

(3) If applicable because the visual depictions at issue were produced outside the United States, the statement that: "I hereby certify that the foreign producers of the visual depictions produced by [name of entity] either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or have certified to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer, in accordance with 28 CFR part 75; and [name of entity] has copies of those records or certifications." The producer may provide the following statement instead: "I hereby certify that with respect to foreign primary producers who do not either collect and maintain the records required by sections 2257 and 2257A of title 18 of the U.S. Code, or certify to the Attorney General that they collect and maintain individually identifiable information regarding all performers, including minor performers, whom they employ pursuant to tax, labor, or other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the names, addresses, and dates of birth of the performers, in accordance with 28 CFR part 75, [name of entity] has taken reasonable steps to confirm that the performers in any depictions that may potentially constitute simulated sexually explicit conduct or lascivious exhibition of the genitals or pubic area of any person were not minors at the time the depictions were originally produced." "Reasonable steps" for purposes of this statement may include, but are not limited to, a good-faith review of the visual depictions themselves or a good-faith reliance on representations or warranties from a foreign producer.

(d) *Entities covered by each certification.* A single certification may cover all or some subset of all entities owned by the entity making the certification. However, the names of all sub-entities covered must be listed in such certifi-

cation and must be cross-referenced to the matter for which the sub-entity served as the producer.

(e) *Timely submission of certification.* An initial certification is due June 16, 2009. Initial certifications of producers who begin production after December 18, 2008, but before June 16, 2009, are due on June 16, 2009. Initial certifications of producers who begin production after June 16, 2009 are due within 60 days of the start of production. A subsequent certification is required only if there are material changes in the information the producer certified in the initial certification; subsequent certifications are due within 60 days of the occurrence of the material change. In any case where a due date or last day of a time period falls on a Saturday, Sunday, or federal holiday, the due date or last day of a time period is considered to run until the next day that is not a Saturday, Sunday, or federal holiday.

[73 FR 77471, Dec. 18, 2008]

**PART 76—RULES OF PROCEDURE FOR ASSESSMENT OF CIVIL PENALTIES FOR POSSESSION OF CERTAIN CONTROLLED SUBSTANCES**

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AUTHORITY: 5 U.S.C. 301; 21 U.S.C. 844a, 875, 876; 28 U.S.C. 509, 510.; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 104–134, 110 Stat. 1321.

SOURCE: Order No. 1462–90, 56 FR 1089, Jan. 11, 1991, unless otherwise noted.

### § 76.1 Purpose.

This part implements section 6486 of the Anti-Drug Abuse Act of 1988 (the Act), 21 U.S.C. 844a. This part establishes procedures for imposing civil penalties against persons who knowingly possess a controlled substance for personal use that is listed in 21 CFR 1316.91(j)(2) in violation of 21 U.S.C. 844a and specifies the appeal rights of persons subject to a civil penalty pursuant to section 6486 of the Act.

### § 76.2 Definitions.

(a) *Act* means the Anti-Drug Abuse Act of 1988, Public Law 100–690.

(b) *Adjudicatory proceeding* means a judicial-type proceeding leading to the formulation of a final order.

(c) *Administrative Procedure Act* means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559.

(d) *Attorney General* means the Attorney General of the United States or his or her designee.

(e) *Department* means the United States Department of Justice.

(f) *Judge* means an Administrative Law Judge appointed pursuant to the provisions of 5 U.S.C. 3105.

(g) *Penalty* means the amount described in 28 CFR 76.3 and includes the plural of that term.

(h) The term *Personal Use Amount* means possession of controlled substances in circumstances where there is no other evidence of an intent to dis-

tribute, or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of any controlled substance. Evidence of personal use amounts shall not include sweepings or other evidence of possession of amounts of a controlled substance for other than personal use. The following criteria shall be used to determine whether an amount of controlled substance in a particular case is in fact a personal use amount. The absence of any of the factors listed in paragraphs (h)(1) through (h)(5) of this section and the existence of the factor in paragraph (h)(6) of this section shall be relevant, although not necessarily conclusive, to establish that the possession was for personal use, and amounts in excess of those listed in paragraph (h)(6) of this section may be determined to be personal use amounts where circumstances indicate possession of the substance without an intent to distribute or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of the controlled substance.

(1) Evidence, such as drug scales, drug distribution paraphernalia, drug records, drug packaging material, method of drug packaging, drug “cutting” agents and other equipment, that indicates an intent to process, package or distribute a controlled substance;

(2) Other information indicating possession of a controlled substance with intent to distribute;

(3) The controlled substance is related to large amounts of cash or any amount of prerecorded government funds;

(4) The controlled substance is possessed under circumstances that indicate such a controlled substance is a sample intended for distribution in anticipation of a transaction involving large amounts, or is part of a larger delivery; or

(5) Statements by the possessor, or otherwise attributable to the possessor, including statements of co-conspirators, that indicate possession with intent to distribute.

(6) The amounts do not exceed the following:

(i) One gram of a mixture or substance containing a detectable amount of heroin;

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(ii) One gram of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivations of ecgonine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (h)(6)(ii) (A) through (C) of this section;

(iii) 1/10 gram of a mixture or substance described in paragraph (h)(6)(ii) of this section which contains cocaine base;

(iv) 1/10 gram of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 500 micrograms of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) One ounce of a mixture or substance containing a detectable amount of marijuana;

(vii) One gram of methamphetamine, its salts, isomers, and salts of its isomers, or one gram of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

(i) *United States Attorney* means the United States Attorney in the federal district in which the alleged violation occurred, or his or her designees, or an Assistant Attorney General.

(j) *Commencement of proceeding* is the service upon a respondent of a Notice of Intent to Assess a Civil Penalty.

(k) *Complainant* means the United States.

(l) *Complaint* means the formal document initiating adjudicatory proceedings.

(m) *Consent Order* means any written document containing a specified remedy or other relief agreed to by all parties and entered as an order by the Judge.

(n) *Hearing* means that part of a proceeding which involves the submission

of evidence, either by oral presentation or written submission.

(o) *Motion* means an oral or written request, made by a person or party, for some action by a Judge.

(p) *Order* means the whole or any part of a final procedural or substantive disposition of a matter by the Judge.

(q) *Party* includes the United States of America and any person named as a respondent.

(r) *Respondent* means any person alleged in a Notice of Intent to Assess a Civil Penalty or Complaint under 28 CFR 76.4 and 76.5 to be liable for a civil penalty under 28 CFR 76.3.

§ 76.3 Basis for civil penalty.

(a) Any individual who knowingly possesses a controlled substance that is listed in § 76.2(h) in violation of 21 U.S.C. 844a shall be liable to the United States for a civil penalty in an amount of not to exceed \$10,000 for each such violation occurring before September 29, 1999, and not to exceed \$11,000 for each such violation occurring on or after September 29, 1999. For civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, see the civil penalty amount as provided in 28 CFR 85.5.

(b) The income and net assets of an individual shall not be relevant to the determination whether to assess a civil penalty under this part or to prosecute the individual criminally. However, if a decision is made to assess a civil penalty, the income and net assets of an individual shall be considered in determining the amount of a penalty under this part.

(c) A civil penalty may not be assessed under this part if the individual previously was convicted of a federal or state offense relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(d) A civil penalty may not be assessed on an individual under this part on more than two separate occasions.

(e) A civil penalty under this part may be assessed by the Attorney General only after an order has been issued on the record and after an opportunity

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for a hearing has been given in accordance with 5 U.S.C. 554. The Attorney General by and through the United States Attorney having jurisdiction over the matter shall provide written notice to the individual who is the subject of the proposed order informing the individual of the opportunity to receive such a hearing with respect to the proposed order. The hearing may be held only if the individual makes a request for the hearing before the expiration of the thirty (30) day period beginning on the date such notice is served.

[Order No. 1462–90, 56 FR 1089, Jan. 11, 1991, as amended by Order No. 2249–99, 64 FR 47103, Aug. 30, 1999; AG Order 3690–2016, 81 FR 42500, June 30, 2016]

### § 76.4 Enforcement procedures.

(a) *Commencement of proceedings.* If the United States Attorney's office having jurisdiction over the matter determines that a person has violated section 6486 of the Act, the proceeding to assess a civil penalty under section 6486 of the Act shall be commenced by the United States Attorney issuing a Notice of Intent to Assess Civil Penalty. Service of this Notice shall be accomplished pursuant to 28 CFR 76.6.

(b) *Notice of intent to assess a civil penalty.* The Notice of Intent to Assess Civil Penalty (Notice) will contain a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of law, the statutory and regulatory provisions alleged to have been violated, and the amount of penalty for which the respondent could be liable. The Notice will advise the respondent of the following, in addition to any other specific information determined by the United States Attorney to be necessary:

(1) That the respondent has the right to representation by counsel, but not at government expense;

(2) That any statement given during the course of the proceeding may be used against the person in this or any other proceeding, including any criminal prosecution;

(3) That a respondent may be able to assert a privilege, such as the privilege against self-incrimination;

(4) That failure to file a response to the allegations listed in the Notice

within thirty (30) days of the date of service may result in the entry of a non-appealable final order assessing a penalty in an amount to be determined by the Attorney General;

(5) That the respondent has the right to request an adjudicatory proceeding, including a hearing, before a Judge pursuant to 5 U.S.C. 554–557 and this part, and that such request, in accordance with paragraph (c) of this section, must be made within thirty (30) days from the date the notice is served;

(6) That a respondent may waive an adjudicatory proceeding at any time and agree to pay a penalty in an amount to be determined by the Attorney General; and

(7) That in determining the amount of the penalty the respondent's income and net assets must be considered.

(c) *Answer to notice.* To timely request an adjudicatory proceeding in response to a Notice, a respondent must serve upon the United States Attorney designated in the Notice a written answer responding to each allegation listed in the Notice and request a hearing, in accordance with 28 CFR 76.4(b), within thirty (30) days from the date the Notice was served upon the respondent. If the respondent does not serve an answer within thirty (30) days, the Attorney General or his designee may enter a final order, from which there is no appeal, ordering a payment of a civil penalty.

### § 76.5 Complaint.

(a) If the respondent requests an adjudicatory proceeding, the United States Attorney, within fifteen (15) days after receipt of the request, shall file a complaint against the respondent with a Judge who has been assigned to hear and decide the case and shall serve a copy of the complaint on the respondent as provided in 28 CFR 76.6(b).

(b) The complaint shall contain a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of law, the approximate date, place and location of the alleged violation including the federal district, the statutory provisions alleged to have been violated, the amount of penalty for which the respondent could be held

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liable, and the amount of the proposed penalty. It shall also indicate the date upon which the Notice of Intent to Assess Civil Penalty was served and shall be accompanied by a copy of that notice.

### § 76.6 Service and filing of documents.

(a) *Generally.* Unless ordered otherwise, an original and one copy of the complaint and all other pleadings shall be filed with the Judge who has been assigned to the case. Each party shall deliver or mail, in accordance with paragraph (b) of this section, a copy of all pleadings, including any attachments to the other party. Each pleading filed shall be clear and legible.

(b) *By and on parties.* The Notice of Intent to Assess Civil Penalty and the Complaint shall be served by personal delivery or by certified or registered mail, return receipt requested, to the respondent. When it is known that a party is represented by an attorney, service of any other pleading, paper or document subsequent to the Notice and Complaint shall be made upon the party's attorney. Service of such other pleadings, papers, or documents may be made by personal delivery or by mailing, by first class mail, a copy to the party or attorney at the party's or attorney's last known address. The party serving the document shall certify the manner and date of service.

(c) *By the judge.* Except as provided in paragraph (d) of this section, service of Notices, Orders and Decisions shall be made by first class mail to the last known address of a party or, if the party is known to be represented by an attorney, to the attorney.

(d) *Service of notice of hearing.* Service of Notice of the Date Set for Hearing shall be made by the Judge with whom the complaint has been filed either by delivering a copy to the individual party or, if known, to the attorney of record of a party; or by mailing, by certified or registered mail, return receipt requested, a copy to the last known address of a party or a party's attorney.

(e) Service is complete upon delivery to the addressee or, in the case of service by mail, upon mailing.

(f) Filing of pleadings, papers or other documents shall be deemed completed upon delivery to the Judge as-

signed to the case or the Judge's designee.

### § 76.7 Content of pleadings.

(a) Every pleading shall contain a caption setting forth the statutory provision under which the proceeding is instituted, the title of the proceeding, the docket number assigned by the Judge, the names of all parties, and a designation of the type of pleading or paper (e.g., complaint, motion to dismiss). The pleading shall be signed and shall contain the address and telephone number of the party or person representing the party. The pleadings should be typewritten when possible on standard-size (8½ × 11) paper. Legal size (8½ × 14) paper will not be accepted, except upon approval by the Judge.

(b) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process, provided all copies are clear and legible.

(c) All documents presented by a party in a proceeding must be in English or, if in a foreign language, accompanied by a certified translation.

### § 76.8 Time computations.

(a) *Generally.* In computing any period of time under this part or in an order issued hereunder, the time begins with the day following the act, event, or default requiring service, and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday observed by the federal government, in which case the time period includes the next business day. When the period of time prescribed is eleven (11) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) *Date of entry of orders.* In computing any period of time involving the date of the entry of an order, the date of entry shall be the date the order is signed by the Judge.

(c) *Computation of time for service by mail.* Whenever a party has a right or is required to do some act or take some action within a prescribed period after service of a pleading, paper, or notice and the pleading, paper, or notice is served upon the party by mail, three (3)

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days shall be added to the prescribed period.

### § 76.9 Responsive pleading—answer.

(a) *Time for answer.* A respondent shall file and serve on the United States Attorney having jurisdiction over the matter an answer within thirty (30) days after the service of a complaint.

(b) *Default.* Failure of the respondent to file and serve an answer within the time provided shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. In such cases, the Judge may enter a judgment by default.

(c) *Answer.* Any respondent contesting any material fact alleged in a complaint, or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing.

(1) The answer shall include a statement of the facts supporting each affirmative defense.

(2) The answer shall include a statement that the respondent admits, denies, does not have and is unable to obtain sufficient information to admit or deny each allegation, or that an answer to the allegation is protected by a privilege, including the privilege against self-incrimination.

(3) A statement of lack of information or a statement that the answer to the allegation is privileged shall have the effect of a denial.

(4) Any allegation not denied shall be deemed to be admitted.

(d) *Reply.* A complainant may file a reply responding to each affirmative defense arrested if the Judge, pursuant to 28 CFR 76.10, so provides.

(e) *Amendments and supplemental pleadings.* If it will facilitate resolution of the controversy, the Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Judge's order based on the complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings,

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and such amendments may be made as necessary to make the pleadings conform to the evidence. The Judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events which have happened or new law promulgated since the date of the pleadings and which are relevant to any of the issues involved.

### § 76.10 Motions and requests.

(a) *Generally.* Any application for an order or any other request shall be made by motion which shall be in writing (unless the Judge in the course of an oral hearing or appearance consents to accept such motion orally), state with particularity the grounds therefor, and set forth the relief or order sought. Motions or requests made during the course of any oral hearing or appearance before a Judge may be stated orally or in writing and made part of the transcript. All parties shall be given reasonable opportunity to respond or object to the motion or request.

(b) *Responses to motions.* Within ten (10) days after a written motion is served, or within such other period as the Judge may fix, the other party to the proceeding may file a response to the motion, accompanied by such affidavits or other evidence as the party desires to rely upon. Unless the Judge provides otherwise, no reply to a response shall be filed.

(c) *Oral arguments or briefs.* No oral argument will be heard on motions unless the Judge otherwise directs. Written memoranda or briefs may be filed with motions or responses to motions, stating the points and authorities relied upon in support of the position taken.

### § 76.11 Notice of hearing.

(a) When the Judge receives the complaint and answer, the Judge shall cause to be served a Notice of Hearing upon the parties in the manner prescribed by 28 CFR 76.6(d).

(b) Such notice shall include:

(1) The time and place and nature of the hearing. In fixing the time and place of the hearing, the Judge will attempt to minimize the costs to the parties;

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(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The description of the procedures for the conduct of the hearing;

(4) A notice that the respondent party may waive the right to an oral hearing and request that the matter be determined on written motions and written submission of the evidence; and

(5) Such other matters as the Judge deems appropriate.

### § 76.12 Prehearing statements.

(a) At any time prior to the commencement of the hearing, the Judge may order any party to file a prehearing statement of position.

(b) A prehearing statement shall state the name of the party on whose behalf it is presented and shall briefly set forth the following matters, unless otherwise ordered by the Judge:

(1) Issues involved in the proceedings and whether the respondent requests an oral hearing;

(2) Facts stipulated;

(3) Facts in dispute;

(4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;

(5) A brief statement of applicable law;

(6) The conclusions to be drawn;

(7) The estimated time required for presentation of the party's case; and

(8) Any appropriate comments, suggestions, or information which might assist the parties or the Judge in preparing for the hearing or otherwise aid in the disposition of the proceeding.

### § 76.13 Parties to the hearing.

The parties to the hearing shall be the United States of America and the respondent.

### § 76.14 Separation of functions.

An employee or an agent of the Department who is or was engaged in investigative or prosecutive functions for or on behalf of the United States in a case may not participate in the decision of that case.

### § 76.15 Ex parte communications.

(a) *Generally.* The Judge shall not consult with any party, attorney or

person (except persons in the office of the Judge) on any legal or factual issue unless upon notice and opportunity for all parties to participate. No party or attorney representing a party shall communicate in any instance with the Judge on any matter at issue in a case, unless notice and opportunity has been afforded for the other party to participate. This provision does not prohibit a party or attorney from inquiring about the status of a case or asking questions concerning administrative functions or procedures.

(b) *Sanctions.* A party or participant who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanctions. An attorney who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to sanctions, including, but not limited to, exclusion from the proceedings.

### § 76.16 Disqualification of a Judge.

(a) When a Judge deems himself or herself disqualified to preside in a particular proceeding, such Judge shall withdraw therefrom by notice on the record directed to the Chief Administrative Hearing Officer for the district in which the case is brought or, if there is no Chief Administrative Hearing Officer, to the Attorney General.

(b) Whenever any party shall deem the Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The Judge shall rule upon the motion.

(c) In the event of disqualification or recusal of a Judge as provided in paragraph (a) or (b) of this section, the Chief Administrative Hearing Officer or the Attorney General shall refer the matter to another Judge for further proceedings.

(d) If the Judge denies a motion to disqualify, the Attorney General may determine the matter only as part of the Attorney General's review of the initial decision on appeal, if any.

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**§ 76.17 Rights of parties.**

Except as otherwise limited by this part, all parties may:

- (a) Be represented, advised and accompanied by an attorney at law who is a member in good standing of the bar of the District of Columbia or of any state, territory or commonwealth of the United States;
- (b) Participate in any conference held by the Judge;
- (c) Conduct discovery in accordance with 28 CFR 76.18 and 76.21;
- (d) Agree to stipulations of fact or law, which shall be made part of the record;
- (e) Present evidence relevant to the issues at the hearing;
- (f) Present and cross-examine witnesses;
- (g) Present oral argument at the adjudicatory proceeding as permitted by the Judge; and
- (h) Submit a written brief and a proposed final order after the hearing.

**§ 76.18 Authority of the Judge.**

- (a) The Judge shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.
- (b) The Judge has the authority to:
  - (1) Set and change the date, time and place of the hearing upon reasonable notice to the parties;
  - (2) Continue or recess the hearing in whole or in part for a reasonable period of time;
  - (3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;
  - (4) Administer oaths and affirmations;
  - (5) Issue subpoenas in accordance with 21 U.S.C. 875 and 876 requiring the attendance of witnesses and the production of documents at dispositions or at hearings;
  - (6) Rule on motions and other procedural matters;
  - (7) Regulate the scope and timing of discovery;
  - (8) Regulate the course of the hearing and the conduct of representatives and parties;
  - (9) Examine witnesses;
  - (10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as necessary to carry out the responsibilities of the Judge under this part.

(c) The Judge does not have the authority to rule upon the validity of federal statutes or regulations.

**§ 76.19 Prehearing conferences.**

(a) *Purpose and scope.* Upon motion of a party or in the Judge's discretion, the Judge may direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to a hearing, or during the course of a hearing, when the Judge finds that the proceeding would be expedited by such a conference. Prehearing conferences normally shall be conducted by telephone unless, in the opinion of the Judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance. Reasonable notice of the time, place, and manner of the prehearing conference shall be given. At the conference, the following matters may be considered:

- (1) The simplification of issues;
- (2) The necessity of amendments to pleadings;
- (3) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;
- (4) The limitations on the number of expert or other witnesses;
- (5) Negotiation, compromise, or settlement of issues;
- (6) The exchange of copies of proposed exhibits;
- (7) The identification of documents or matters of which official notice may be required;
- (8) A schedule to be followed by the parties to completion of the actions decided at the conference; and

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(9) Such other matters, including the disposition of pending motions and resolution of issues regarding the admissibility of evidence, as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A verbatim record of the conference shall not be kept unless directed by the Judge.

(c) *Order.* Actions taken as a result of a prehearing conference shall be reduced to a written order unless the Judge concludes that a stenographic report shall suffice or, if the conference takes place within seven (7) days of the beginning of a hearing, and the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

**§ 76.20 Consent Order or settlement prior to hearing.**

(a) *Generally.* At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of reaching an agreement which will result in a just disposition of the issue involved. The Judge may require the parties to submit progress reports on a regular basis as to the status of negotiations.

(b) *Consent orders.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint or notice of administrative determination (or amended notice, if one is filed), as appropriate, and the agreement;

(3) A waiver of any further procedural steps before the Judge; and

(4) A waiver of any right to challenge or contest the validity of the order en-

tered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order for consideration by the Judge; or

(2) Notify the Judge that the parties have reached a full settlement and have agreed to dismissal of the action; or

(3) Inform the Judge that agreement cannot be reached.

(d) *Disposition.* In the event that an agreement containing consent findings and an order is submitted, the Judge, within thirty (30) days or as soon as practicable thereafter may, if satisfied with its timeliness, form, and substance, accept such agreement by issuing a decision based upon the agreed findings. The Judge has the discretionary authority to conduct a hearing to determine the fairness of the agreement, consent findings, and proposed order.

**§ 76.21 Discovery.**

(a) *Scope.* Discovery under this part covers any matter not otherwise privileged or protected by law, which is directly relevant to the issues involved in the case, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons having knowledge of relevant facts. To the extent not inconsistent with this part, the Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Judge. However, unless otherwise stated in this part, the Federal Rules shall be deemed to be instructive rather than controlling.

(b) *Methods.* Discovery may be obtained by one or more of the methods provided under the Federal Rules of Civil Procedure, including: written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission addressed to parties.

(c) *Procedures governing discovery—(1) Discovery from a party.* A party seeking

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discovery from another party shall initiate the process by serving a request for discovery on the other party. The request for discovery shall:

(i) State the time limit for responding, as prescribed in 28 CFR 76.21(c)(4);

(ii) In the case of a request for a deposition of a party or an employee of a party shall

(A) Specify the time and place of the taking of the deposition, and

(B) Be served on the person to be deposed.

(2) *Discovery from a nonparty.* Whenever possible, a party seeking a deposition and/or production of documents from a nonparty shall attempt to obtain the nonparty's voluntary cooperation. A party seeking such discovery from a nonparty may initiate such discovery by serving a request for discovery on the nonparty directly and by serving the other party. Upon failure to obtain voluntary cooperation, discovery from a nonparty may be sought by a written motion directed to the Judge in accordance with paragraph (c)(3) of this section.

(3) *Discovery motions.* (i) A party shall answer a discovery request within the time provided by 28 CFR 76.21(c)(4), either by furnishing to the requesting party the information or testimony requested, agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for objection. Upon the failure of a party to respond in full to a discovery request, the requesting party may file with the Judge a motion to compel. A copy of the motion shall be served on the other party. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance and materiality of the information sought; and

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received.

(ii) If a nonparty will not voluntarily respond to a discovery request in full, the requesting party may file with the Judge a written motion seeking a subpoena. A copy of the motion shall be served on the other party in accordance

with 28 CFR 76.23. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance, materiality and reasonable scope of the information sought;

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received; and

(C) In the case of a deposition, the date, time, and place of the proposed deposition.

(iii) The other party may respond to a motion to compel discovery or for issuance of a subpoena requiring a deposition or production of documents under this section by filing an opposition and/or a motion for a protective order in accordance with 28 CFR 76.24 within the time limits set forth in paragraph (c)(4)(iv) of this section.

(4) *Time limits.* (i) Discovery may be initiated after the filing of a complaint and shall be completed within the time designated by the Judge, but no later than seventy-five (75) days after the filing of the answer, unless a different time limit is set by the Judge after due consideration of the particular situation, including the dates set for hearing.

(ii) A party or nonparty shall file and serve a response to a discovery request promptly, but not later than twenty (20) days after the date of service of the request or order of the Judge.

(iii) A motion seeking a subpoena for the deposition testimony of a nonparty or for the production of documents by a nonparty, or a motion for an order compelling discovery from a party, shall be filed with the Judge and served upon the other party within ten (10) days of the date of service of objections, or within ten (10) days of the expiration of the time limit for response when no response is received, unless otherwise ordered by the Judge.

(iv) An opposition to a motion to compel, an opposition to a motion for an order to depose a nonparty or for the production of documents by a nonparty, or a motion for a protective order must be filed with the Judge and served upon the other party within ten (10) days of the date of service of the motion to which such motion relates.

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(5) *Orders for discovery.* (i) Any order issued compelling discovery shall include, as appropriate:

(A) Provision for notice to the person to be deposed as to the time and place of such deposition;

(B) Such conditions or limitations concerning the conduct or scope of the discovery or the subject matter of the discovery as may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment or oppression;

(C) Limitations upon the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(D) Other restrictions upon the discovery process as determined by the Judge.

(ii) The order will be served on the parties by the Judge, together with a subpoena, if approved in the case of discovery sought from nonparties, directed to the individual or entity from which discovery is sought, specifying the manner and time limit for compliance. It shall be the responsibility of the party seeking discovery from a nonparty to serve or arrange for service of an approved discovery request and subpoena on the nonparty from whom discovery is sought and on the other party.

(iii) Failure to comply with an order compelling discovery may subject the noncomplying party to sanctions under 28 CFR 76.26.

(6) *Costs.* Each party shall bear its own costs of discovery unless otherwise agreed by the parties or ordered by the Judge. The party seeking the deposition shall provide for a verbatim transcript of the description, which shall be available to all parties for inspection and copying.

§ 76.22 Exchange of witness lists, statements and exhibits.

(a) At least twenty-one (21) days before the hearing or at such other time as may be ordered by the Judge, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the respondent intends to offer in lieu of live testi-

mony in accordance with 28 CFR 76.29. At the time these documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the Judge, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects to admission, the Judge may not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the Judge finds good cause for the failure and that there is no prejudice to the objecting party.

(c) Unless a party objects within the times set by the Judge, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 76.23 Subpoenas.

(a) Requests for the issuance of subpoenas requiring the attendance and testimony of witnesses or the production of documents or other evidence under 21 U.S.C. 875 and 876 shall be filed with the Judge. Subpoenas are not ordinarily required to obtain the attendance of federal employees as witnesses, but such testimony shall be sought first by filing a request with the United States Attorney.

(b) Requests for subpoenas shall be filed with the Judge in writing and shall specify with particularity the books, papers, or testimony desired, supported by a showing of general relevance and reasonable scope, and a statement of the facts expected to be proven thereby. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses or documents to be found.

(c) A party seeking a subpoena for the attendance of a witness at a hearing shall file a written request therefor not less than fifteen (15) days before the date fixed for the hearing unless otherwise allowed by the Judge upon a showing of good cause.

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(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) Unless otherwise ordered by the Judge, the party seeking the subpoena is responsible for service of the subpoena. A subpoena may be served by any person at least eighteen (18) years of age who is not a party, including a private process server or other person authorized to serve process in actions brought in state courts of general jurisdiction or in Federal courts. Service shall be by personal delivery. Proof of service shall be made by affidavit of the person serving a subpoena entered on a true copy of the subpoena.

(f) A party or the individual to whom the subpoena is directed may file with the Judge a motion to quash the subpoena within ten (10) days after service of the subpoena, or on or before the time specified in the subpoena for compliance if it is less than ten (10) days after service.

(g) Upon failure of any person to comply with a subpoena issued by the Judge, the Attorney General, in the name of the Judge, but on relation of the party, shall institute proceedings in the appropriate district court for the enforcement of the subpoena, unless the enforcement of the subpoena would be inconsistent with law. Neither the Attorney General nor the Judge shall be deemed thereby to have assumed responsibility for prosecution of the same before the court.

**§ 76.24 Protective order.**

(a) A party or a prospective witness or deponent may seek to limit the availability or disclosure of evidence by filing a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing.

(b) In issuing a protective order, the Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to protect privileged information including one or more of the following orders:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions,

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including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be the subject of inquiry, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the Judge;

(6) That the contents of discovery or evidence be sealed;

(7) That a sealed deposition be opened only by order of the Judge;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Judge.

**§ 76.25 Fees.**

Unless otherwise ordered by the Judge, the party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed. Such costs shall be in the amounts that would be payable to a witness in a proceeding in United States district court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the complainant, a check for witness fees and mileage need not accompany the subpoena.

**§ 76.26 Sanctions.**

(a) As necessary to meet the ends of justice, the Judge may impose sanctions upon any party or a party's counsel, including, but not limited to sanctions based upon the following reasons:

(1) Failure to comply with an order, rule, or procedure governing the proceeding;

(2) Failure to prosecute an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the proceeding.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking

a deposition, the production of evidence within the party's control, or a request for admission the Judge may, as appropriate under law:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission as to unprivileged matters, deem admitted each matter of which an admission is requested;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought;

(4) Strike any appropriate part of the pleadings or other submissions of the party failing to comply with such order; and

(5) Permit the requesting party to introduce secondary evidence concerning the information sought.

(d) If a party fails to prosecute an action under this part commenced by service of a notice of hearing, the Judge may dismiss the action.

(e) If a respondent who has requested a hearing pursuant to 28 CFR 76.4, and who has been served with a Notice of a Hearing under 28 CFR 76.6, fails to appear at the hearing, absent good cause shown by the respondent, the Judge may issue an initial decision imposing a penalty.

(f) The Judge may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

#### **§ 76.27 The hearing and burden of proof.**

(a) The Judge shall conduct a hearing on the record in order to determine whether the respondent is liable for a civil penalty under 28 CFR 76.3 and, if so, the appropriate amount of any such civil penalty, considering the income and net assets of the respondent.

(b) The United States Attorney shall prove respondent's liability and appropriateness of the amount of the penalty by a preponderance of the evidence.

(c) The respondent shall prove any affirmative defenses by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise closed by the Judge for good cause shown.

#### **§ 76.28 Location of hearing.**

The hearing shall be held in the judicial district of the United States Attorney's Office having jurisdiction over the matter.

#### **§ 76.29 Witnesses.**

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the Judge and to the extent otherwise permitted by law, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties, along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena, if necessary, such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in 28 CFR 76.22.

(c) The Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The Judge shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the Judge, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination.

(f) Upon motion of any party, the Judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This part does not authorize exclusion of the following:

(1) The respondent;

(2) An individual whose presence is shown by a party to be essential to the presentation of its case.

#### **§ 76.30 Evidence.**

(a) The Judge shall determine the admissibility of evidence.

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(b) Except as provided in this part, the Judge shall not be bound by the Federal Rules of Evidence. However, the Judge may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The Judge shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Relevant evidence may be excluded if it is privileged under federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The Judge shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the Judge pursuant to 28 CFR 76.27.

**§ 76.31 Standards of conduct.**

(a) All persons appearing in proceedings before a Judge are expected to act with integrity and in an ethical manner.

(b) The Judge may exclude parties, witnesses, and their attorneys for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against *ex parte* communications. The Judge shall state in the record the cause for suspending or barring an attorney from participation in a proceeding. Any attorney so suspended or barred may appeal to the Chief Administrative Hearing Officer for the District, or if there is no Chief Administrative Hearing Officer, to the Attorney General but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney.

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**§ 76.32 Hearing room conduct.**

Proceedings shall be conducted in an orderly manner. The consumption of food or beverage, smoking, or rearranging of courtroom furniture, unless specifically authorized by the Judge, is prohibited.

**§ 76.33 Legal assistance.**

The Judge does not have authority to appoint counsel, nor can it refer a party to an attorney.

**§ 76.34 Record of hearings.**

(a) *General.* Unless otherwise agreed by the parties, a verbatim written record of all hearings shall be kept. All evidence upon which the Judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits introduced as evidence shall be marked for identification and incorporated into the record. Upon completion of the transcript, the transcript shall be filed by the official court reporter with the Judge, who will notify the parties. Transcripts may be obtained by the parties and the public from the official court reporter of record. Unless otherwise ordered by the Judge, any fees in connection therewith shall be the responsibility of the parties.

(b) *Corrections.* Corrections to the official transcript will be permitted upon motion. Motions for corrections must be submitted within ten (10) days of the service by the Judge of the notice of the filing of the transcript, or such other time as may be permitted by the Judge. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the Judge.

(c) The record of the proceedings shall consist of the notices, pleadings, motions, rulings, exhibits, orders, the findings, decisions or opinions of the Judge, the stipulations and briefs, and the transcript(s) of the hearing(s).

**§ 76.35 Decision and Order of the Judge.**

(a) *Proposed decision and order.* Within twenty (20) days of the filing of the transcript of the testimony, or such additional time as the Judge may allow, a party, if authorized by the Judge,

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may file proposed Findings of Fact, Conclusions of Law, and Order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision.* Within a reasonable time, but not later than forty-five (45) days after the filing of the hearing transcript, and the time allowed for the filing of the post-hearing briefs, proposed Findings of Fact, Conclusions of Law, and Order, if any, or within thirty (30) days after receipt of an agreement containing Consent Findings and Order disposing of the disputed matter in whole, the Judge shall make a decision. The decision of the Judge shall include Findings of Fact and Conclusions of Law upon each material issue of fact or law presented on the record. The decision of the Judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. The standard of proof shall be a preponderance of the evidence. Such decision shall be in accordance with the regulations and the statutes conferring jurisdiction. If the Judge fails to meet the deadline contained in this paragraph, he or she shall notify the parties and the Attorney General of the reason for the delay and shall set a new deadline.

(c) *Order.* If the Judge determines, by a preponderance of the evidence, that the respondent knowingly possessed a controlled substance that is listed in section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)) in violation of 21 U.S.C. 844, in an amount that, as specified by this part, is a personal use amount, the order shall require the respondent to pay a civil penalty of not more than \$10,000 for each violation. If the Judge determines that a preponderance of the evidence does not establish that the respondent knowingly possessed a controlled substance as described above, for his or her personal use, then the order shall dismiss the complaint. A copy of the decision and order together with a record of the proceedings will be forwarded to the Attorney General.

### § 76.36 Administrative and judicial review.

(a) Upon entry of an order by a Judge, any party may file with the Attorney General, within ten (10) days of the date of the Judge's decision and order, a written request for review of the decision and order together with supporting arguments. Within thirty (30) days from the date of the filing of the request for review, the Attorney General may enter an order which adopts, affirms, modifies or vacates the Judge's order.

(b) If a party does not seek review of the Judge's decision, or if the Attorney General enters no order within thirty (30) days from the date of the filing of the request for review, the order of the Judge becomes the final order of the Attorney General. If the Attorney General modifies or vacates the order, the order of the Attorney General becomes the final order.

(c) An individual subject to an order assessing a penalty after a hearing may, before the expiration of the thirty (30) day period beginning on the date the final order is entered, either by the Judge or the Attorney General, whichever is applicable, bring a civil action in the appropriate District Court of the United States pursuant to the provisions of 21 U.S.C. 844a(g) and obtain *de novo* judicial review of the final order.

### § 76.37 Collection of civil penalties.

(a) Collection of any penalty shall be the responsibility of the United States Attorney having jurisdiction over the matter.

(b) The United States Attorney having jurisdiction over the matter may commence a civil action in any appropriate district court of the United States for the purpose of recovering the amount assessed and an amount representing interest at a rate computed in accordance with 28 U.S.C. 1961.

### § 76.38 Deposit in the United States Treasury.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the United States Treasury.

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**§ 76.39 Compromise or settlement after Decision and Order of a Judge.**

(a) The United States Attorney having jurisdiction over the case may, at any time before the Attorney General issues an order, compromise, modify, or remit, with or without conditions, any civil penalty imposed under this section.

(b) Any compromise or settlement must be in writing.

**§ 76.40 Records to be public.**

All documents contained in the records of formal proceedings for imposing a penalty under this part may be inspected and copied, unless ordered sealed by the Judge.

**§ 76.41 Expungement of records.**

(a) The Attorney General shall expunge all official Department records created pursuant to this part upon application of a respondent at any time after the expiration of three (3) years from the date of the final order of assessment if:

(1) The respondent has not previously been assessed a civil penalty under this section;

(2) The respondent has paid the penalty;

(3) The respondent has complied with any conditions imposed by the Attorney General;

(4) The respondent has not been convicted of a federal or state offense relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); and

(5) The respondent agrees to submit to a drug test, and such test shows the individual to be drug free.

(b) A non-public record of a disposition under this part shall be retained by the Department solely for the purpose of determining in any subsequent proceeding whether the person qualifies for a civil penalty or expungement under this part.

(c) If a record is expunged under this part, the individual for whom such an expungement was made shall not be held guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this part or the results thereof in response to an inquiry made of him for any purpose.

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**§ 76.42 Limitations.**

No action under this part shall be entertained unless commenced within five (5) years from the date on which the violation occurred.

**PART 77—ETHICAL STANDARDS FOR ATTORNEYS FOR THE GOVERNMENT**

Sec.

77.1 Purpose and authority.

77.2 Definitions.

77.3 Application of 28 U.S.C. 530B.

77.4 Guidance.

77.5 No private remedies.

AUTHORITY: 28 U.S.C. 530B.

SOURCE: Order No. 2216-99, 64 FR 19275, Apr. 20, 1999, unless otherwise noted.

**§ 77.1 Purpose and authority.**

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to implement 28 U.S.C. 530B and to provide guidance to attorneys concerning the requirements imposed on Department attorneys by 28 U.S.C. 530B.

(b) Section 530B requires Department attorneys to comply with state and local federal court rules of professional responsibility, but should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States.

(c) Section 530B imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys or to alter rules of professional responsibility that expressly exempt government attorneys from their application.

(d) The regulations set forth in this part seek to provide guidance to Department attorneys in determining the rules with which such attorneys should comply.