

crossing out erroneous information without obliterating or otherwise making illegible any of the originally recorded information. With regard to trading cards only, a member may correct erroneous information by rewriting the trading card; provided, however, that the member must submit a ply of the trading card, or in the absence of plies the original trading card, that is subsequently rewritten in accordance with contract market rules which set forth the required collection schedule for trading cards and provided further that the member is accountable for any trading card that subsequently is rewritten pursuant to paragraph (d)(6) of this section.

\* \* \* \* \*

Issued in Washington, DC on August 13, 1996 by the Commission.

Catherine D. Dixon,

*Assistant to the Secretary of the Commission.*

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## UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

### 22 CFR Part 212

#### Public Information

**AGENCY:** United States Agency for International Development.

**ACTION:** Final rule.

**SUMMARY:** These amendments make technical revisions to the Agency's Freedom of Information Act Regulations as set forth in 5 U.S.C. 553(d).

**EFFECTIVE DATE:** August 20, 1996.

**FOR FURTHER INFORMATION CONTACT:**

Willette L. Smith, Customer Outreach and Oversight Staff, Office of Administrative Services, 703/516-1849, Fax 703/516-1894.

**SUPPLEMENTARY INFORMATION:** Revisions and updates have been made to the following sections of 22 of Chapter II of Title 22: (a) 212.25—change of addresses for Public Reading Room; (b) 212.33 procedure for making requests for agency's records; (c) 212.34 procedures for responding to requests for records; (d) 212.35 (b) revised method of calculating processing fees and 212.35(e) added an appeal right to fee waiver decision; 212.36 change appeal time period and update address of Appeal's Officer; 212.38 revised Agency's predislosure notification procedures for processing request for confidential commercial information.

This rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981. As required by the

Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

#### List of Subjects in 22 CFR Part 212

Freedom of information.

For the reasons set forth in the preamble, Part 212 of Chapter II of Title 22 of the Code of Federal Regulations is revised to read as follows:

### PART 212—PUBLIC INFORMATION

#### Subpart A—General

Sec.

212.1 Statement of policy.

#### Subpart B—Publication in the Federal Register

212.11 Materials to be published.

212.12 Effect of nonpublication.

212.13 Incorporation by reference.

#### Subpart C—Availability of Information for Public Inspection and Copying

212.21 Public records.

212.22 Protection of personal privacy.

212.23 Current index.

212.24 Effect of noncompliance.

212.25 Procedures for obtaining materials under this subpart.

#### Subpart D—Access to Agency Records

212.31 Availability of agency records.

212.32 Identification of records.

212.33 Procedure for making requests.

212.34 Procedures for responding to requests for records.

212.35 Schedule of fees and methods of payment for services rendered.

212.36 Denial of request for access to records.

212.37 Procedures for agency consideration of appeals.

212.38 Predislosure notification procedures for confidential commercial information.

#### Subpart E—Exemptions From Disclosure

212.41 Exemptions from publication and disclosure requirements of subparts B, C, and D.

212.42 Exemption from 5 U.S.C. 552.

#### Subpart F—Opening of Records for Nonofficial Research Purposes.

212.51 General Policy

Authority: 22 U.S.C. 2381(a).

#### Subpart A—General

##### § 212.1 Statement of policy.

(a) It is the policy of the United States Agency for International Development (hereinafter "USAID" or "the Agency") that information about its objectives and operations be freely available to the public in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, as amended; the President's Memorandum for Heads of Departments and Agencies regarding the FOIA, 29

Weekly Comp. Pres. Doc. 1999 (October 4, 1993); and the Attorney General's Memorandum of the same title and date. The Director, Office of Administrative Services, Bureau for Management, or his/her designee, is responsible on behalf of the Agency for administration of the provisions of the regulations set forth in this part.

(b) In addition, concerning the International Cooperation and Development Agency ("IDCA"), pursuant to executive order and delegations of authority USAID is responsible not only for management of its own affairs but also for those of IDCA. The policy of IDCA in the FOIA area has been determined by USAID to be identical to that of USAID, as stated in this section. Therefore, all policies and procedures set forth in this part apply equally to IDCA as to USAID; and it is intended that references in this part to "USAID" or "the Agency" shall, wherever appropriate, include or mean a reference to IDCA. Accordingly, all IDCA FOIA-related matters shall be referred to and processed by USAID staff under this part as though they were USAID matters.

(c) All records of USAID shall be made available to the public upon compliance with the procedures established in § 212.33, except to the extent a determination is made to withhold a record exemptible under 5 U.S.C. 552(b). Such a determination shall be made pursuant to procedures set forth in § 212.36, 212.37 and 212.38.

(d) The term "record" as used in this part includes all books, papers, maps, photographs, or other documentary material or copies thereof, regardless of physical form or characteristics, made in or received by USAID (including its missions or offices abroad), and preserved as evidence of its organization, functions, policies, decisions, procedures, operations, or other activities. The term does not include copies of the records of other U.S. Government agencies, foreign governments, international organizations, or non-governmental entities which do not evidence organization, functions, policies, decisions, procedures, operations, or activities of USAID.

#### Subpart B—Publication in the Federal Register

##### § 212.11 Materials to be published.

(a) USAID separately states and currently publishes in the Federal Register for the information and guidance of the public:

(1) Descriptions of its central and field organization and the established places

at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;

(2) Statements of the general course and method by which its functions are channelled and determined, including the nature and requirements for all formal and informal procedures available;

(3) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by USAID; and

(5) Every amendment, revision or repeal of the material listed in this section.

(b) USAID Public Notice No. 1 and the USAID Regulations published in chapter II of Title 22 and in subtitle A, Chapter 7 of Title 41 of the Code of Federal Regulations implement the provisions of this section.

#### **§ 212.12 Effect of nonpublication.**

The materials referenced in § 212.11 shall not be binding upon or otherwise adversely affect a person unless either

(a) The materials were in fact published in the Federal Register or

(b) The person otherwise had actual and timely notice of the content of such materials.

#### **§ 212.13 Incorporation by reference.**

For purposes of this subpart B, USAID matters which are reasonably available to the class of persons affected thereby are deemed to be published in the Federal Register when they have been incorporated by reference therein with the approval of the Director of the Federal Register.

### **Subpart C—Availability of Information for Public Inspection and Copying**

#### **§ 212.21 Public records.**

In accordance with this subpart, USAID makes the following information and materials available for public inspection and copying:

(a) All final opinions (including concurring and dissenting opinions), and all orders made in the adjudication of the cases;

(b) those statements of policy and interpretations which have been adopted by the Agency and are not published in the Federal Register; and

(c) Administrative staff manuals and instructions to staff that affect any member of the public.

#### **§ 212.22 Protection of personal privacy.**

To the extent required to prevent a clearly unwarranted invasion of personal privacy, USAID may delete identifying details when USAID makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. USAID will, in each such case, explain in writing the justification for the deletion.

#### **§ 212.23 Current index.**

USAID maintains and makes available for public inspection and copying a current index providing identifying information for the public as to any matter which has been issued, adopted, or promulgated after July 4, 1967, and which is required by § 212.21 to be made available or published. Publication of an index is deemed both unnecessary and impractical. However, copies of the index are available, upon request, for a fee based on the direct cost of duplication.

#### **§ 212.24 Effect of noncompliance.**

No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public will be relied upon, used, or cited as precedent by USAID against any private party unless it has been indexed and either made available or published as provided by this subpart, or unless that private party shall have actual and timely notice of the terms thereof.

#### **§ 212.25 Procedures for obtaining materials under this subpart.**

(a) The materials required to be made available for public inspection and copying in accordance with this subpart are available to members of the public at USAID's Public Reading Room, Room 1113, 1621 North Kent Street, Rosslyn, Virginia 22209, which is open from 9 a.m. to 5 p.m., Monday through Friday, except on holidays. All such materials are available in electronic form (disks) only; to a reasonable degree, assistance will be provided in use of necessary equipment.

(b) Requests for materials which are available under this subpart should follow the procedures under § 212.33(a) of this part.

(c) The direct costs of any necessary duplication will be charged in accordance with the fee schedule set forth in § 212.35.

(d) USAID Missions and offices in countries abroad are not responsible for the maintenance of the index and materials available under this subpart. However, insofar as they do have these materials, they will make them available to citizens of the United States who are present in their respective countries

upon application made either or in person in writing to the USAID Director, or other principal USAID officer, c/o American Embassy in the applicable country.

### **Subpart D—Access to Agency Records**

#### **§ 212.31 Availability of agency records.**

Upon receiving a request which reasonably describes a USAID record, and which is made in accordance with the provisions of this subpart, USAID will make such records, except the following, promptly available to the requesting party:

(a) Matters published in the Federal Register pursuant to subpart B;

(b) Matters made available to the public pursuant to subpart C; and

(c) Matters exempt from disclosure pursuant to § 212.41 or § 241.42 of this part.

#### **§ 212.32 Identification of records.**

The request for a record by a member of the public must contain a reasonably specific description of the particular record sought so that a USAID officer who is familiar with the subject matter of the request may be able to locate the record with a reasonable amount of effort. A description that includes as much information as possible, such as the subject matter, format, approximate date and, where pertinent, the name of the country or person involved, will facilitate the search for the requested record.

#### **§ 212.33 Procedure for making requests.**

(a) Requests for records, other than records available at the Public Reading Room identified in § 212.24(a), may be made by a member of the public in writing only to the Chief, Customer Outreach and Oversight Staff, Room 1113, SA-16, Agency for International Development, Department of State, 320 21st Street, N.W., Washington, D.C. 20523-1608. The request and the envelope must be plainly marked "FOIA Request." Requests may be made orally, that is, in person, only for records and materials available at the Public Reading Room.

(b) Requests for records may be made directly to a USAID mission or office abroad only by a citizen of the United States who is present in that country and must be by written application to the USAID Director (or other principal USAID officer), care of the American Embassy in that country. Any such written request and its envelope must be plainly marked "FOIA Request."

(c) Only signed original (as opposed to electronically transmitted) requests are acceptable for procedures pursuant

to paragraphs (a) and (b) of this section. Telephoned requests, or in-person requests other than to the Public Reading Room, cannot be accepted. If a written request not properly marked "FOIA Request" on both the letter and envelope is thereby delayed in reaching the Chief, Office of Customer Outreach and Oversight Staff, such request will not be deemed received by USAID until actually received by that official. In the event of such a delay, the person making the request will be furnished a notice of the effective date of receipt.

**§ 212.34 Procedures for responding to requests for records.**

(a) Upon receipt by the Chief, Office of Customer Outreach and Oversight Staff, of a reasonably specific request made pursuant to § 212.33 of this part, a maximum of ten working days will normally be taken to determine to what extent the Agency can provide the information requested. Upon the making of that determination, the person making the request will be promptly so informed. Copies of the releasable documents will be made available promptly thereafter upon receipt of applicable fees and charges as set forth in § 212.35.

(b)(1) In unusual circumstances, USAID may not be able to determine the availability of the requested documents within ten working days, in which event the person making the request will be informed by written notice of the delay, the reasons for the delay and the date on which a determination may be expected. In this context, the term "unusual circumstances" refers to the following situations:

(i) When there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) When there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single request; or

(iii) When there is a need for consultation (which will be conducted with all practicable speed) with another agency having a substantial interest in the determination of the request or among two or more components of the Agency, each having substantial subject-matter interest therein.

(2) The maximum time in making a determination of availability, in the event of such unusual circumstances, will be twenty working days from receipt of the request. In the event that only part of the permissible ten working days extension is used, then USAID reserves the right, if necessary, to use

any remainder of such time for the determination of an appeal, if one is made.

(c) If a request is made to USAID for material that is controlled or held by another agency, the person making the request will be immediately notified that USAID does not have or control the requested material and he/she will be advised of the name of the controlling agency and of the address from which the material may be requested, unless the other agency has, by public regulation, delegated the release authority to USAID. If release authority has been delegated, USAID will follow the procedures authorized by the delegation in determining whether to release the information. If a request for material is referred to USAID from another agency, the time period for determination of release of the information will not start until the request is received by the Chief, Office of Customer Outreach and Oversight Staff; and the person making the request will be immediately notified of the referral and of the date the request was received in USAID. USAID will not accept referral of requests unless and until the Chief, Customer Outreach and Oversight Staff, or his/her designee, determines that the material requested is actually within the scope and control of the release authority of USAID.

(d) If only a part of a record is exempt from disclosure, then any reasonably segregable portion of such record will be furnished after deletion of the portions which are exempt, provided that the segregable portion constitutes an intelligible record which is not distorted out of context or contradictory to the substance of the entire record before segregation.

**§ 212.35 Schedule of fees and method of payment for services rendered.**

(a) *Definitions.* (1) *Direct costs* means those expenditures which the Agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents in order to respond to a FOIA request.

(2) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Line-by-line search will not be done when duplicating an entire document would prove the less expensive and quicker method of complying with a request. ("Search" for this purpose is distinguished from "review" (see paragraph (a)(4) of this section).

(3) *Duplication* refers to the process of making a copy of a document available

to the FOIA requester. Copies can take the form of paper copy, microfilm or audiovisual materials (among others) and will be in a form that is reasonably usable by requesters.

(4) *Review* refers to the process of examining documents located in response to a commercial use request (see paragraph (a)(5) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to redact those documents of exempt material and otherwise preparing them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that is related to commerce, trade, or the profit interest of the requester or of the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Agency will determine the use to which a requester will put the documents requested. Where the Agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Agency may seek additional clarification before assigning the request to a specific category.

(6) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education which operates a program or programs of scholarly research.

(7) *Non-commercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (a)(5) of this section and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(8) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can

qualify as disseminators of "news" who make their products available for purchase or subscription by the general public). These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a sound basis for expecting publication through such an organization, even though not actually employed by it. A publication contract would be the clearest evidence, but the Agency may also look to the past publication record of the requester in making this determination.

(b) *Fees to be charged.* The following specific fees shall be applicable with respect to services rendered to members of the public under this part:

(1) *Commercial use requesters.* Fees are intended to cover the full estimated direct costs of researching for, reviewing for release, and duplicating the records requested. *Search costs* are computed based on the following formula: hours spent by Agency personnel, whatever their grade and location, and rounded up to the nearest full hour, and including locality pay for Washington-based personnel only, at the basic annual rate then payable to U.S. Government employees at the GS-9/Step 4 level, times 1.17 (to factor in related benefits) and divided by 2080 (hours per work year). *Review costs* are computed based on the same formula but, instead, using the rate then payable to employees at the GS-13/Step 4 level. *Duplicating costs* are \$0.20 per page. Search costs will be assessed even though no records may be found or even if, after review, there is no disclosure of records.

(2) *Educational and non-commercial scientific institution requester.* The Agency will provide documents to requesters in this category for the cost of duplication alone (\$0.20 per page), excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that a request is being made under the auspices of a qualifying institution and that the records are sought in furtherance of scholarly research, if the request is from an educational institution or scientific research, if the request is from a non-commercial scientific institution. Requesters eligible for free search must (as with all FOIA requesters) reasonably describe the records sought.

(3) *Requesters who are representatives of the news media.* The Agency will provide documents to requesters in this category for the cost of reproduction alone (\$0.20 per page), excluding charges for the first 100 pages. To be eligible for inclusion in this category a requester must meet the criteria in paragraph (a)(8) of this section, and his/her request must not be made for commercial use. In reference to this class of requesters, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Requesters eligible for free search must also reasonably describe the records sought.

(4) *All other requesters.* The Agency will charge requesters who do not fit into any of the categories in paragraphs (b) (1), (2), and (3) of this section fees which recover the full direct cost of search, and for reproducing records that are responsive to the request, except that the first 100 pages and the first two hours of search time shall be furnished without charge. The hourly rates outlined in paragraph (b)(1) of this section will prevail. Requesters must reasonably describe the records sought. Moreover, requests from subjects for records filed in the Agency's Privacy Act System of Records will continue to be treated under the fee provisions of the Privacy Act of 1975 except that the first 100 pages of reproduction will be furnished without charge.

(c) *Non-payment of fees.* (1) The Agency will begin assessing interest charges on the thirty-first day following the day on which the requester is advised of the fee charge. Interest will be at the rate prescribed in 31 U.S.C. 3717.

(2) Where a requester has previously failed to copy a fee charged in a timely fashion (i.e. within thirty days of the billing date), the Agency will require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (c)(1) of this section, and to make an advance payment of the full amount of the remaining estimated fee before the Agency begins to process a new request or continues processing a then-pending request from the requester.

(3) When the Agency acts under paragraph (c) (1) or (2) of this section the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., ten working days from receipt of initial request and twenty working days from receipt of appeals from initial denial plus permissible extensions of these time limits) will begin only after the Agency has received fee payments described in this section.

(d) *Advance payments or confirmation.* Where USAID estimates or determines that allowable charges to a requester are likely to exceed \$250, USAID will require a requester to make an advance payment of the entire estimated charges before continuing to process the request. Where the estimated charges are in the \$25-\$250 range, then USAID in its discretion, before processing the request, may require either—

(1) An advance deposit of the entire estimated charges or (2) Written confirmation of the requester's willingness, when billed, to pay such charges.

(e) *Waiving or reducing fee.* In accordance with section (4)(A)(ii) of the FOIA, the Agency will furnish documents without charge or at reduced charges if disclosure of the information is "in the public interest" in that such disclosure is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. A requester may at any time, up to a period not to exceed thirty days from the final USAID decision concerning his/her request, request such waiver or reduction of fee by letter addressed to the Chief, Customer Outreach and Oversight Staff; such request shall address the above criteria for waiver. Such request will initially be decided by the Chief, Customer Outreach and Oversight Staff, or his/her designee; such decision will normally be made, and the requester so advised, within ten working days of its receipt. The requester, if dissatisfied with that decision, may appeal pursuant to the same procedures as apply under § 212.36 and § 212.37 of this part.

(f) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, Section (4)(A)(iv) of the FOIA, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These provisions work together so that, except for commercial use requesters, the Agency will not begin to assess fees until it has provided such free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, the Agency will determine the cost of only ten minutes of search time and only five pages of reproduction. If this

cost is equal to or less than the cost of processing the payment instrument—a figure which the Agency will from time to time review and determine—then there will be no charge to the requester.

(g) *Other provisions*—(1) *Charges for unsuccessful search*. The Agency will assess charges for time spent searching even if the Agency fails to locate the records or if records located are determined to be exempt from disclosure.

(2) *Aggregating requesters*. When the Agency reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Agency will aggregate any such requesters and charge accordingly.

(3) *Effect of the Debt Collection Act of 1982* (Public Law 97-365). The Agency will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

(4) *Remittances*. (i) Remittances will be in U.S. Dollars in the form of either a personal check or bank draft drawn on a bank in the United States or a money order.

(ii) Remittances shall be made payable to the order of the U.S. Treasury and mailed to the Chief, Customer Outreach and Oversight Staff, at the address set forth in § 212.33(a) of this part.

#### **§ 212.36 Denial of request for access to records.**

(a) If it is determined that the Agency cannot comply with all or part of a request for records, the person making the request shall be immediately notified of the determination, the reasons for the determination, the name and title of each officer responsible for the denial, and the right of the person to appeal the adverse determination.

(b) The denial of a request for records may be made, initially, only by the Chief, Customer Outreach and Oversight Staff, or his/her designee.

(c) (1) Any person who has been denied access to records pursuant to this section may appeal the relevant decision not later than thirty days after the date of the notification of denial or, in the case of a partial denial, not later than thirty days after the date the releasable documents are actually furnished to the person making the request, whichever is later. The appeal shall be in writing addressed to the Agency's FOIA Appeals Officer, who is:

The Director, Office of Administrative Services, Bureau for Management, Room 803, SA-2, Agency for International

Development, 21st and Virginia Ave., N.W., Washington, D.C., 20523-0217.

(2) In order for the Agency to make a timely response to the appeal, both the text of the appeal and its envelope must be plainly marked "FOIA Appeal". The appeal must contain a reasonable description of the record sought and withheld, a copy of the initial decision to deny access and any other information that will enable the Appeals Officer to make the final decision.

#### **§ 212.37 Procedures for agency consideration of appeals.**

(a) Upon receipt of the appeal by the Appeals Officer, a maximum of twenty working days will normally be taken to decide the appeal. In unusual circumstances, as defined in § 212.34, the twenty working days may be extended by ten working days or by the number of days not used in the original denial of the request.

(b) If the appeal is granted, the person making the appeal shall be immediately notified and copies of the releasable documents shall be made available promptly thereafter upon receipt of appropriate fees as set forth in § 212.35. If the appeal is denied in whole or part, the person making the request shall be immediately notified of the decisions and of the provisions for judicial review of the Agency's denial of the request.

(c) In the event a determination is not issued within the applicable time limit and the person making the request therefore chooses to sue the Agency, the Agency-level determination process shall nonetheless continue.

(d) If an appeal not properly marked "FOIA Appeal" on the text of the appeal and/or envelope is thereby delayed in reaching the Appeals Officer, it will not be deemed received by the Appeals Officer until actually received by him/her. In such event, the person making the appeal will be furnished notice of the effective date of receipt.

#### **§ 212.38 Predisclosure notification procedures for confidential commercial information.**

(a) *In general*. Confidential commercial information provided to the Agency shall not be disclosed pursuant to a FOIA request except in accordance with this section. For purposes of this section, the following definitions apply:

(1) *Confidential commercial information* means records provided to the Agency by a submitter that arguably contain material exempt from release under Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the Agency. The term "submitter" includes, but is not limited to, corporations, state governments and foreign governments.

(b) *Notice to submitters*. Whenever the Agency receives a FOIA request for confidential commercial information and, pursuant to paragraph (c) of this section, the submitter of such information is entitled to receive notice of that request, then the Agency shall promptly notify the submitter that it has received the request, unless such a notice is not required pursuant to paragraph (g) of this section. The notice shall be in writing and shall either describe the exact nature of the confidential commercial information requested or provide a copy of the records or portion of the records containing the confidential commercial information. The notice shall be addressed to the submitter and mailed, postage prepaid, first class mail, to the submitter's last known address. Where notice is required to be given to a voluminous number of submitters, in lieu of such a mailing the notice may be posted or published in a manner and place reasonably calculated to provide notice to the submitters.

(c) *When notice is required; related matters*. (1) For confidential commercial information submitted prior to January 1, 1988, the Agency shall provide a submitter with notice of its receipt of a FOIA request whenever:

(i) The records are less than ten years old and the information has been designated by the submitter as confidential commercial information; or

(ii) The Agency has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm to the submitter thereof.

(2) For confidential commercial information submitted to the Agency on or after January 1, 1988, the Agency shall provide a submitter with notice of its receipt of a FOIA request whenever:

(i) The submitter has designated the information as confidential commercial information pursuant to the requirements of this section; or

(ii) The Agency has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm to the submitter.

(3) Notice of a request for confidential commercial information falling within paragraph (c)(2)(i) of this section shall be required for a period of not more than ten years after the date of submission unless the submitter

provides reasonable justification for a designation period of greater duration.

(4) A submitter shall use good-faith efforts to designate by appropriate markings, either at the time a record is submitted to the Agency or within a reasonable period of time thereafter, those portions of the record which it deems to contain confidential commercial information. The designation shall be accompanied by a certification made by the submitter, its agent or designee that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public.

(5) Whenever the Agency provides notice to the submitter in accordance with paragraph (c) of this section, the Agency shall at the same time provide written notice to the requester that it is affording the submitter a reasonable period of time within which to object to the disclosure, and that, therefore, the Agency may be required to enlarge the time within which it otherwise would respond to the request.

(d) *Opportunity to object to disclosure.* To the extent permitted by law, the notice required by paragraph (c) of this section shall afford a submitter a reasonable period of time within which the submitter or its authorized representative may provide the Agency with a written objection to the disclosure of the confidential commercial information and demonstrate why the submitter believes that the records contain confidential commercial information whose disclosure would, probably, cause substantial competitive injury to the submitter. Except where a certification already has been made in conformance with the requirements of paragraph (c)(4) of this section, the objection shall be accompanied by certification made by the submitter, its agent or designee, that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* (1) The Agency shall give careful consideration to objections made by a submitter pursuant to paragraph (d) of this section prior to making any administrative determination of the issue. Whenever the Agency decides to disclose information despite the objection of a submitter, the Agency shall forward to the submitter a written notice which shall include:

(i) A statement of the reasons for which a submitter's disclosure objections were not sustained; and

(ii) A description of the information to be disclosed.

(2) To the extent permitted by law, the notice required to be given by paragraph (e)(1) of this section shall be provided to the submitter a reasonable number of days prior to the specific disclosure date.

(3) Whenever the Agency provides notice to the submitter in accordance with paragraphs (e) (1) and (2) of this section, the Agency shall at the same time notify the requester

(i) That such a notice has been given and

(ii) Of the proposed date for disclosure.

(f) *Notice of lawsuit.* When a requester brings suit seeking to compel the disclosure of information for which notice is required pursuant to paragraph (c) of this section, the Agency shall promptly notify the submitter that such suit has been filed.

(g) *Exceptions to notice requirements.* The notice requirements of this section shall not apply if:

(1) The Agency determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by an Agency rule that;

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the Agency that are to be released under the FOIA; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(4) For purposes of paragraph (c) of this section, the information requested was not designated by the submitter as exempt from disclosure when the submitter had an opportunity to make such designation at the time of submission of the information or within a reasonable time thereafter, unless;

(i) The Agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(ii) The designation made by the submitter appears obviously frivolous; except that, in such case, the Agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

## Subpart E—Exemptions From Disclosure

### § 212.41 Exemptions from publication and disclosure requirements of subparts B, C, and D.

None of the provisions of subparts B, C, and D which provide for publication and disclosure of certain information and records shall be applicable to matters that are:

(a) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(b) Related solely to the internal personnel rules and practices of the Agency;

(c) Specifically exempted from disclosure by statute;

(d) Trade secrets and commercial or financial information obtained from a person and privileged and confidential;

(e) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(g) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(1) Would reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedure for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) Contained in or related to examination, operating, or condition

reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and

(i) Geological and geophysical information and data (including maps) concerning wells.

**§ 212.42 Exemption from 5 U.S.C. 552.**

Whenever a request is made which involves access to records described in paragraph (g) of § 212.41 and the investigation or proceedings involves a possible violation of criminal law; and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the Agency may, during only such time as that circumstances continues, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

**Subpart F—Opening of Records for Nonofficial Research Purposes**

**§ 212.51 General policy.**

(a) The Agency will open its records on an equitable basis to all individuals engaged in private research as soon as such action may be taken without adversely affecting the national security, the maintenance of friendly relations with other nations, the efficient operation of the Agency, or the administrative feasibility of servicing requests for access to such records.

(b) Access for research purposes to the classified foreign policy records in the Agency's custody will be governed by the regulations of the Department of State with respect thereto, as set forth in part 6, chapter II of title II of the Code of Federal Regulations. Application for such access may be made to the Chief, Customer Outreach and Oversight Staff, at the address listed in § 212.33(a) of this part. That officer, or his/her designee, in consultation with the Director, Historical Office, Department of State, or his/her designee, will determine the action to be taken and will so advise the researcher.

Dated: July 31, 1996.

Willette L. Smith,

*Public Affairs Specialist, Office of Admin. Services.*

[FR Doc. 96-20880 Filed 8-19-96; 8:45 am]

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**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Parts 19 and 20**

RIN 2900-A111

**Appeals Regulations, Rules of Practice: Hearings Before the Board of Veterans' Appeals at Department of Veterans Affairs Field Facilities**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends the Appeals Regulations for the Board of Veterans' Appeals (Board) to shorten from 60 days to 30 days the minimum notice the Department of Veterans Affairs (VA) must give an appellant of the date and place of a hearing before the Board at a VA field facility. This change will help reduce the number of "no shows" at field hearings.

This document also amends the Board's Rules of Practice to change, from the initiation of an appeal to the perfection of the appeal, the event beginning the period during which an appellant may request a hearing before the Board at a VA field facility. This change would reduce the number of hearings scheduled for appellants who never perfect their appeals.

The Board adjudicates appeals of denials of claims for veterans' benefits.

**EFFECTIVE DATE:** August 20, 1996.

**FOR FURTHER INFORMATION CONTACT:** Steven L. Keller, Chief Counsel, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202-565-5978).

**SUPPLEMENTARY INFORMATION:** Former 38 CFR 19.76 generally required VA to notify an appellant and his or her representative of the time and place of a hearing before the Board at a VA field facility at least 60 days before the hearing. The Board has consistently experienced a high rate of "no shows" at such hearings—sometimes as high as 60 percent—which we believe is due, at least in part, to the relatively long time between notice of the hearing and the hearing. VA believes that 30 days' notice to appellants and their representatives is sufficient and may help reduce the rate of "no shows" at field hearings. We have therefore changed § 19.76 accordingly.

Former 38 CFR 20.703 permitted an appellant to request a hearing before the Board at a VA field facility any time after filing a notice of disagreement, which initiates an appeal to the Board. A substantive appeal (VA Form 9) must be filed to perfect an appeal. 38 CFR

20.200. Historically, fewer than 65% of VA claimants who initiated an appeal perfected it. By allowing an appellant to request a hearing before perfecting the appeal, VA expended resources scheduling hearings for appellants who never perfected their appeals. We therefore have changed § 20.703 to permit an appellant to request a hearing before the Board at a field facility only when or after filing a substantive appeal.

This final rule concerns agency procedure or practice and, consequently, pursuant to 5 U.S.C. 553, is exempt from notice and comment requirements.

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rule will affect VA beneficiaries and will not affect small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

**List of Subjects**

*38 CFR Part 19*

Administrative practice and procedure, Claims, Veterans.

*38 CFR Part 20*

Administrative practice and procedure, Claims, Lawyers, Legal services, Veterans.

Approved: June 28, 1996.

Jesse Brown,

*Secretary of Veterans Affairs.*

For the reasons set out in the preamble, 38 CFR parts 19 and 20 are amended as set forth below:

**PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS**

1. The authority citation for part 19 continues to read as follows:

Authority: 38 U.S.C. 501(a).

**Subpart D—Hearings Before the Board of Veterans' Appeals at Department of Veterans Affairs Field Facilities**

**§ 19.76 [Amended]**

2. Section 19.76 is amended by removing "60 days" each time it appears and adding, in its place, "30 days".

**PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE**

3. The authority citation for part 20 continues to read as follows:

Authority: 38 U.S.C. 501(a).