frivolous, insubstantial, or outside the scope of the rule will not be considered significant or adverse under this procedure. A comment recommending a regulation change in addition to those in the rule would not be considered a significant adverse comment unless the comment states why the rule would be ineffective without the additional change. In addition, if a significant adverse comment applies to an amendment, paragraph, or section of this rule and that provision can be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subjects of a significant adverse comment.

If any significant adverse comments are received during the comment period, FDA will publish, before the effective date of this direct final rule, a document withdrawing the direct final rule. If we withdraw the direct final rule, any comments received will be applied to the proposed rule and will be considered in developing a final rule using the usual notice-and-comment procedures.

If FDA receives no significant adverse comments during the specified comment period, FDA intends to publish a document, before the effective date of the direct final rule, confirming the effective date.

IV. Analysis of Impacts

A. Review Under Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Act of 1995

FDA has examined the impacts of the direct final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this direct final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the direct final rule is removing a regulation, it would not result in any increased burden or costs on small entities. Therefore, the agency certifies that the direct final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this direct final rule to result in any 1-year expenditure that would meet or exceed this amount.

B. Environmental Impact

The agency has determined, under 21 CFR 25.31(h), that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

C. Federalism

FDA has analyzed this direct final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the direct final rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the direct final rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

V. Paperwork Reduction Act of 1995

This direct final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not required.

VI. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

VII. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**), and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Massell, B.F., L.H. Honikman, and J. Amezcua, ''Rheumatic Fever Following Streptococcal Vaccination. Report of Three Cases,'' *Journal of the American Medical Association*, 207(6): 1115–1119, 1969.

2. Kaplan, M.H. and M. Meyeserian, ''An Immunological Cross-Reaction Between Group A Streptococcal Cells and Human Heart Tissue,'' *Lancet*, 1:706–710, 1962.

3. Fox, E.N., L.M. Pachman, M.K. Wittner, and A. Dorfman, ''Primary Immunization of Infants and Children with Group A Streptococcal M Protein,'' *Journal of Infectious Diseases*, 120:598–604, 1969.

List of Subjects in 21 CFR Part 610

Biologics, Labeling, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, and under authority delegated by the Commissioner of Food and Drugs, 21 CFR part 610 is amended as follows:

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

■ 1. The authority citation for 21 CFR part 610 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360c, 360d, 360h, 360i, 371, 372, 374, 381; 42 U.S.C. 216, 262, 263, 263a, 264.

§ 610.19 [Removed]

■ 2. Remove § 610.19.

Dated: November 21, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–23546 Filed 12–1–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

28 CFR Part 16

[AAG/A Order No. 010–2005]

Privacy Act of 1974; Implementation

AGENCY: Federal Bureau of Investigation, DOJ.

ACTION: Final rule.

SUMMARY: The Department of Justice (DOJ), Federal Bureau of Investigation (FBI), is issuing a final rule exempting a new system of records entitled the Terrorist Screening Records System (TSRS) (JUSTICE/FBI–019) from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (5), and (8); and (g) of the Privacy Act, pursuant to 5 U.S.C. 552a(j) and (k). The FBI published a system of records notice for JUSTICE/FBI–019 and a proposed rule implementing these exemptions on July 28, 2005, at 70 FR 43661 and 43715. The listed exemptions are necessary to avoid interference with the law enforcement, intelligence, and counterterrorism functions and responsibilities of the FBI and the Terrorist Screening Center (TSC). This document addresses public comments on both the proposed rule and the system of records notice.

DATES: This final rule is effective January 3, 2006.

FOR FURTHER INFORMATION CONTACT: Mary E. Cahill, (202) 307–1823.

SUPPLEMENTARY INFORMATION:

Background

On July 28, 2005, the FBI published notice of a new Privacy Act system of records entitled ''Terrorist Screening Records System, JUSTICE/FBI–019,'' which became effective on September 6, 2005.[1] The Terrorist Screening Records System (TSRS) supports the mission of the FBI-administered Terrorist Screening Center (TSC) to consolidate the Government's approach to terrorism screening. Under Homeland Security Presidential Directive/HSPD–6, the TSC maintains the Government's consolidated watch list of known and suspected terrorists in the Terrorist Screening Database (TSDB). As required by HSPD–6, the TSDB contains ''information about individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.'' [2] The TSDB is a sensitive-but-unclassified database containing only identifying information about known or suspected terrorists. Information from the TSDB is used to screen for terrorists in a variety of contexts, including during law enforcement encounters, the adjudication of applications for U.S. visas or other immigration and citizenship programs, at U.S. land borders and ports of entry, and for civil aviation security purposes. The TSDB is included in the new TSRS.

In conjunction with publication of the TSRS system of records notice, the FBI initiated a rulemaking to exempt the TSRS from a number of provisions of the Privacy Act, pursuant to its authority in Privacy Act subsections 552a(j) and (k).[3] On July 28, 2005, the FBI published at 70 FR 43661 a proposed rule exempting records in the TSRS from Privacy Act subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (5), and (8); and (g).[4]

Public Comments

The FBI received comments on the proposed rule and the TSRS system of records notice from the Electronic Privacy Information Center (EPIC) and joint comments from the Electronic Frontier Foundation and Privacy Activism (EFF/PA). A discussion of these comments and the FBI's responses are set forth below. With respect to the public comments on the routine uses for the TSRS that were published in the July 28, 2005, notice, the FBI has determined that none of the comments merited changes to routine uses prior to their implementation.

A. Exemption From Subsections (c) and (d) (Accounting, Access, and Amendment)

EPIC objected to the FBI's proposal to exempt the TSRS from subsection (d) of the Privacy Act, which generally requires an agency to permit individuals access to records pertaining to them and the ability to request correction of any portion they believe is not accurate, relevant, timely, or complete.[5] EPIC stated that exemption of the TSRS from subsection (d) is in conflict with the purposes of the Privacy Act. EPIC stated that the FBI's notice of proposed rulemaking does not explain how the application of standard Privacy Act procedures permitting access to records would seriously damage the purpose of the TSRS.

EFF/PA objected to the FBI's application of any of the exemptions to information about individuals who have been misidentified as known or suspected terrorists. EFF/PA stated that, for instance, there is no basis to exempt information about misidentified persons from subsection (c)(3) of the Privacy Act, which permits individuals to obtain an accounting of any disclosures of records containing information about them.[6]

The exemption of the TSRS from the access provisions of subsection (d) is fully consistent with the language and intent of the Privacy Act. Allowing the subject of a TSRS record to obtain access to the record could, among other things, reveal the Government's investigative interest in a known or suspected terrorist, leading to the destruction of evidence, improper influencing of witnesses, or flight of the subject. Public release of information in the TSRS also could endanger the safety of confidential sources and law enforcement personnel. Congress anticipated these types of potentially damaging consequences of allowing access to some categories of Government records and included the exemption provisions in the Privacy Act to address them. According to the Office of Management and Budget's Guidelines for Privacy Act Implementation (OMB Guidelines), ''[t]he drafters of the Act recognized that the application of all the requirements of the Act to certain categories of records would have had undesirable and often unacceptable effects upon agencies in the conduct of necessary public business.'' [7] Frustrating the detection and prevention of terrorist activities and endangering the lives of law enforcement personnel are the type of ''undesirable'' and ''unacceptable'' effects on the Government's operation that the drafters of the Privacy Act sought to avoid through the allowance of exemptions. Thus, the FBI's claim of exemption from the access provisions of the Privacy Act for the TSRS is consistent with the principles of public policy reflected in the Act.

Although the FBI has claimed exemption from the access and amendment requirements of subsection (d), this exemption applies only to those records or portions of records contained in the TSRS that meet the requirements for exemption. While the FBI anticipates that all the records in the TSRS meet such requirements, individuals may submit requests for access to any non-exempt records pertaining to them. In addition, the FBI may allow individuals access to exempt records on a discretionary basis under proposed 28 CFR 16.96(r)(2). The FBI also will consider requests for amendment of records under this discretionary procedure. In addition, the TSC will work with the agencies that use data from the TSDB in their screening operations to assist those agencies in helping individuals who may be misidentified during the screening process.

EPIC stated that the FBI's discretionary procedures for access and amendment and its assistance to

[1] 70 FR 43715 (July 28, 2005).

[2] Homeland Security Presidential Directive/HSPD–6 (Sept. 16, 2003).

[3] 5 U.S.C. 552a(j), (k).

[4] 5 U.S.C. 552a(c)(3)–(4); (d)(1)–(4); (e)(1)–(3), (5), (8); (g).

[5] 5 U.S.C. 552a(d).

[6] 5 U.S.C. 552a(c)(3).

[7] 40 FR 28971 (July 9, 1975).

screening agencies in resolving complaints provide inadequate recourse for individuals misidentified as watch list matches. This is in part, according to EPIC, because the screening agencies do not have effective redress processes in place for those adversely affected by watch list screening procedures. The FBI believes that its procedures strike the appropriate balance between the interest in public safety and the needs of those individuals who experience repeated difficulties related to terrorist watch list information. The FBI and its partner agencies in the TSC continue to work to improve redress processes related to terrorist screening.

EPIC also stated that the application of the claimed exemptions to the entire TSRS is inappropriate, because the system will contain information that should be subject to access. EFF/PA objected to applying any exemptions to information about misidentified persons. They argued that because misidentified persons are not actually subjects of an investigation, the release of information about them would not reveal the Government's interest in investigating terrorists. Therefore, they argued, exemption from provisions such as subsection (c)(3) regarding accounting of record disclosures, is unwarranted.

As stated in subsection proposed 28 CFR 16.96(r)(2), the exemptions claimed by the FBI for the TSRS apply only to the extent that information in the system is subject to one of those exemptions. If any record or portion of a record in the TSRS is not subject to the claimed exemptions, the FBI will release that information, as appropriate, in response to a proper Privacy Act request. The FBI is claiming exemptions for the entire TSRS, however, in accordance with the language of 5 U.S.C. 552a(j) and (k), which permits the head of an agency ''to exempt any system of records'' from the access requirements of the Privacy Act. Furthermore, as stated in the proposed rule, the FBI may waive an applicable exemption where compliance with access procedures would not appear to interfere with or adversely affect the counterterrorism processes of the TSRS and the overall law enforcement process.

With respect to the comments of EFF/PA on misidentified persons, individuals are misidentified as known or suspected terrorists during the screening process when their names and other identifying information are the same as, or very similar to, that of a known or suspected terrorist. Disclosing information about misidentified persons, therefore, could reveal the Government's investigative interest in a terrorist suspect, because it could make known the name of the individual who actually is the subject of the Government's interest. Consequently, the Government has as great an interest in protecting the confidentiality of identifying information of misidentified persons as it does in protecting the confidentiality of the identities of the actual persons of interest. The FBI has added a discussion of this justification in sections 16.96(s)(1) and (3) of the final rule.

EPIC raised a question about the FBI's ability to use 5 U.S.C. 552a(k)(2) as the basis for exempting the TSRS from the access provisions in subsection (d). EPIC stated that exemption (k)(2) is applicable only where the system of records consists of investigatory material compiled for law enforcement purposes. EPIC further stated that exemption (k)(2) generally does not permit an agency to deny an individual access to a record where the agency's maintenance of the record resulted in the individual being denied a right, privilege, or benefit to which he would otherwise be entitled by Federal law, or for which he would otherwise be eligible.[8] EPIC requested further explanation of the FBI's authority to exempt the TSRS from the Privacy Act's access provisions, in light of the limitations on the applicability of the (k)(2) exemption.

Under the Privacy Act, an agency may exempt a system of records from the access provisions of subsections (c) and (d) if the system of records meets certain criteria under 5 U.S.C. 552a(j) or (k). The FBI is exempting the TSRS from the access provisions under the authority of 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

Exemption (j)(2) applies where a system of records consists of information compiled for purposes of a criminal investigation and the system is maintained by an agency or component of the agency that performs as its principal function any activity pertaining to the enforcement of criminal laws, including efforts to prevent, control, or reduce crime or to apprehend criminals.[9] The records in the TSRS come within the scope of the (j)(2) exemption because they are maintained by the FBI for the purpose of identifying individuals who pose potential terrorist threats and enforcing the criminal laws with respect to those individuals.[10]

Exemption (k)(1) applies to a system of records that contains information classified in the interest of national security.[11] Some records in the TSRS are subject to exemption (k)(1) because they contain such classified information.

Exemption (k)(2) applies to investigatory material compiled for law enforcement purposes that is not otherwise covered by exemption (j)(2). The FBI believes most, if not all, records in the TSRS fall within the scope of exemptions (j)(2) and (k)(1). The FBI is invoking exemption (k)(2) as a precautionary measure to protect investigatory information that may not be covered by exemption (j)(2) or (k)(1). If an instance arises where a record is not covered by exemptions (j)(2) or (k)(1), and the exception to exemption (k)(2) applies regarding denial of an individual's right, privilege, or benefit due to maintenance of the record at issue, the FBI will provide the individual access to that record to the extent that the law requires.

B. Exemption From Subsection (e)(1) (Relevant and Necessary)

EPIC objected to the FBI's proposal to exempt the TSRS from subsection (e)(1) of the Privacy Act, which requires an agency to ''maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.'' [12] EPIC stated that exemption of the TSRS from subsection (e)(1) will increase the likelihood that the system will contain erroneous and invasive information unrelated to terrorist screening.

As discussed in the notice of proposed rulemaking, the FBI is exempting the TSRS from subsection (e)(1) in furtherance of the screening and law enforcement purposes of the system. The collection of information during the screening process and the facilitation of an appropriate law enforcement response may involve the collection of identifying information that, following completion of the screening or response, turns out to have been unnecessary. It is not always possible to know in advance what information will be relevant or necessary, such that the TSC and the FBI can tailor their information collection in all cases to meet the requirements of subsection (e)(1). This is not, however, inconsistent with the principles of the Privacy Act. As discussed above, the drafters of the Privacy Act established exemptions from provisions such as subsection

[8] 5 U.S.C. 552a(k)(2).

[9] 5 U.S.C. 552a(j)(2).

[10] 70 FR 43716 (July 28, 2005).

[11] 5 U.S.C. 552a(k)(1).

[12] 5 U.S.C. 552a(e)(1).

(e)(1) to avoid inappropriately limiting the ability of the Government to carry out certain functions, such as law enforcement.[13] Constraining the collection of information included in the TSRS in accordance with the ''relevant and necessary'' requirement of subsection (e)(1) could discourage the appropriate collection of information, and thereby impede the Government's efforts to detect and apprehend terrorists. It is, therefore, appropriate to exempt the TSRS from subsection (e)(1).

C. Exemption From Subsection (e)(5) (Accuracy, Relevance, Timeliness and Completeness)

EPIC and EFF/PA objected to the FBI's proposal to exempt the TSRS from subsection (e)(5) of the Privacy Act, which requires agencies to ''maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.'' [14] EPIC and EFF/PA stated that exemption of the TSRS from subsection (e)(5) is inconsistent with the TSC's obligation under its governing organizational document to develop and maintain ''the most thorough, accurate, and current information possible'' about known or appropriately suspected terrorists.[15]

As discussed in the notice of proposed rulemaking, the TSC supports agencies that conduct terrorism investigations by collecting information from encounters with known or suspected terrorists. It is not always possible to determine, when collecting information during an encounter with a terrorist suspect, whether the information is accurate, relevant, timely, and complete. It is the nature of the investigative process to obtain information of uncertain accuracy and completeness with the goal of achieving accuracy and completeness. Moreover, with the passage of time, seemingly irrelevant or untimely information collected during an encounter with a terrorist suspect may acquire new significance as further investigation brings new details to light.

The TSC's obligation to develop and maintain the most thorough, accurate, and current information possible about individuals known or suspected to be terrorists must be read in the context of the investigative process. The FBI completely agrees with EPIC's view that ''[m]aintaining the most accurate possible data is unquestionably a critical goal of the TSRS * * *'' To meet this goal, TSC has implemented internal quality assurance procedures. Applying the requirements of subsection (e)(5), however, to the TSRS would hinder the ability of the law enforcement and intelligence agencies supported by TSC to conduct investigations and develop intelligence necessary for effective law enforcement and counterterrorism efforts.

The FBI also is exempting the TSRS from the requirements of subsection (e)(5) in order to prevent the use of a challenge under subsection (e)(5) as a collateral means to obtain access to records in the TSRS. As discussed above, the FBI has exempted TSRS records from the access and amendment requirements of subsection (d) of the Privacy Act in order to protect the integrity of counterterrorism investigations. In the past, where agencies have exempted records from access under subsection (d), individuals have asserted challenges to a record's accuracy, timeliness, completeness, and/or relevance under subsection (e)(5) as an alternative means to get access to the records. Exempting the TSRS from subsection (e)(5) serves to prevent the use of that subsection to circumvent the exemption claimed from subsection (d). The FBI has added a discussion of this justification in section 16.96(s)(7) of the final rule.

D. Exemption From Subsection (g) (Civil Remedies)

EPIC objected to the FBI's proposal to exempt the TSRS from subsection (g) of the Privacy Act, which establishes civil remedies for violations of certain of the Act's provisions.[16] Specifically, EPIC stated that the FBI failed to explain why it is exempting the TSRS from the civil remedies provisions in subsection (g) as they relate to the right to enforce the amendment requirements under subsection (d) of the Act.

The proposed rule states that the FBI is exempting the TSRS from subsection (g) ''to the extent that the system is exempt from other specific subsections of the Privacy Act.'' [17] Therefore, the TSRS is exempt from the civil remedies provisions only to extent that the TSRS is exempt from the underlying requirement to which the remedies relate. Because the FBI is claiming exemption from the record amendment requirement under subsection (d), it also is claiming exemption from the civil remedy provisions under subsection (g), as they relate to enforcement of subsection (d).

E. Extension of Opportunity for Public Comment

EPIC stated that the FBI should suspend this rulemaking and provide a further opportunity for public comment after the FBI has publicly released more information in response to EPIC's previously filed Freedom of Information Act (FOIA) request regarding the use of the TSDB for the Transportation Security Administration's proposed Secure Flight program.

Information about specific programs, such as Secure Flight, that will use the TSDB to perform terrorist screening may be informative in understanding the TSRS. The FBI does not believe, however, that this type of information is necessary to allow the public to engage in informed consideration of the issues raised by the proposed rule and the operation of the TSRS. Therefore, the FBI sees no basis to indefinitely suspend this rulemaking, pending the release of additional information about the Secure Flight program.

F. Routine Uses

EPIC and EFF/PA generally objected to the breadth of the routine uses set forth in the TSRS notice. EFF/PA stated that the FBI's intention to disclose only those records that are ''relevant'' in accordance with any current and future blanket routine uses established for FBI record systems fails to establish any limit on disclosure, because the FBI has exempted the TSRS from the requirement under subsection (e)(1) to maintain only relevant records. This comment incorrectly links the issue of whether the collection of a record is properly relevant to the accomplishment of an agency purpose and whether the disclosure of a record is relevant to the purpose of a routine use. By exempting the TSRS from the relevance requirement under subsection (e)(1), the FBI has permitted the collection of records whose relevance to the purpose of the TSRS may be unclear. The FBI is not, however, claiming that it will disclose a record without determining whether the record is relevant to the purpose of the routine use under which it is to be disclosed. By stating that the TSC will disclose only those records that are ''relevant'' in accordance with any current and future blanket routine uses established for FBI record systems, the FBI is limiting, not expanding, its ability to make disclosures of records in the TSRS.

EFF/PA objected to routine use (F) as allowing unlimited disclosure,

[13] OMB Guidelines, 40 FR 28971 (July 9, 1975).

[14] 5 U.S.C. 552a(e)(5).

[15] See Memorandum of Understanding on the Use and Integration of Screening Information to Protect Against Terrorism at 1, (Sept. 16, 2003).

[16] 5 U.S.C. 552a(g).

[17] 70 FR 43663 (July 28, 2005).

including to consumer reporting agencies. The FBI specifically states in the system of records notice that the TSC will not make disclosures to consumer reporting agencies. The FBI will not use general language of a routine use to override this specific statement. Furthermore, the language of routine use (F) limits its scope to disclosures that are in furtherance of the TSC's function. TSC anticipates that it will use this routine use in order to share information with other agencies and entities (other than consumer reporting agencies) to verify the quality and accuracy of its information.

EFF/PA objected to routine uses (J) and (K) because they permit disclosure of TSRS records to Governmental authorities with law enforcement responsibilities. EFF/PA argued that this allows TSC to make disclosures beyond the scope of the counterterrorism purposes of the TSRS.

The TSC maintains information about individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.[18] Terrorist activities are inherently criminal in nature. In addition, individuals engaged in preparation for terrorist acts engage in illegal activities that support the terrorist enterprise. Therefore, government authorities involved in law enforcement are integrally related to counterterrorism efforts. The FBI accordingly has written routine uses (J) and (K) to permit appropriate information sharing with such authorities.

G. Maintenance of Misidentified Person Information

EFF/PA stated that including information on misidentified persons in the TSRS has inherent privacy and civil liberties costs. EFF/PA suggested that instead of maintaining information on misidentified persons in order to avoid causing them inconvenience during the screening process, the Federal government should discontinue information-based terrorist screening. Alternatively, the FBI should segregate data on misidentified persons to avoid cross-contamination with data on persons of interest.

Whether the government should engage in information-based terrorist screening is beyond the scope of the issues raised for public comment through the TSRS system of records notice and this rulemaking. In implementing the directive of HSPD–6 to integrate information on known and appropriately suspected terrorists for use in screening processes, the FBI has determined that maintenance of information on misidentified persons is essential to carrying out this function in a fair and efficient manner. The FBI, therefore, has reflected its handling of such information in the TSRS notice and the proposed rule.

In order to maintain the integrity of the TSDB and avoid cross-contamination of information, data on misidentified persons is not maintained in the TSDB. All records containing information on misidentified persons are clearly marked, and the TSC has procedures in place to prevent the accidental inclusion of misidentified persons' data in TSC records on known or appropriately suspected terrorists. In addition, the TSC has attempted to mitigate any privacy and civil liberties costs associated with its use of misidentified persons' information through data quality and security assurance procedures.

Final Rule; Implementation of Routine Uses

After consideration of the public comments, the FBI has determined to issue the proposed rule in final form, with the changes described above. In addition, the FBI determined that none of the public comments merited changes to routine uses for the TSRS system of records prior to their implementation.

Regulatory Flexibility Act

This rule relates to individuals, as opposed to small business entities. Nevertheless, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, the rule will not have a significant economic impact on a substantial number of small entities.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FBI to comply with small entity requests for information and advice about compliance with statutes and regulations within FBI jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT.** Persons can obtain further information regarding SBREFA on the Small Business Administration's Web page at *http://www.sba.gov/advo/laws/law_lib.html.*

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FBI consider the impact of paperwork and other information collection burdens imposed on the public. There are no current or new information collection requirements associated with this rule.

Analysis of Regulatory Impacts

This rule is not a ''significant regulatory action'' within the meaning of Executive Order 12886. Because the economic impact should be minimal, further regulatory evaluation is not necessary. Moreover, the Attorney General certifies that this rule would not have a significant economic impact on a substantial number of small entities, because the reporting requirements themselves are not changed and because it applies only to information on individuals.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), (Pub. L. 104–4, 109 Stat. 48), requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A ''Federal mandate'' is a new or additional enforceable duty, imposed on any State, local, or tribal government, or the private sector. If any Federal mandate causes those entities to spend, in aggregate, $100 million or more in any one year the UMRA analysis is required. This rule would not impose Federal mandates on any State, local, or tribal government or the private sector.

Executive Order 13132, Federalism

The FBI has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. This action will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore, will not have federalism implications.

Environmental Analysis

The FBI has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

Energy Impact

The energy impact of this action has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). This rulemaking is not a major regulatory action under the provisions of the EPCA.

[18] HSPD–6 at 1.

List of Subjects in 28 CFR Part 16

Administrative Practices and Procedures, Courts, Freedom of Information Act, Government in the Sunshine Act, and the Privacy Act.

■ Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 793–78, amend 28 CFR part 16 as follows:

PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

■ 1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Subpart E—Exemption of Records Systems Under the Privacy Act

■ 2. Section 16.96 is amended to add new paragraphs (r) and (s) to read as follows:

§ 16.96 Exemption of Federal Bureau of Investigation Systems'—limited access.

* * * * *

(r) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (5), and (8); and (g):

(1) Terrorist Screening Records System (TSRS) (JUSTICE/FBI–019).

(2) These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2). Where compliance would not appear to interfere with or adversely affect the counterterrorism purposes of this system, and the overall law enforcement process, the applicable exemption may be waived by the FBI in its sole discretion.

(s) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a known or suspected terrorist by notifying the record subject that he/she is under investigation. This information could also permit the record subject to take measures to impede the investigation, *e.g.*, destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation. Similarly, disclosing this information to individuals who have been misidentified as known or suspected terrorists due to a close name similarity could reveal the Government's investigative interest in a terrorist suspect, because it could make known the name of the individual who actually is the subject of the Government's interest. Consequently, the Government has as great an interest in protecting the confidentiality of identifying information of misidentified persons as it does in protecting the confidentiality of the identities of known or suspected terrorists.

(2) From subsection (c)(4) because this system is exempt from the access and amendment provisions of subsection (d).

(3) From subsections (d)(1), (2), (3), and (4) because these provisions concern individual access to and amendment of records contained in this system, which consists of counterterrorism, investigatory and intelligence records. Compliance with these provisions could alert the subject of a terrorism investigation of the fact and nature of the investigation, and/or the investigative interest of the FBI and/or other intelligence or law enforcement agencies; compromise sensitive information classified in the interest of national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; could identify a confidential source or disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses. Amendment of these records would interfere with ongoing counterterrorism investigations and analysis activities and impose an impossible administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised. Similarly, compliance with these provisions with respect to records on individuals who have been misidentified as known or suspected terrorists due to a close name similarity could reveal the Government's investigative interest in a terrorist suspect, because it could make known the name of the individual who actually is the subject of the Government's interest.

(4) From subsection (e)(1) because it is not always possible for TSC to know in advance what information is relevant and necessary for it to complete an identity comparison between the individual being screened and a known or suspected terrorist. Also, because TSC and the FBI may not always know what information about an encounter with a known or suspected terrorist will be relevant to law enforcement for the purpose of conducting an operational response.

(5) From subsection (e)(2) because application of this provision could present a serious impediment to counterterrorism efforts in that it would put the subject of an investigation, study or analysis on notice of that fact, thereby permitting the subject to engage in conduct designed to frustrate or impede that activity. The nature of counterterrorism investigations is such that vital information about an individual frequently can be obtained only from other persons who are familiar with such individual and his/her activities. In such investigations it is not feasible to rely upon information furnished by the individual concerning his own activities.

(6) From subsection (e)(3), to the extent that this subsection is interpreted to require TSC to provide notice to an individual if TSC receives information about that individual from a third party. Should the subsection be so interpreted, exemption from this provision is necessary to avoid impeding counterterrorism efforts by putting the subject of an investigation, study or analysis on notice of that fact, thereby permitting the subject to engage in conduct intended to frustrate or impede that activity.

(7) From subsection (e)(5) because many of the records in this system are derived from other domestic and foreign agency record systems and therefore it is not possible for the FBI and the TSC to vouch for their compliance with this provision; however, the TSC has implemented internal quality assurance procedures to ensure that TSC terrorist screening data is as thorough, accurate, and current as possible. In addition, TSC supports but does not conduct investigations; therefore, it must be able to collect information related to terrorist identities and encounters for distribution to law enforcement and intelligence agencies that do conduct terrorism investigations. In the collection of information for law enforcement, counterterrorism, and intelligence purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. The

restrictions imposed by (e)(5) would limit the ability of those agencies' trained investigators and intelligence analysts to exercise their judgment in conducting investigations and impede the development of intelligence necessary for effective law enforcement and counterterrorism efforts. The TSC has, however, implemented internal quality assurance procedures to ensure that TSC terrorist screening data is as thorough, accurate, and current as possible. The FBI also is exempting the TSRS from the requirements of subsection (e)(5) in order to prevent the use of a challenge under subsection (e)(5) as a collateral means to obtain access to records in the TSRS. The FBI has exempted TSRS records from the access and amendment requirements of subsection (d) of the Privacy Act in order to protect the integrity of counterterrorism investigations. Exempting the TSRS from subsection (e)(5) serves to prevent the assertion of challenges to a record's accuracy, timeliness, completeness, and/or relevance under subsection (e)(5) to circumvent the exemption claimed from subsection (d).

(8) From subsection (e)(8) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on the FBI and the TSC and could alert the subjects of counterterrorism, law enforcement, or intelligence investigations to the fact of those investigations when not previously known.

(9) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: November 22, 2005.

Paul R. Corts,

Assistant Attorney General for Administration.

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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4044

RIN 1212–AA55

Valuation of Benefits; Mortality Assumptions

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation is amending its benefit valuation regulation by adopting more current mortality assumptions. The mortality assumptions prescribed under PBGC's regulations to be used to value benefits for non-disabled (''healthy'') participants are taken from the 1983 Group Annuity Mortality (GAM–83) Tables. The PBGC published a final rule adopting these tables in 1993, noting that many private-sector insurers used the GAM–83 Tables when setting group annuity prices. At that time, the PBGC also said that it intended to keep each of its individual valuation assumptions in line with those of private-sector insurers, and to modify its mortality assumptions whenever it is necessary to do so to achieve consistency with the private insurer assumptions. This rule updates those assumptions by replacing a version of the GAM–83 Tables with a version of the GAM–94 Tables. The updated mortality assumptions will better conform to those used by private-sector insurers in pricing group annuities.

DATES: Effective January 1, 2006. For a discussion of applicability of the amendments, see the Applicability section in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: James J. Armbruster, Acting Director, Legislative and Regulatory Department, or James L. Beller, Jr., Attorney, Legislative and Regulatory Department, PBGC, 1200 K Street, N.W., Washington, DC 20005–4026; 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: On March 14, 2005 (at 70 FR 12429), the Pension Benefit Guaranty Corporation (PBGC) published a proposed rule modifying 29 CFR part 4044 (Allocation of Assets in Single-employer Plans). The PBGC received one comment letter on the proposed rule (which is addressed below) and is issuing the final regulation as proposed.

The PBGC's regulations provide rules for valuing benefits in a single-employer plan that terminates in a distress or involuntary termination. (The rules are codified at 29 CFR part 4044, subpart B.) The PBGC uses these rules to determine: (1) The extent to which participants' benefits are funded under the allocation rules of ERISA section 4044, (2) whether a plan is sufficient for guaranteed benefits, and (3) how much an employer owes the PBGC as a result of a plan termination under ERISA section 4062. Employers must use these rules to determine the value of plan benefit liabilities in annual reports required to be submitted under ERISA section 4010, and may use these rules to ensure that plan spinoffs, mergers, and transfers comply with Internal Revenue Code section 414(l).

General Valuation Approach

The valuation rules prescribe a number of assumptions intended to produce reasonable valuation results on average for the range of plans terminating in distress or involuntary terminations, rather than for any particular plan or plan type. The assumptions prescribed by this rule for valuing benefits in terminating plans match the private-sector annuity market to the extent possible.

The market cost of providing annuity benefits is based upon data from periodic surveys conducted for the PBGC by the American Council of Life Insurers (the ACLI surveys). These ACLI surveys ask insurers for pricing information on group annuities. Each respondent to the surveys provides its prices (net of administrative expenses) for a range of ages for immediate annuities (annuities where payments start immediately) and for deferred annuities (annuities where payments are deferred to age 65). Prices of each of the two types of annuities are averaged at each age to get an average market price. Interest factors are derived so that, when combined with the PBGC's healthy-life mortality assumptions, they provide the best fit for the average market prices (as obtained from the ACLI surveys) over the entire range of ages. The interest factors are recalibrated to the annuity survey prices each year. Each month between recalibrations, the interest factors are adjusted based on changes in the yield on long-term corporate investment-grade bonds. The interest factors are then used in conjunction with the PBGC's mortality assumptions (and other PBGC assumptions) to value annuity benefits.

These derived interest factors are not market interest rates. The factors stand in for all the many components used in annuity pricing that are not reflected in the given mortality table—*e.g.*, assumed yield on investment, margins for profit and contingencies, premium and income taxes, and marketing and sales expenses. Because of the relationship among annuity prices, a mortality table, and the derived interest factors, it is never meaningful to compare PBGC's interest factors to market interest rates. The PBGC's interest factors are meaningful only in combination with the PBGC's mortality assumptions.

Mortality Assumptions

One set of assumptions prescribed by the valuation regulation relates to the probabilities that a participant (or beneficiary) will survive to each