as follows:

(1) On and after February 7, 2003, the following sections are applicable: §§ 73.1 through 73.6 (definitions, purpose and scope, general prohibition, HHS select agents and toxins, overlap select agents and toxins, exemptions from requirements under this part); §§ 73.8 through 73.10 (Security risk assessments, Responsible Official, Safety); §§ 73.12 through 73.21 (emergency response, training, transfers, records; inspections; notification for theft, loss, or release; administrative review; civil money penalties; criminal penalties; and submissions and forms) and must hold a valid permit under 9 CFR part 122 and/or 42 CFR part 71.54.

(2) The provisions of § 73.11 are applicable on and after September 12, 2003.

(3) On and after November 12, 2003, the provisions of § 73.7 (registration) are applicable.

(4) During the period from February 7, 2003, through November 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted to HHS or USDA an application package under § 73.7 certifying compliance with the provisions referred to in paragraph (b)(2) of this section.

#### § 73.1 Definitions.

For purposes of this part:

*Biological agent* means any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substance, or any naturally occurring, bioengineered, or synthesized component of any such microorganism or infectious substance, capable of causing death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism; deterioration of food, water, equipment, supplies, or material of any kind; or deleterious alteration of the environment.

*CDC* means Centers for Disease Control and Prevention of the Department of Health and Human Services.

*Diagnosis* means the analysis of specimens for the purpose of identifying or confirming the presence of a listed select agent or toxin provided that such analysis is directly related to protecting the public health or safety.

*Entity* means any government agency (Federal, State, or local), academic institution, corporation, company, partnership, society, association, firm, sole proprietorship, or other legal entity.

*HHS* means the Department of Health and Human Services.

*HHS Secretary* means the Department of Health and Human Services or his or

her designee, unless otherwise specified.

*HHS select agent or toxin* means a biological agent or toxin included in § 73.4.

*Overlap select agent or toxin* means a biological agent or toxin included in § 73.5.

*Proficiency testing* means a sponsored, time-limited analytical trial whereby one or more analytes, previously confirmed by the sponsor, are submitted to the testing laboratory for analysis and where final results are graded, scores are recorded and provided to participants, and scores for participants are evaluated.

*Principal investigator* means the one individual who is designated by the entity to direct a project or program and who is responsible to the entity for the scientific and technical direction of that project or program.

*Select agent or toxin or select agent and toxin* without identification as HHS or overlap means all of those biological agents or toxins included in §§ 73.4 and 73.5 of this part.

*Toxin* means the toxic material or product of plants, animals, microorganisms (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substances, or a recombinant or synthesized molecule, whatever their origin and method of production, and includes any poisonous substance or biological product that may be engineered as a result of biotechnology, produced by a living organism; or any poisonous isomer or biological product, homolog, or derivative of such a substance.

*United States* means the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

*USDA* means the United States Department of Agriculture.

*USDA Secretary* means the Department of Agriculture or his or her designee, unless otherwise specified.

*Verification* means the processes required to assure the accuracy, precision, and the analytical sensitivity and specificity of any procedure used for diagnosis.

#### § 73.2 Purpose and scope.

(a) This part sets forth requirements regarding the possession or use in the United States, receipt from outside the United States, or transfer within the United States, of select agents and toxins. The requirements are designed to implement provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107-188). The Act was

designed to provide protection against the effects of misuse of select agents and toxins whether inadvertent or the result of terrorist acts against the United States homeland or other criminal acts. The agents and toxins subject to requirements under this part are those that have the potential to pose a severe threat to public health and safety. They are further identified as either HHS select agents and toxins or overlap select agents and toxins. The term HHS select agents and toxins refers to those select agents and toxins subject to these regulations but not subject to USDA requirements at 9 CFR part 121. The overlap group consists of those select agents and toxins subject to requirements promulgated by the HHS Secretary under this part and also subject to corresponding requirements promulgated by USDA at 9 CFR part 121.

(b) This part does not set requirements for the exportation of select agents or toxins. The Department of Commerce has primary responsibility for regulating the exportation of microorganisms and toxins in Title 15 of the Code of Federal Regulations.

(c) This part does not set requirements for the transportation in commerce of select agents or toxins. The Department of Transportation has primary responsibility for regulating the transportation of such select agents and toxins as hazardous materials under 49 CFR parts 171 through 180.

### § 73.3 General prohibition.

An entity or individual may not possess or use in the United States, receive from outside the United States, or transfer within the United States, a select agent or toxin unless such activities are conducted for a lawful purpose and in accordance with the provisions of this part. Registration, exclusions, and exemptions are automatically revoked when any event occurs that results in an entity or individual no longer being eligible.

### § 73.4 HHS select agents and toxins.

Except for exclusions under paragraph (f) of this section, the viruses, bacteria, fungi, toxins, genetic elements, recombinant nucleic acids, and recombinant organisms specified in paragraphs (a) through (e) of this part are HHS select agents and toxins.

#### (a) Viruses:

- (1) Crimean-Congo haemorrhagic fever virus.
- (2) Ebola viruses.
- (3) Cercopithecine herpesvirus 1 (Herpes B virus).
- (4) Lassa fever virus.
- (5) Marburg virus.

(6) Monkeypox virus.

(7) South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito).

(8) Tick-borne encephalitis complex (flavi) viruses (Central European Tick-borne encephalitis, Far Eastern Tick-borne encephalitis [Russian Spring and Summer encephalitis, Kyasanur Forest disease, Omsk Hemorrhagic Fever]).

(9) Variola major virus (Smallpox virus) and Variola minor virus (Alastrim).

#### (b) Bacteria:

- (1) *Rickettsia prowazekii*.
- (2) *Rickettsia rickettsii*.
- (3) *Yersinia pestis*.

#### (c) Fungi: *Coccidioides posadasii*.

#### (d) Toxins:

- (1) Abrin.
- (2) Conotoxins.
- (3) Diacetoxyscirpenol.
- (4) Ricin.
- (5) Saxitoxin.
- (6) Tetrodotoxin.
- (7) Shiga-like ribosome inactivating proteins.

#### (e) Genetic Elements, Recombinant Nucleic Acids, and Recombinant Organisms:

(1) Select agent viral nucleic acids (synthetic or naturally derived, contiguous or fragmented, in host chromosomes or in expression vectors) that can encode infectious and/or replication competent forms of any of the select agent viruses.

(2) Nucleic acids (synthetic or naturally derived) that encode for the functional form(s) of any of the toxins listed in paragraph (d) of this section if the nucleic acids:

- (i) Are in a vector or host chromosome;
- (ii) Can be expressed *in vivo* or *in vitro*; or
- (iii) Are in a vector or host chromosome and can be expressed *in vivo* or *in vitro*.

(3) Viruses, bacteria, fungi, and toxins listed in paragraphs (a) through (d) of this section that have been genetically modified.

#### (f) Exclusions:

(1) This section does not include any select agent or toxin that is in its naturally occurring environment provided it has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source.

(2) This section does not include non-viable select agent organisms or nonfunctional toxins.

(3) Paragraph (a) of this section does not include the vaccine strain of Junin virus (Candid #1).

(4) Paragraph (d) of this section does not include the following toxins (in the

purified form or in combinations of pure and impure forms) if the aggregate amount under the control of a principal investigator does not, at any time, exceed the amount specified: 100 mg of Abrin; 100 mg of Conotoxins; 1,000 mg of Diacetoxyscirpenol; 100 mg of Ricin; 100 mg of Saxitoxin; 100 mg of Shiga-like ribosome inactivating proteins; or 100 mg of Tetrodotoxin.

(5) The HHS Secretary may exclude from this section attenuated strains of HHS select agents or toxins upon a determination that they do not pose a severe threat to the public health and safety. To apply for an exclusion an applicant must submit a request in writing in accordance with § 73.21 to the HHS Secretary establishing that the attenuated strain or toxin is eligible for exclusion. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request. An exclusion will be effective upon notification to the applicant. Exclusions will be published in the notice section of the **Federal Register** and will be listed on the CDC Web site at <http://www.cdc.gov>. Exclusions also will be referenced in this section when changes are made based on periodic reviews.

### § 73.5 Overlap select agents and toxins.

Except for exclusions under paragraph (f) of this section, the viruses, bacteria, fungi, toxins, genetic elements, recombinant nucleic acids, and recombinant organisms specified in paragraphs (a) through (e) of this part are overlap select agents and toxins.

#### (a) Viruses:

- (1) Eastern Equine Encephalitis virus.
- (2) Nipah and Hendra Complex viruses.
- (3) Rift Valley fever virus.
- (4) Venezuelan Equine Encephalitis virus.

#### (b) Bacteria:

- (1) *Bacillus anthracis*.
- (2) *Brucella abortus*.
- (3) *Brucella melitensis*.
- (4) *Brucella suis*.
- (5) *Burkholderia mallei* (formerly *Pseudomonas mallei*).
- (6) *Burkholderia pseudomallei* (formerly *Pseudomonas pseudomallei*).

(7) Botulinum neurotoxin producing species of *Clostridium*.

#### (8) *Coxiella burnetii*.

#### (9) *Francisella tularensis*.

#### (c) Fungi: *Coccidioides immitis*.

#### (d) Toxins:

- (1) Botulinum neurotoxins.
- (2) *Clostridium perfringens* epsilon toxin.
- (3) Shigatoxin.
- (4) Staphylococcal enterotoxins.
- (5) T-2 toxin.

(e) Genetic elements, recombinant nucleic acids, and recombinant organisms:

(1) Select agent viral nucleic acids (synthetic or naturally derived, contiguous or fragmented, in host chromosomes or in expression vectors) that can encode infectious and/or replication competent forms of any of the select agent viruses.

(2) Nucleic acids (synthetic or naturally derived) that encode for the functional form(s) of any of the toxins listed in paragraph (d) of this section if the nucleic acids:

(i) Are in a vector or host chromosome;

(ii) Can be expressed *in vivo* or *in vitro*; or

(iii) Are in a vector or host chromosome and can be expressed *in vivo* or *in vitro*.

(3) Viruses, bacteria, fungi, and toxins listed in paragraphs (a) through (d) of this section that have been genetically modified.

(f) Exclusions:

(1) This section does not include any select agent or toxin that is in its naturally occurring environment provided that it has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source.

(2) This section does not include non-viable select agent organisms or nonfunctional toxins.

(3) Paragraph (a) does not include the vaccine strain of Rift Valley fever virus (MP-12) or Venezuelan Equine encephalitis virus vaccine strain TC-83.

(4) Paragraph (d) of this section does not include the following toxins (in the purified form or in combinations of pure and impure forms) if the aggregate amount under the control of a principal investigator does not, at any time, exceed the amount specified: 0.5 mg of Botulinum neurotoxins; 5 mg of Staphylococcal enterotoxins; 100 mg of *Clostridium perfringens* epsilon toxin; 100 mg of Shigatoxin; or 1,000 mg of T-2 toxin.

(5) The HHS Secretary, after consultation with the USDA Secretary, may exclude from this section attenuated strains of overlap select agents or toxins upon a determination that they do not pose a severe threat to the public health and safety and do not meet the criteria in 9 CFR part 121 for inclusion. To apply for an exclusion, an applicant must submit a request in writing in accordance with § 73.21 to the HHS Secretary or the USDA Secretary in accordance with 9 CFR part 121, establishing that the attenuated strain is eligible for exclusion. In response to an application submitted to

the HHS Secretary, the HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request. An exclusion will be effective upon notification to the applicant. Exclusions will be published in the notice section of the **Federal Register** and will be listed on the CDC Web site at <http://www.cdc.gov>. Also, they will be referenced in this section when changes are made based on periodic reviews.

#### **§ 73.6 Exemptions from requirements under this part.**

(a) An entity is exempt from the provisions of this part, other than § 73.14 (transfer), provided that all of the following apply:

(1) The only activities conducted by the entity that are subject to this part concern select agents or toxins that are contained in specimens or in isolates from specimens presented for diagnosis, verification, or proficiency testing;

(2) Upon identification of a select agent or toxin as the result of diagnosis or verification, the entity immediately reports to the HHS Secretary by telephone, facsimile, or e-mail in accordance with § 73.21 any of the following: Variola major virus (Smallpox virus) and Variola minor (Alastrim), *Bacillus anthracis*, *Yersinia pestis*, Botulinum neurotoxins, *Francisella tularensis*, Ebola viruses, Marburg virus, Lassa fever virus, and South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito);

(3) The entity reports as required under Federal, State, or local law, to appropriate authorities;

(4) After the diagnosis, verification, or proficiency testing, the entity either transfers the specimens or isolates containing a select agent or toxin from the specimens to a facility eligible for receiving them under this part, or destroys them on-site by autoclaving, incineration, or by a sterilization or neutralization process sufficient to cause inactivation;

(5) The entity transfers or destroys those select agents or toxins used for diagnosis or testing within seven days after identification, unless directed otherwise by the Federal Bureau of Investigation or other law enforcement entity after consultation with the HHS Secretary; and

(6) The entity transfers or destroys those select agents or toxins used for proficiency testing within 90 days after receipt; and

(7) The entity prepares a record of the identification and transfer or destruction on CDC Form 0.1318, submits the completed form to the HHS

Secretary in accordance with § 73.21 within seven days after identification, and maintains a copy of the record for a period of three years.

(b) Unless the HHS Secretary issues an order to an entity making specific provisions of this part applicable to protect the public health and safety, products that are, bear, or contain listed select agents or toxins that are cleared, approved, licensed, or registered under any of the following laws, are exempt from the provisions of this part insofar as their use is only for the approved purpose and meets the requirements of such laws:

(1) The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*);

(2) Section 351 of the Public Health Service Act pertaining to biological products (42 U.S.C. 262);

(3) The Act commonly known as the Virus-Serum-Toxin Act (21 U.S.C. 151-159); or

(4) The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*).

(c) The HHS Secretary may exempt from the requirements of this part on a case-by-case basis an investigational product that is, bears, or contains a select agent or toxin, when such product is being used in an investigation authorized under a Federal Act referred to in paragraph (b) of this section and additional regulation under this part is not necessary to protect public health and safety. To apply for an exemption an applicant must submit to the HHS Secretary in accordance with § 73.21 a completed CDC Form 0.1317 certifying that the product is being used in an investigation authorized under a Federal Act referred to in paragraph (b) of this section, and that additional regulation under this part is not necessary to protect public health and safety. The HHS Secretary shall make a determination regarding the application within 14 calendar days after receipt, provided the application meets all of the requirements of this section and the application establishes that the investigation has been authorized under the cited Act. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request. The applicant must notify the HHS Secretary when an authorization for an investigation no longer exists. This exemption automatically ceases when such authorization is no longer in effect.

(d) The HHS Secretary may temporarily exempt an entity from the requirements of this part, in whole or in part, based on a determination that the exemption is necessary to provide for the timely participation of the entity in

response to a domestic or foreign public health emergency. With respect to the emergency involved, the exemption may not exceed 30 days, except that the HHS Secretary may grant one extension of an additional 30 days. To apply for an exemption or an extension of an exemption, an applicant must submit to the HHS Secretary in accordance with § 73.21 a completed CDC Form 0.1317 establishing the need to provide for the timely participation of the entity in a response to a domestic or foreign public health emergency. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request.

(e) Upon request of the USDA Secretary, after the USDA Secretary has granted an exemption under section 212(g)(1)(D) of the Agricultural Bioterrorism Protection Act of 2002 based on a finding that there is an agricultural emergency, the HHS Secretary may temporarily exempt an entity from the applicability of the requirements of this part, in whole or in part, to provide for the timely participation of the entity in response to the agricultural emergency. With respect to the emergency, the exemption under this part may not exceed 30 days, except that upon the request of the USDA Secretary, the HHS Secretary may grant one extension of an additional 30 days.

### § 73.7 Registration.

(a) An entity may not possess or use in the United States, receive from outside the United States, or transfer within the United States, any select agent or toxin unless the entity has been granted a certificate of registration by the HHS Secretary or the USDA Secretary.

(b) To apply for a certificate of registration an entity must:

(1) Obtain a registration application number from the HHS Secretary and then apply for approval under § 73.8 for the entity, the Responsible Official, and any individual who owns or controls the entity; and

(2) In accordance with § 73.21, submit the information requested to the HHS Secretary or the USDA Secretary as specified in the registration application package [CDC Form 0.1319].

Information submitted will be used to determine whether the applicant would be eligible to conduct activities under this part. Minimum information required includes:

(i) Identification information (*e.g.*, name, address, contact numbers, identification number assigned by the Attorney General for compliance with § 73.8);

(ii) The name, source, and characterization information on select agents and toxins included in the registration, and quantities held at the time of the application;

(iii) The location, including building and room and floor plans for each building and room, where each select agent or toxin will be stored or used;

(iv) Information addressing safety, security, emergency response plans, and training, including descriptions of any equivalent measures adopted pursuant to § 73.11(d);

(v) The name, position, and identification information regarding the Responsible Official, including the identification number assigned by the Attorney General for compliance with § 73.8;

(vi) A list of individuals who will need access to select agents and toxins;

(vii) A certification statement signed by the Responsible Official attesting to the accuracy of the information submitted; and

(viii) Any other information necessary for the determination.

(c) An application that covers any HHS select agents or toxins (regardless of whether it also covers overlap select agents or toxins) must be submitted to the HHS Secretary in accordance with § 73.21. An application that covers only overlap select agents or toxins may be submitted to either the HHS Secretary or the USDA Secretary.

(d) A certificate of registration will be valid only for the specific select agents and toxins, and the specified activities and locations that are consistent with the information provided by the entity upon which the certificate of registration or amendment was granted. The Responsible Official must promptly notify the HHS Secretary in writing in accordance with § 73.21, if a change occurs in any information submitted to the HHS Secretary in the application for the certificate of registration or amendments. This includes modifications to the list of individuals approved under § 73.8, changes in area of work, or changes in protocols or objectives of studies. To apply for an amendment to a certificate of registration to add select agents or toxins or to change specified activities or locations, an entity must obtain the relevant portion of the registration application package and submit the information requested in the package to the agency that issued the certificate of registration. The package must be submitted to the appropriate address specified in the package.

(e) In response to an application to the HHS Secretary for a certificate of registration or amendment for select

agents and toxins, the HHS Secretary will issue a certificate of registration or amendment if it is determined that the stated activities would be lawful (based on information submitted by the applicant or otherwise obtained by the HHS Secretary) and meet the requirements of this part. Otherwise, the application for a certificate of registration or amendment will be denied. The HHS Secretary will issue a certificate of registration or amendment for an overlap select agent or toxin only if the USDA Secretary concurs that the requirements for obtaining a certificate of registration or amendment under 9 CFR part 121 have been met. The determination of whether a certificate of registration or amendment will be granted may be contingent upon inspection or submission of additional information.

(f) A certificate of registration will cover activities at only one general physical location (a building or a complex of buildings at a single mailing address).

(g) Unless terminated sooner in accordance with this paragraph, a certificate of registration will be valid for up to three years. To obtain a new certificate of registration an entity must submit a new application. (Note: To help ensure timely processing of an application for a certificate of registration or amendment, the applicant should submit the application at least eight weeks prior to the expiration date.)

(1) The HHS Secretary will terminate a certificate of registration based on a determination that the recipient no longer conducts activities covered by the certificate.

(2) Also, the HHS Secretary may terminate a certificate of registration based on a security risk assessment under § 73.8 or failure to comply with the provisions of this part, and may take such action immediately if necessary to protect the public health or safety. Upon such termination, any select agent or toxin in the possession of the entity must be destroyed or transferred as directed by the HHS Secretary.

(h) An entity must provide notice in writing to the HHS Secretary in accordance with § 73.21 at least five business days before destroying a select agent or toxin, if the destruction would be for the purpose of discontinuing activities with a select agent or toxin covered by a certificate of registration. This will allow the HHS Secretary to observe the destruction or take other action as appropriate.

**§ 73.8 Security risk assessment.**

(a) An entity may not possess or use in the United States, receive from outside the United States, or transfer within the United States, any select agent or toxin unless approved by the HHS Secretary or the USDA Secretary based on a security risk assessment by the Attorney General. This paragraph does not apply to Federal, State, or local governmental agencies, but does apply to the Responsible Official and others working for or otherwise acting on behalf of such agencies.

(b) An entity may not provide an individual access to a select agent or toxin and an individual may not access a select agent or toxin, unless the individual is approved by the HHS Secretary or the USDA Secretary, based on a security risk assessment by the Attorney General.

(c) To obtain a security risk assessment under this section, an entity must submit to the Attorney General the information requested for the entity, the Responsible Official, any individual who owns or controls the entity, and any other individuals required to obtain approval under this section. The determinations regarding approval will be made by the agency that is responsible for making determinations regarding the corresponding certificate of registration. An entity will receive prompt notice of action taken in response to a request for approval for the entity, the Responsible Official, and individuals. An individual will receive prompt notice of a denial of approval.

(d) The Attorney General will conduct a security risk assessment on entities and individuals whose identifying information is properly submitted. Based on the security risk assessment, the Attorney General will notify the HHS Secretary if the Attorney General identifies any entity, individual who owns or controls the entity, or any other individual who is:

(1) A restricted person under 18 U.S.C. 175b; or

(2) Reasonably suspected by any Federal law enforcement or intelligence agency of:

(i) Committing a crime specified in 18 U.S.C. 2332b(g)(5);

(ii) Having a knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or

(iii) Being an agent of a foreign power (as defined in 50 U.S.C. 1801).

(e) The HHS Secretary will deny or revoke access to any select agent or toxin to an entity or individual identified by the Attorney General as a

restricted person under paragraph (d)(1). The HHS Secretary will deny or revoke access to any select agent or toxin to an entity or individual identified by the Attorney General as meeting the criteria of paragraph (d)(2) unless determined by the HHS Secretary to be warranted in the interest of the public health and safety or national security. For individuals meeting the criteria of paragraph (d)(2) the HHS Secretary may provide a limited approval for a specified time based upon the finding that circumstances warrant such action in the interest of the public health and safety or national security.

(f) Unless a shorter period is granted under paragraph (e) of this section, an approval for an entity or individual under this section will be valid for five years unless terminated sooner. The HHS Secretary may terminate an approval for an entity or an individual based on a request from the entity or individual, a security risk assessment under this section, or a failure to comply with the provisions of this part, and may take such action immediately if necessary to protect the public health and safety, or national security.

(g) The HHS Secretary will request the Attorney General to expedite the review process for an individual and will take action to expedite the HHS Secretary's review process for an individual upon a showing of good cause (e.g., public health or agricultural emergencies, national security, impending expiration of a research grant, a short-term visit by a prominent researcher). To apply for an expedited review, an entity must submit a request in writing in accordance with § 73.21 to the HHS Secretary establishing the need for such action. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request.

**§ 73.9 Responsible Official.**

(a) As a condition of conducting activities regulated under this part, an entity must identify and authorize an individual as the Responsible Official. The Responsible Official may identify one or more individuals, any of whom may serve as the Alternate Responsible Official when the Responsible Official is unavailable. The Responsible Official and all individuals identified to serve as the Alternate Responsible Official must meet all of the qualifications for a Responsible Official. The Responsible Official and all Alternate Responsible Officials must:

(1) Be approved under § 73.8;

(2) Be familiar with the requirements of this part; and

(3) Have authority and responsibility to ensure that the requirements of this part are met, on behalf of the entity.

(b) For purposes of this part, the Alternate Responsible Official acting in the absence of the Responsible Official may conduct all of those activities required under this part to be performed by the Responsible Official.

(c) The Responsible Official is responsible for ensuring compliance with the regulations, including:

(1) Developing and implementing safety, security and emergency response plans in accordance with § 73.10—§ 73.12;

(2) Allowing only approved individuals to have access to select agents or toxins in accordance with § 73.8 and § 73.11;

(3) Providing appropriate training for safety, security and emergency response in accordance with § 73.13;

(4) Transferring select agents or toxins in accordance with § 73.14;

(5) Providing timely notice of any theft, loss, or release of a select agent or toxin in accordance with § 73.13;

(6) Maintaining detailed records of information necessary to give a complete accounting of all activities related to select agents or toxins in accordance with § 73.15.

(7) The reporting of the identification of a select agent or toxin as a result of diagnosis, verification or proficiency testing in accordance with § 73.6.

**§ 73.10 Safety.**

(a) An entity subject to the provisions of this part, must develop and implement a safety plan. In developing a safety plan, an entity should consider:

(1) The biosafety standards and requirements for BSL 2, 3, or 4 operations, as they pertain to the respective select agents, that are contained in the CDC/NIH publication, "Biosafety in Microbiological and Biomedical Laboratories," including all appendices except Appendix F. Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 371954, Pittsburgh, Pennsylvania, 75250-7954 or call in the Washington, DC metropolitan area 202-512-1800 or outside that area call toll free 1-866-512-1800. Copies may be inspected at the Centers for Disease Control and Prevention, 1600 Clifton Road, Mail Stop E-79, Atlanta, Georgia. This publication is also available on the CDC Web site at <http://www.cdc.gov>.

(2) The specific requirements for handling toxins found in 29 CFR 1910.1450, "Occupational Exposure to Hazardous Chemicals in Laboratories" and/or 29 CFR 1910.1200, "Hazard



Communication," whichever applies and specific provisions for handling toxins found in Appendix I in the CDC/NIH publication, "Biosafety in Microbiological and Biomedical Laboratories,"

(3) For provisions of the safety plan relating to genetic elements, recombinant nucleic acids and recombinant organisms, the "NIH Guidelines for Research Involving Recombinant DNA Molecules," (NIH Guidelines). This includes, among other things, provisions regarding risk assessment, physical containment, biological containment, and local review and applies to all recombinant DNA research, regardless of funding. Copies may be obtained from the Centers for Disease Control and Prevention, 1600 Clifton Road, Mail Stop E-79, Atlanta, Georgia, 30333. Copies may be inspected at the Centers for Disease Control and Prevention, 1600 Clifton Road, Mail Stop E-79, Atlanta, Georgia. The "NIH Guidelines for Research Involving Recombinant DNA Molecules," is also available on the CDC Web site at <http://www.cdc.gov>.

(b) The Responsible Official or his or her designee must conduct regular inspections (at least annually) of the laboratory where select agents and toxins are stored or used to ensure compliance with all of the procedures and protocols of the safety plan. The results of these inspections must be documented, and any deficiencies identified during inspections must be corrected.

(c) An entity may not conduct the following experiments unless approved by the HHS Secretary after consultation with experts:

(1) Experiments utilizing recombinant DNA that involve the deliberate transfer of a drug resistance trait to select agents that are not known to acquire the trait naturally, if such acquisition could compromise the use of the drug to control disease agents in humans, veterinary medicine, or agriculture.

(2) Experiments involving the deliberate formation of recombinant DNA containing genes for the biosynthesis of select toxins lethal for vertebrates at an LD50 < 100 ng/kg body weight.

(d) [Reserved]

#### **§ 73.11 Security.**

(a) An entity must develop and implement a security plan establishing policy and procedures that ensure the security of areas containing select agents and toxins. The security plan must be based on a systematic approach in which threats are defined, vulnerabilities are examined, and risks

associated with those vulnerabilities are mitigated with a security systems approach.

(b) The plan must:

(1) Describe inventory control procedures, minimal education and experience criteria for those individuals with access to select agents or toxins, physical security, and cyber security;

(2) Contain provisions for routine cleaning, maintenance, and repairs; provisions for training personnel in security procedures; provisions for securing the area (*e.g.*, card access, key pads, locks) and protocols for changing access numbers or locks following staff changes;

(3) Describe procedures for loss or compromise of keys, passwords, combinations, etc.;

(4) Contain procedures for reporting suspicious persons or activities, loss or theft of listed agents or toxins, release of listed agents or toxins, or alteration of inventory records;

(5) Contain provisions for the control of access to containers where listed agents and toxins are stored; and procedures for reporting and removing unauthorized persons;

(6) Contain provisions for ensuring that all individuals with access, including workers and visitors, understand security requirements and are trained and equipped to follow established procedures;

(7) Establish procedures for reporting and removing unauthorized persons; and

(8) Establish procedures for securing the area when individuals approved under § 73.8 are not present (*e.g.*, card access system, key pads, locks), including protocols for changing access numbers or locks following staff changes.

(c) The security plan must be reviewed by the RO at least annually and after any incident.

(d) With respect to areas containing select agents and toxins, the entity must adhere to the following security requirements or implement measures to achieve an equivalent or greater level of security as the provisions below:

(1) Allow unescorted access only to individuals who have been approved under § 73.8 and who are performing a specifically authorized function during hours required to perform the defined job (including delivery to an outside shipping agent for transportation in commerce);

(2) Allow individuals not approved under § 73.8 to conduct routine cleaning, maintenance, repairs, and other non-laboratory functions only when escorted and continually

monitored by individuals approved under § 73.8;

(3) Provide for the control of access to containers where select agents and toxins are stored by requiring freezers, refrigerators, cabinets, and other containers where stocks of select agents and toxins are stored to be locked (*e.g.*, card access system, lock boxes) when they are not in the direct view of approved staff, and by using other monitoring measures as needed, such as video surveillance;

(4) Require the inspection of all packages upon entry to and exit from the area;

(5) Establish a protocol for intra-entity transfers, including provisions for ensuring that the packaging, and movement from a laboratory to another laboratory or from a laboratory to a shipping place, is conducted under the supervision of an individual approved under § 73.8;

(6) Require that each approved individual under 73.8 does not share with any other person, his or her unique means (*e.g.*, keycards or passwords) of accessing the area or select agent or toxin;

(7) Require that each individual approved under § 73.8 report any of the following immediately to the Responsible Official:

(i) Any loss or compromise of their keys, passwords, combinations, etc.;

(ii) Any suspicious persons or activities;

(iii) Any loss or theft of select agents or toxins;

(iv) Any release of select agents or toxins; and

(v) Any sign that inventory and use records of select agents or toxins have been altered or otherwise compromised.

(e) The entity must separate areas where select agents and toxins are stored or used from the public areas of the buildings.

(f) Upon termination of the use, a select agent or toxin must be

(1) Securely stored in accordance with the requirements of this section;

(2) Transferred to another registered facility in accordance with § 73.14; or

(3) Destroyed on-site by autoclaving, incineration, or another recognized sterilization or neutralization process.

#### **§ 73.12 Emergency response.**

(a) An entity required to register under this part must develop and implement an emergency response plan that meets the requirements of OSHA Hazardous waste operations and emergency response standard at 29 CFR 1910.120. Nothing in this section is to supersede or preempt the enforcement of the emergency response requirements

imposed by the other statute or regulation.

(b) The emergency response plan must be coordinated with any entity-wide plans. The plan must address such events as bomb threats, severe weather (hurricanes, floods), earthquakes, power outages, and other natural disasters or emergencies.

(c) The emergency response plan must address the following:

- (1) The hazards associated with the use of the select agents and toxins;
- (2) Any hazards associated with response actions that could lead to a spread of a select agent or toxin;
- (3) Planning and coordination with outside parties;
- (4) Personnel roles, lines of authority, training, and communication;
- (5) Emergency recognition and prevention;
- (6) Safe distances and places of refuge;
- (7) Site security and control;
- (8) Evacuation routes and procedures;
- (9) Decontamination;
- (10) Emergency medical treatment and first aid;
- (11) Emergency alerting and response procedures;
- (12) Critique of response and follow-up;
- (13) Personal protective and emergency equipment; and
- (14) Special procedures needed to address the hazards of specific agents.

#### § 73.13 Training.

(a) An entity required to register under this part and falls outside of the OSHA Bloodborne Pathogen Standard 29 CFR 1910.1030(a) must provide information and training on safety and security for working with select agents and toxins to each individual approved for access under § 73.8 and each unapproved individual working in, or visiting, areas where select agents and toxins are handled or stored. The information and training must meet the requirements of this section and must ensure that all individuals who work in, or visit, the areas understand the hazards of select agents and toxins present in the area.

(b) The entity must provide information and training at the time of an individual's initial assignment to a work area where select agents or toxins are present and prior to assignments involving new exposure situations. The entity must provide refresher training annually.

(c) The Responsible Official must provide appropriate training in safety, containment, and security to all individuals with access to areas where select agents and toxins are handled or stored.

(d) In lieu of initial training for those individuals already involved in handling select agents or toxins, the Responsible Official may certify in writing that the individual has the required knowledge, skills, and abilities to safely carry out the duties and responsibilities.

(e) The entity must ensure that each individual with access to areas where select agents or toxins are handled or stored received and understood the training required by this section unless certified under paragraph (d) of this section. The entity must record the identity of the individual trained, the date of training, and the means used to verify that the employee understood the training.

#### § 73.14 Transfers.

A select agent or toxin may not be transferred from one entity to another entity within the United States (regardless of whether the transfer is interstate or intrastate), or received by an entity in the United States from an entity outside the United States, unless:

- (a) The sender:
  - (1) Has a certificate of registration that covers the transfer of the particular select agent or toxin to be transferred,
  - (2) Meets the exemption requirements under § 73.6 (a) for the particular select agent or toxin to be transferred, or
  - (3) Is transferring the select agent or toxin from outside the United States (and all import requirements are met);
- (b) The recipient has a certificate of registration that includes the particular select agent or toxin to be transferred;
- (c) Prior to the transfer, the recipient and sender completes CDC Form EA-101, and the recipient submits to the HHS Secretary in accordance with § 73.21 a completed CDC Form EA-101.
- (d) CDC has authorized the transfer based on the finding that the recipient has a certificate of registration covering the transfer of the select agent or toxin;
- (e) The sender complies with all applicable laws concerning packaging and shipping;
- (f) The Responsible Official of the recipient provides a completed paper copy or facsimile transmission of CDC Form EA-101 to the sender and to the HHS Secretary within 2 business days of receipt of the select agent or toxin; and
- (g) The recipient immediately reports to the HHS Secretary if the select agent or toxin has not been received within 48 hours after the expected delivery time, or if the package received containing select agents or toxins has been leaking or was otherwise damaged.
- (h) When the select agents or toxins are consumed or destroyed after a transfer, the recipient must within five

business days report such fact to the HHS Secretary in accordance with § 73.21 on a CDC Form EA-101.

**Note to § 73.14:** This section does not cover transfers within an entity when the sender and the recipient are covered by the same certificate of registration.

#### § 73.15 Records.

The Responsible Official must maintain complete records relating to the activities covered by this Part. Such records include:

(a) An entity required to register under this part must maintain an up-to-date, accurate list of the individuals approved under § 73.8 for access to select agents and toxins.

(b) The entity must maintain an accurate, current inventory of each select agent and toxin held. The inventory records must include the following information for each select agent and toxin:

- (1) The name, characteristics, and source data;
  - (2) The quantity held on the date of the first inventory (toxins only);
  - (3) The quantity acquired, the source, and date of acquisition;
  - (4) The quantity, volume, or mass destroyed or otherwise disposed of and the date of each such action;
  - (5) The quantity used and date(s) of the use (toxins only);
  - (6) The quantity transferred, the date of transfer, and individual to whom it was transferred (this includes transfers within an entity when the sender and the recipient are covered by the same certificate of registration);
  - (7) The current quantity held (toxins only);
  - (8) Any select agent or toxin lost, stolen, or otherwise unaccounted for; and
  - (9) A written explanation of any discrepancies.
- (c) The entity must maintain the following records:
- (1) For access to the select agents or toxins:
    - (i) The name of each individual who has accessed any select agent or toxin;
    - (ii) The select agent or toxin used;
    - (iii) The date when the select agent or toxin was removed, if removed from long-term storage or holdings for stock cultures;
    - (iv) The quantity removed (toxins only);
    - (v) The date the select agent or toxin was returned to the long-term storage or holdings for stock cultures; and
    - (vi) The quantity returned (toxins only);
  - (2) For access to the area where select agents are used or stored:

(i) The name of each individual who has accessed the area;

(ii) The date and time the individual entered the area;

(iii) The date and time the individual left the area; and

(iv) For individuals not approved under § 73.8, the individual approved under § 73.8 who accompanied the unapproved individual into the area.

(d) The entity must implement a system to ensure that all records and databases created under paragraphs (b) and (c) of this section are accurate, and that the authenticity of records may be verified.

(e) The entity must create a record concerning inspections conducted under § 73.10(b).

(f) Safety, security, and emergency response plans.

(g) Training records.

(h) Transfer documents (CDC Form EA-101) and permits.

(i) Safety and security incident reports.

(j) The entity must maintain all records created under this part for three years.

#### § 73.16 Inspections.

The HHS Secretary, without prior notification and with or without cause, shall be allowed to inspect any site at which activities regulated by this part are conducted and shall be allowed to inspect and copy any records relating to the activities covered by this part.

#### § 73.17 Notification for theft, loss, or release.

(a) Upon discovery of a theft or loss of a select agent or toxin, an entity required to register under this part must immediately notify the HHS Secretary and State and local law enforcement. The notification must be reported to the HHS Secretary by either telephone, facsimile, or e-mail in accordance with § 73.21.

(b) Thefts or losses must be reported whether the select agent or toxin is subsequently recovered or the responsible parties are identified.

(c) When reporting a theft or loss, the entity must provide the following information:

(1) The name of the select agent or toxin and any identifying information (*e.g.*, strain or other characterization information);

(2) An estimate of the quantity lost or stolen;

(3) An estimate of the time during which the theft or loss occurred; and

(4) The location (building, room) from which the theft or loss occurred.

(d) The entity shall immediately notify the HHS Secretary and State and

local public health agencies of any release of a select agent or toxin causing occupational exposure or release outside of the primary containment barriers. The report must be made to the HHS Secretary by telephone, facsimile, or e-mail in accordance with § 73.21.

(e) When reporting a release, the entity must provide the following information:

(1) The name of the select agent or toxin and any identifying information (*e.g.*, strain or other characterization information);

(2) An estimate of the quantity released;

(3) The time and duration of the release;

(4) The environment into which the release occurred (*e.g.*, in building or outside of building, waste system);

(5) The location (building, room) from which the release occurred;

(6) The number of individuals potentially exposed at the facility.

(7) Actions taken to respond to the release; and

(8) Hazards posed by the release.

(f) Within seven calendar days of theft, loss, or release, the entity must submit a follow-up report in writing to the HHS Secretary on CDC Form 0.1316 in accordance with § 73.21.

#### § 73.18 Administrative review.

An entity may obtain review of a decision denying or revoking a certificate of registration under § 73.7 and the affected entity or individual may obtain review of a decision denying or revoking approval under § 73.8 by requesting such review in writing within 30 calendar days after the adverse decision. The request for review must state the factual basis for the review, which will be carried out in accordance with 42 U.S.C. 262a(e)(7). Where the adverse decision is in whole or in part based upon notification by the Attorney General under 42 U.S.C. 262a (e)(3), the request for review will be forwarded to the Attorney General for the Attorney General's review and final notification to the HHS Secretary.

#### § 73.19 Civil money penalties.

(a) The Inspector General of the Department of Health and Human Services is delegated authority to conduct investigation and to impose civil money penalties against any individual or entity in accordance with regulations in 42 CFR part 1003 for violation of the regulations in this part, as authorized by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107-188). The delegation of authority includes all powers contained in section

6 of the Inspector General Act of 1978 (5 U.S.C. App.).

(b) The administrative law judges in, assigned to, or detailed to the Departmental Appeals Board (DAB) have been delegated authority to conduct hearings and to render decisions with respect to the imposition of civil money penalties, as authorized by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107-188). This delegation includes, but is not limited to, the authority to administer oaths and affirmations, to subpoena witnesses and documents, to examine witnesses, to exclude or receive and give appropriate weight to materials and testimony offered as evidence, to make findings of fact and conclusions of law, and to determine the civil money penalties to be imposed.

(c) The DAB of the Department of Health and Human Services is delegated authority to make final determinations with respect to the imposition of civil money penalties for violations of the regulations of this part.

#### § 73.20 Criminal Penalties.

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107-188) provides specific criminal penalties for violation of provisions of this part. This is in addition to any other criminal penalties that would apply for violation of provisions of this part.

#### § 73.21 Submissions and forms.

(a) CDC forms referred to in this part, including registration application packages, may be obtained on the Select Agent Program Web site at <http://www.cdc.gov>, or by requesting them in writing from the Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., Mail Stop E 79, Atlanta, Georgia 30333. Forms (including any required attachments) must be submitted in accordance with the instructions on the form.

(b) Applications, requests, notifications, and other information required to be submitted to the HHS Secretary in writing, but not required to be on a form, unless otherwise specified, must be submitted to the Select Agent Program, Center for Disease Control and Prevention, 1600 Clifton Road, NE., Mail Stop E 79, Atlanta, Georgia 30333, or by e-mail at [lrsat@cdc.gov](mailto:lrsat@cdc.gov).

(c) Information not required to be submitted to the HHS Secretary on a form may be submitted to the Select Agent Program, Center for Disease Control and Prevention, 1600 Clifton

Road, NE., Mail Stop E 79, Atlanta, Georgia 30333, or by e-mail at [lrsat@cdc.gov](mailto:lrsat@cdc.gov).

(d) If an application or request submitted to the HHS Secretary is incomplete or additional information is needed to allow the decision maker to make a determination, the HHS Secretary will notify the applicant or requester in writing of the deficiency and request additional information. If the applicant or requester fails to respond within 30 calendar days (or within such time period agreed upon by the applicant or requester and the HHS Secretary) the application or request will be deemed abandoned.

(e) You may request forms or other information from the USDA at the following address: APHIS, Veterinary Services, National Center for Import and Export, 4700 River Road Unit 40, Riverdale, MD 20737-1231.

### **PART 1003—CIVIL MONEY PENALTIES, ASSESSMENTS AND EXCLUSIONS**

1. The authority citation for part 1003 is revised to read as follows:

**Authority:** 42 U.S.C. 262a, 1302, 1320-7, 1320a-7a, 1320b-10, 1395u(j), 1395u(k), 1395cc(j), 1395dd(d)(1), 1395mm, 1395nn(g), 1395ss(d), 1396b(m), 11131(c), and 11137(b)(2).

2. Section 1003.100 is amended by revising paragraph (a), republishing the introductory text for paragraphs (b) and (b)(1), revising paragraphs (b)(1)(xiv) and (b)(1)(xv), and by adding a new paragraph (b)(1)(xvi) to read as follows:

#### **§ 1003.100 Basis and purpose.**

(a) *Basis.* This part implements sections 1128(c), 1128A, 1140, 1876(i)(6), 1877(g), 1882(d) and 1903(m)(5) of the Social Security Act;

sections 421(c) and 427(b)(2) of Pub. L. 99-660; and section 201(i) of Pub. L. 107-188 (42 U.S.C. 1320-7(c), 1320a-7a, 1320b-10, 1395mm, 1395ss(d), 1396b(m), 11131(c), 11137(b)(2) and 262).

(b) *Purpose.* This part—

(1) Provides for the imposition of civil money penalties and, as applicable, assessments against persons who—

(xiv) Have submitted, or caused to be submitted, certain prohibited claims, including claims for services rendered by excluded individuals employed by or otherwise under contract with such person, under one or more Federal health care programs;

(xv) Violate the Federal health care programs' anti-kickback statute as set forth in section 1128B of the Act; or

(xvi) Violate the provisions of part 73 of this chapter, implementing section 351A(b) and (c) of the Public Health Service Act, with respect to the possession and use within the United States, receipt from outside the United States, and transfer within the United States, of select agents and toxins in use, or transfer of listed biological agents and toxins.

3. Section 1003.101 is amended by republishing the introductory text and by adding, in alphabetical order, a definition for the term "Select agents and toxins" to read as follows:

#### **§ 1003.101 Definitions.**

For purposes of this part:

*Select agents and toxins* means agents and toxins that are listed by the HHS Secretary as having the potential to pose a severe threat to public health and safety, in accordance with section

351A(a)(1) of the Public Health Service Act.

4. Section 1003.102 is amended by republishing the introductory text for paragraph (b), and by adding a new paragraph (b)(16) to read as follows:

#### **§ 1003.102 Basis for civil money penalties and assessments.**

(b) The OIG may impose a penalty and, where authorized, an assessment against any person (including an insurance company in the case of paragraphs (b)(5) and (b)(6) of this section) whom it determines in accordance with this part—

(16) Is involved in the possession or use in the United States, receipt from outside the United States, or transfer within the United States, of select agents and toxins in violation of part 73 of this chapter as determined by the HHS Secretary, in accordance with sections 351A(b) and (c) of the Public Health Service Act.

5. Section 1003.103 is amended by adding a new paragraph (l) to read as follows:

#### **§ 1003.103 Amount of penalty.**

(l) For violations of section 351A(b) or (c) of the Public Health Service Act and 42 CFR part 73, the OIG may impose a penalty of not more than \$250,000 in the case of an individual, and not more than \$500,000 in the case of any other person.

[FR Doc. 02-31370 Filed 12-9-02; 4:03 pm]

**BILLING CODE 4160-17-P**