

**DEPARTMENT OF JUSTICE****Bureau of Prisons****28 CFR Part 540****[BOP-1064-I]****RIN 1120-AA59****Incoming Publications: Nudity and Sexually Explicit Material or Information****AGENCY:** Bureau of Prisons, Justice.**ACTION:** Interim rule.

**SUMMARY:** This rule modifies the Bureau of Prisons rule on Incoming Publications in order to implement the provisions of the Fiscal Year 1997 Omnibus Budget Act (Public Law 104-208) prohibiting use of appropriated funds for distributing or making available to an inmate any commercially published information or material when such information or material is sexually explicit or features nudity.

**DATES:** Effective December 1, 1996; comments must be submitted by January 6, 1997.

**ADDRESSES:** Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, D.C. 20534.

**FOR FURTHER INFORMATION CONTACT:** Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.

**SUPPLEMENTARY INFORMATION:** The Bureau of Prisons is adopting interim regulations to its existing rule on incoming publications (28 CFR part 540, subpart F). A final rule on this subject was published June 29, 1979 (44 FR 38260), as amended December 7, 1982 (47 FR 55129) and January 3, 1985 (50 FR 411).

The current modification implements a provision of the Fiscal Year 1997 Omnibus Budget Act (P.L. 104-208) that directly affects the Bureau. The specific provision provides that none of the funds made available in this Act to the Federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to the Federal Official having authority to obligate or expend such funds that such information or material is sexually explicit or features nudity.

Based on this statutory restriction, a new § 540.72 is being added, entitled, "Statutory restrictions requiring return of commercially published information or material which is sexually explicit or features nudity". This section implements the provisions of Public Law 104-208 by providing for the return

of the disallowed information or material to the publisher or sender. The rule provides for the publisher or sender to be notified that an independent review of the decision may be obtained by writing to the Regional Director within 20 days of receipt of the letter returning the material. The inmate is to be provided with written notice of the action. The new section contains definitions of "commercially published information or material", "nudity", "features", and "sexually explicit".

Other provisions in subpart F have been amended in order to improve organization and to update references to the Bureau's provisions on the Administrative Remedy Program. Section 540.70, on purpose and scope, has been revised to remove procedural details on delegation of authority. Those procedural details have been included in § 540.71(a). The definition of publication contained in that section has been updated to include better examples of material likely to be submitted. An introductory phrase, "Except when precluded by statute (see § 540.72)," has been added to the section in recognition of the new legislative requirement. Amendments also have been made in § 540.71 (d) and (e) to indicate the retitled Administrative Remedy Program and to indicate the longer period of time now available to the inmate for filing a remedy request (20 days rather than 15 days).

Because this statutory restriction on the Bureau of Prisons' appropriated funds is applicable with the Fiscal Year beginning October 1, 1996, the Bureau finds good cause for making this amendment effective without a full thirty day delay and without notice of proposed rulemaking. The Bureau, however, has elected to publish this regulation as an interim rule in order to invite public comment and to delay effectiveness until December 1, 1996. Members of the public may submit comments concerning this rule by writing to the previously cited address. Comments received before the deadline will be considered before the rule is finalized; comments received after the deadline will be considered to the extent practicable.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), does not have a significant impact on a substantial number of small entities beyond that required by the Fiscal Year 1997

Omnibus Budget Act. The economic impact of this regulation is either limited to the Bureau's appropriated funds or is required by the Fiscal Year 1997 Omnibus Budget Act.

**List of Subjects in 28 CFR Part 540**

Prisoners.

Kathleen M. Hawk,

*Director, Bureau of Prisons.*

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), part 540 in subchapter C of 28 CFR, chapter V is amended as set forth below.

**SUBCHAPTER C—INSTITUTIONAL MANAGEMENT****PART 540—CONTACT WITH PERSONS IN THE COMMUNITY**

1. The authority citation for 28 CFR part 540 is revised to read as follows:

Authority: 5 U.S.C. 301, 551, 552a; 18 U.S.C. 1791, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; Public Law 104-208, Section 614 (110 Stat. 3009); 28 CFR 0.95-0.99.

2. Section 540.70 is revised to read as follows:

**§ 540.70 Purpose and scope.**

Except when precluded by statute (see § 540.72), the Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this subpart, means a book, booklet, pamphlet, or similar document, or a single issue of a magazine, periodical, newsletter, newspaper, plus such other materials addressed to a specific inmate such as advertising brochures, flyers, and catalogs.

3. In § 540.71, paragraph (a) is amended by adding two sentences at the end, paragraph (d) is amended by revising the phrase "Administrative Remedy Procedure" to read "Administrative Remedy Program", and paragraph (e) is amended by revising the phrase "Administrative Remedy Procedure" to read "Administrative Remedy Program" and by revising the phrase "15 days" to read "20 days".

**§ 540.71 Procedures.**

(a) \* \* \* The Warden may designate staff to review and where appropriate to

approve all incoming publications in accordance with the provisions of this subpart. Only the Warden may reject an incoming publication.

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4. Section 540.72 is added to read as follows:

**§ 540.72 Statutory restrictions requiring return of commercially published information or material which is sexually explicit or features nudity.**

(a) When commercially published information or material may not be distributed by staff or made available to inmates due to statutory restrictions (for example, a prohibition on the use of appropriated funds to distribute or make available to inmates information or material which is sexually explicit or features nudity), the Warden or designee shall return the information or material

to the publisher or sender. The Warden or designee shall advise the publisher or sender that an independent review of the decision may be obtained by writing to the Regional Director within 20 days of receipt of the notification letter. Staff shall provide the inmate with written notice of the action.

(b) Definitions: For the purpose of this section:

(1) *Commercially published information or material* means any book, booklet, pamphlet, magazine, periodical, newsletter, or similar document, including stationery and greeting cards, published by any individual, organization, company, or corporation which is distributed or made available through any means or media for a commercial purpose. This definition includes any portion

extracted, photocopied, or clipped from such items.

(2) *Nudity* means a pictorial depiction where genitalia or female breasts are exposed.

(3) *Features* means the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition.

(4) *Sexually explicit* means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation.

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