

standards of legibility and readability described in § 721.3 and you intend to rely on that record to meet the recordkeeping requirements of the EAR, you must retain the original record.

§ 721.3 Reproduction of original records.

(a) You may maintain reproductions instead of the original records provided all of the requirements of paragraph (b) of this section are met.

(b) If you must maintain records under this part, you may use any photostatic, miniature photographic, micrographic, automated archival storage, or other process that completely, accurately, legibly and durably reproduces the original records (whether on paper, microfilm, or through electronic digital storage techniques). The process must meet all of the following requirements, which are applicable to all systems:

(1) The system must be capable of reproducing all records on paper.

(2) The system must record and be able to reproduce all marks, information, and other characteristics of the original record, including both obverse and reverse sides of paper documents in legible form.

(3) When displayed on a viewer, monitor, or reproduced on paper, the records must exhibit a high degree of legibility and readability. (For purposes of this section, legible and legibility mean the quality of a letter or numeral that enable the observer to identify it positively and quickly to the exclusion of all other letters or numerals. Readable and readability mean the quality of a group of letters or numerals being recognized as complete words or numbers.)

(4) The system must preserve the initial image (including both obverse and reverse sides of paper documents) and record all changes, who made them and when they were made. This information must be stored in such a manner that none of it may be altered once it is initially recorded.

(5) You must establish written procedures to identify the individuals who are responsible for the operation, use and maintenance of the system.

(6) You must establish written procedures for inspection and quality assurance of records in the system and document the implementation of those procedures.

(7) The system must be complete and contain all records required to be kept by this part or the regulated person must provide a method for correlating, identifying and locating records relating to the same transaction(s) that are kept in other record keeping systems.

(8) You must keep a record of where, when, by whom, and on what equipment the records and other information were entered into the system.

(c) *Requirements applicable to a system based on digital images.* For systems based on the storage of digital images, the system must provide accessibility to any digital image in the system. The system must be able to locate and reproduce all records relating to a particular transaction based on any one of the following criteria:

(1) The name(s) of the parties to the transaction;

(2) Any country(ies) connected with the transaction;

(3) Chemical Abstract Service Registry number; or

(4) A document reference number that was on any original document.

(d) *Requirements applicable to a system based on photographic processes.* For systems based on photographic, photostatic, or miniature photographic processes, the regulated person must maintain a detailed index of all records in the system that is arranged in such a manner as to allow immediate location of any particular record in the system.

§ 721.4 Retention of records.

(a) *Five year retention period.* All records required to be kept by this part must be retained for five years from the due date of forms, notifications, chemical determinations (classifications) or reports required by parts 712 through 715, 716 and 717 of this subchapter.

(b) *Destruction or disposal of records.* If the Department of Commerce or other authorized U.S. government agency makes a formal or informal request for a certain record or records, such record or records may not be destroyed or disposed of without the written authorization of the requesting entity.

§ 721.5 Inspection of records.

Upon request by the Department of Commerce or any other agency of competent jurisdiction, you must permit access to and copying of any record in accordance with section 405(3) of the Act. This requires that you make available the equipment and, if necessary, knowledgeable personnel for locating, reading, and reproducing any record in the system.

Dated: July 7, 1999.

R. Roger Majak,
Assistant Secretary for Export
Administration.

[FR Doc. 99-18230 Filed 7-20-99; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF STATE

22 CFR Part 103

[Public Notice 3057]

RIN 1400-ZA01

Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act of 1998; Taking of Samples; Record Keeping and Inspections

AGENCY: Bureau of Arms Control, Department of State.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of State is proposing to establish regulations to implement the provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention) and the Chemical Weapons Convention Implementation Act of 1998 (Act) on the taking of samples and on the enforcement of the requirements concerning record keeping and inspections. The Act authorizes the United States Government to implement provisions of the Convention. These regulations will enable the United States Government to execute the relevant provisions of the Convention and the Act.

DATES: Comments must be received on or before August 20, 1999.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Michael Coffee, Office of the Legal Adviser (L/ACN), 2201 C Street, N.W., Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Michael Coffee, Office of the Legal Adviser (L/ACN), 2201 C Street, N.W., Washington, DC 20520.

SUPPLEMENTARY INFORMATION: On April 25, 1997, the United States ratified the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention). The Convention is both an arms control and nonproliferation treaty. As such, the Convention bans the development, production, stockpiling, and use of chemical weapons, and prohibits States Parties from assisting or encouraging anyone to engage in an activity prohibited by the Convention. States Parties to the Convention, including the United States, have agreed to a comprehensive verification regime that provides transparency and ensures that no State Party to the Convention is

engaging in activity prohibited by the Convention. The verification regime includes declaration and on-site inspection of facilities engaged in activities involving certain chemicals. To further its nonproliferation objectives, the Convention requires restrictions on the import and export of chemicals.

Implementation of the CWC requirements will occur pursuant to the authority of the Chemical Weapons Convention Implementation Act of 1998 (Pub. L. 105-277, Div. I) and the International Emergency Economic Powers Act. Export control related provisions will be enforced by the Departments of State and Commerce under relevant export control authorities. While most of the regulatory provisions will be contained in the Chemical Weapons Convention Regulations (15 CFR Parts 710-721), other State and Commerce Department regulations will contain additional or related provisions. The following outline summarizes the scope of these implementing and related regulations:

Chemical Weapons Convention Regulations (CWCRC) (15 CFR Parts 710-721) (Department of Commerce). In accordance with the Chemical Weapons Convention Implementation Act of 1998, the Department of Commerce is proposing to promulgate regulations that set forth, among other things, reporting and inspection requirements and trade restrictions that affect U.S. private entities. The CWCRC will contain recordkeeping requirements and administrative procedures and penalties related to violations of reporting and inspection requirements and importation restrictions. Finally, the CWCRC will implement section 211 of the Chemical Weapons Convention Implementation Act, which authorizes the revocation of the export privileges of any person determined to have violated the chemical weapons provision of 18 U.S.C. 229.

Regulations Implementing Provisions of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act of 1998 on the Taking of Samples and on Enforcement of Requirements Concerning Reporting and Inspections (22 CFR Part 103) (Department of State). These regulations will implement the provisions of the Convention and the Chemical Weapons Convention Implementation Act of 1998 concerning the taking of samples during on-site inspections in the United States. These regulations will contain the enforcement provisions for violations of the provisions of the Chemical Weapons Convention Implementation Act of 1998 concerning reporting and inspection requirements.

Export Administration Regulations (EAR) (15 CFR Parts 730-774) (Department of Commerce). The EAR implement the Convention's requirements on annual reporting on exports of schedule 1 chemicals, advance notification of exports of schedule 1

chemicals, and end-use certificate requirements for exports of schedule 2 and 3 chemicals to States not Party to the Convention. The EAR include a license requirement for all exports of schedule 1 chemicals subject to Commerce Department jurisdiction to all destinations, including Canada. The EAR also bans the export, after April 28, 2000, of schedule 2 chemicals subject to Commerce Department jurisdiction to States not Party to the Convention. *International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130) (Department of State).*

This proposed rule is intended to implement sections 304(f)(1) and 501 of the Chemical Weapons Convention Implementation Act of 1998, Pub. L. 105-277, Div. I. These regulations will provide the guidelines under which the taking of a sample may be required during an on-site inspection conducted pursuant to the Convention. These regulations will also establish the civil enforcement regime for a violation of §§ 306 or 405 of the Act.

Administrative Procedure Act Requirements

Because this proposed rule involves a foreign affairs function of the United States, it is not subject to 5 U.S.C. 553 and 554. However, the Department is issuing this rule in proposed form and comments are encouraged for the development of a final rule.

Form of Comments

The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially for any reason. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. Comments will be available for inspection between 8:15 a.m. and 5:00 p.m. at the address listed above. In the interest of accuracy and completeness, the Department requires comments in written form. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

Initial Regulatory Flexibility Analysis

Because this proposed rule involves a foreign affairs function of the United States, the Department of State is not required to prepare and make available for public comment an initial regulatory flexibility analysis.

Executive Order 12866 Determination

This proposed rule is exempt from Executive Order 12866, but has been reviewed internally by the Department to ensure consistency with the purposes thereof.

Paperwork Reduction Act Statement

Section 103.5(b) of this rule states that no person may willfully fail or refuse: (1) to establish or maintain any record required under the Chemical Weapons Convention Implementation Act or 15 CFR Parts 710 through 721; (2) to submit any report, notice or other information prescribed by the Act or 15 CFR Parts 710 through 721; or (3) to permit access to or copying of any record that is exempt from disclosure under the Act or 15 CFR Parts 710 through 721.

Notwithstanding any other provision of law, no person is required to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. In promulgating 15 CFR Parts 710 through 721, the Department of Commerce revised an existing collection of information requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), which has been submitted for approval to the Office of Management and Budget. Accordingly, the Department of State will not seek the approval of the Office of Management and Budget. The public reporting burdens for the new collections of information are estimated to average 9 hours for Schedule 1 chemicals, 7.2 hours for Schedule 2 chemicals, 2.5 hours for Schedule 3 chemicals, 5.3 hours for Unscheduled Discrete Organic Chemicals, and .17 hours for Schedule 1 notifications. These estimates include the time required to complete the required forms.

Comments are invited on (a) whether the collection of information is necessary for the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarify the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through use of automated collection techniques or other forms of information technology. Send comments regarding these or any other aspects of the collection of information to: Nancy Crowe, Regulatory Policy Division, Bureau of Export Administration, U.S. Department of Commerce, Room 2705, 14th Street and Pennsylvania Avenue, N.W., Washington, DC 20230.

Unfunded Mandates Reform Act Requirements

No actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Federalism Assessment

Because this proposed rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, a Federalism Assessment is not warranted.

List of Subjects in 22 CFR Part 103

Administrative practice and procedures, Chemicals, Foreign relations, Freedom of information, International organizations, Investigations, National security information, Penalties, Reporting and recordkeeping requirements, Treaties.

For the reasons set forth in the preamble, the Department proposes to add to subchapter K the following part 103 to Title 22 of the Code of Federal Regulations:

PART 103—REGULATIONS FOR IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION AND THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT OF 1998 ON THE TAKING OF SAMPLES AND ON ENFORCEMENT OF REQUIREMENTS CONCERNING RECORD KEEPING AND INSPECTIONS

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103.11 Payment of final assessment.

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Authority: Pub. L. 105-277, 112 Stat. 2681, Div. I.

Subpart A—General

§ 103.1 Purpose.

This part is intended to implement sections 304(f)(1) and 501 of the Chemical Weapons Convention

Implementation Act of 1998, Public Law 105-277, Div. I. The Chemical Weapons Convention Regulations promulgated by the Department of Commerce, 15 CFR Parts 710 through 721, also implement sections of the Act.

§ 103.2 Definitions.

The following are definitions of terms as used in this part only.

Administrative law judge (ALJ). The person authorized to conduct hearings in administrative enforcement proceedings brought under this part.

Bureau of Export Administration (BXA). The Bureau of Export Administration of the United States Department of Commerce, including the Office of Export Administration and the Office of Export Enforcement.

Chemical Weapons Convention (CWC or Convention). The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, and its annexes opened for signature on January 13, 1993, and entered into force on April 29, 1997.

CWCIA. The Chemical Weapons Convention Implementation Act of 1998. (Pub. L. 105-277, Div. I.)

CWCR. The Chemical Weapons Convention Regulations promulgated by the Department of Commerce. (15 CFR parts 710 through 721.)

Executive Director. The Executive Director, Office of the Legal Adviser, U.S. Department of State.

Facility agreement. An agreement or arrangement between a State Party to the Convention and the Organization for the Prohibition of Chemical Weapons relating to a specific facility subject to on-site verification pursuant to Articles IV, V, and VI of the Convention.

Final decision. A decision or order assessing a civil penalty, or otherwise disposing of or dismissing a case, which is not subject to further review under this part, but which may be subject to collection proceedings or judicial review in an appropriate federal court as authorized by law.

Host team. The U.S. Government team that accompanies the inspection team during a CWC inspection to which this part applies.

Host team leader. The head of the U.S. Government team that accompanies the inspection team during a CWC inspection to which this part applies.

Inspection team. The group of inspectors and inspection assistant assigned by the Director-General of the Technical Secretariat to conduct a particular inspection.

Lead agency. The executive department or agency responsible for implementation of the CWC declaration

and inspection requirements for specified facilities. The lead agencies are the Department of Defense (DOD) for facilities owned or leased by DOD, whether DOD-operated or contractor-operated; the Department of Energy (DOE) for facilities owned or leased by DOE, whether DOE-operated or contractor-operated, including the National Laboratories and components of the nuclear weapons complex; and the Department of Commerce (DOC) for all facilities that are not owned or leased by DOD or DOE or other U.S. Government agencies. Other departments and agencies that have notified the United States National Authority of their decision to be excluded from the CWCR shall also have lead agency responsibilities for facilities that they own or lease.

Office of Chemical and Biological Weapons Conventions. The office in the Bureau of Arms Control of the United States Department of State that includes the United States National Authority Coordinating Staff.

Party. The United States Department of State and any person named as a respondent under this part.

Person. Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

Respondent. Any person named as the subject of a Notice of Violation and Assessment (NOVA) proposed order.

Secretary. The Secretary of State.

Technical Secretariat. The Technical Secretariat of the Organization for the Prohibition of Chemical Weapons established by the Chemical Weapons Convention.

United States National Authority. The Department of State serving as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons and States Parties to the Convention and implementing the provisions of the CWCIA in coordination with an interagency group designated by the President consisting of the Secretary of Defense, the Attorney General, the Secretary of Commerce, the Secretary of Energy, and the heads of agencies considered necessary or advisable by the President, or their designees. The Secretary of State is the Director of the United States National Authority.

Subpart B—Samples**§ 103.3 Requirement to provide a sample.**

(a) *Notification of requirement to provide a sample.* The host team leader will notify the owner or operator, occupant or agent in charge of an inspected premises of any requirement to provide a sample pursuant to a request, in accordance with paragraph (j) of this section, of an inspection team of the Technical Secretariat under paragraph (b) or (d) of this section.

(b) *Requirement to provide a sample.* Pursuant to section 304(f)(1) of the CWCIA, unless a consultation occurs pursuant to paragraph (c) of this section, the owner or operator, occupant or agent in charge of the premises to be inspected is hereby required to provide a sample pursuant to a request, in accordance with paragraph (j) of this section, of an inspection team of the Technical Secretariat that a sample be taken in accordance with the applicable provisions contained in the Chemical Weapons Convention and the CWCIA.

(c) *Consultations with the United States National Authority.* After consulting with the host team leader, a lead agency that finds that the following conditions, unless they have been modified pursuant to paragraph (i) of this section, may not have been satisfied shall promptly advise the United States National Authority, which, in coordination with the interagency group designated by the President in section 2 of Executive Order 13128, shall make a decision.

(1) The taking of a sample is consistent with the inspection aims under the Convention and with its Confidentiality Annex;

(2) The taking of a sample does not unnecessarily hamper or delay the operation of a facility or affect its safety, and is arranged so as to ensure the timely and effective discharge of inspection team's functions with the least possible inconvenience and disturbance to the facility;

(3) The taking of samples is consistent with the applicable facility agreement. In particular:

(i) Samples will be taken at sampling points agreed to in the relevant facility agreement; and

(ii) Samples will be taken according to procedures agreed to in the relevant facility agreement;

(4) In the absence of a facility agreement, due consideration is given to existing sampling points used by the owner or operator, occupant or agent in charge of the premises, consistent with any procedures developed pursuant to the CWCIA (15 CFR parts 710 through 721);

(5) The taking of samples does not affect the safety of the premises and will be consistent with safety regulations established at the premises, including those for protection of controlled environments within a facility and for personal safety;

(6) The taking of the sample does not pose a threat to the national security interests of the United States; and

(7) The taking of the sample is consistent with any conditions negotiated pursuant to paragraph (i) of this section.

(d) *Determination by United States National Authority.* If, after consulting with the lead agency pursuant to paragraph (c) of this section, the United States National Authority, in coordination with the interagency group designated by the President to implement the provisions of the CWCIA, determines that the conditions of paragraph (c) are satisfied and that a sample shall be required, then the owner or operator, occupant or agent in charge of the premises shall provide a sample pursuant to a request of the inspection team of the Technical Secretariat.

(e) *Person to take a sample.* If a sample is required, the owner or the operator, occupant or agent in charge of the inspected premises will determine whether the sample will be taken by a representative of the premises, the inspection team, or any other individual present.

(f) *Requirement that samples remain in the United States.* No sample collected in the United States pursuant to an inspection permitted by the CWCIA may be transferred for analysis to any laboratory outside the territory of the United States.

(g) *Handling of samples.* Samples will be handled in accordance with the Convention, the CWCIA, other applicable law, and the provisions of any applicable facility agreement.

(h) *Failure to comply with this section.* Failure by any person to comply with this section may be treated as a violation of section 306 of the Act and § 103.5(a).

(i) *Conditions that restrict sampling activities during challenge inspections.* During challenge inspections within the inspected premises the host team may negotiate conditions that restrict activities regarding sampling, e.g., conditions that restrict where, when, and how samples are taken, whether samples are removed from the site, and how samples are analyzed. Samples taken during challenge inspections within the inspected premises will be analyzed only for substances relevant to the inspection mandate.

(j) *Format of inspection team request.* It is the policy of the United States Government that inspection team requests for samples should be in written form from the head of the inspection team. When necessary, before a sample is required to be provided, the host team leader should seek a written request from the head of the inspection team.

Subpart C—Record Keeping and Inspection Requirements**§ 103.4 General.**

This subpart implements the enforcement of the civil penalty provisions of section 501 of the Chemical Weapons Convention Implementation Act of 1998 (CWCIA), and sets forth relevant administrative proceedings by which such violations are adjudicated. Both the Department of State (in this subpart), and the Department of Commerce (in part 719 of the CWCIA at 15 CFR parts 710 through 721) are involved in the implementation and enforcement of section 501.

§ 103.5 Violations.

(a) *Refusal to permit entry or inspection.* No person may willfully fail or refuse to permit entry or inspection, or to disrupt, delay or otherwise impede an inspection, authorized by the CWCIA.

(b) *Failure to establish or maintain records.* No person may willfully fail or refuse:

(1) To establish or maintain any record required by the CWCIA or the Chemical Weapons Convention Regulations (CWCIA, 15 CFR parts 710 through 721) of the Department of Commerce; or

(2) To submit any report, notice, or other information to the United States Government in accordance with the CWCIA or CWCIA; or

(3) To permit access to or copying of any record required by the CWCIA or regulations thereunder, including information that is exempt from disclosure under the Freedom of Information Act pursuant to section 103(g) or section 404 of the CWCIA or § 711.2 or Supplement 1 of Part 711 of the CWCIA.

§ 103.6 Penalties.

(a) *Civil penalties—(1) Civil penalty for refusal to permit entry or inspection.* Any person that is determined to have willfully failed or refused to permit entry or inspection, or to have disrupted, delayed or otherwise impeded an inspection authorized by the CWCIA, in violation of § 103.5 (a) of this part, shall pay a civil penalty in an

amount not to exceed \$25,000 for each violation. Each day the violation continues constitutes a separate violation.

(2) *Civil penalty for failure to establish or maintain records.* Any person that is determined to have willfully failed or refused to establish or maintain any record required by the CWCIA or CWCER (15 CFR parts 710 through 721), or to submit any report, notice, or other information, required by the CWCIA or the CWCER, or to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCER, in violation of § 103.5 (b) of this part, shall pay a civil penalty in an amount not to exceed \$5,000 for each violation.

(b) *Criminal penalties—Fine or imprisonment for refusal to permit entry or inspection.* Any person that knowingly violates the CWCIA by willfully failing or refusing to permit entry or inspection, or by disrupting, delaying or otherwise impeding an inspection authorized by the CWCIA, or that knowingly violates the CWCIA by willfully failing or refusing to establish or maintain any required record, or to submit any required report, notice, or other information, or by willfully failing or refusing to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCER, shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, or be imprisoned for not more than one year, or both.

(c) *Other remedial action—(1) Injunction.* The United States may, in a civil action, obtain an injunction against:

(i) The conduct prohibited under 18 U.S.C. 229 or 229C; or

(ii) The preparation or solicitation to engage in conduct prohibited under 18 U.S.C. 229 or 229D.

(2) In addition, the United States may, in a civil action, restrain any violation of section 306 or section 405 of the CWCIA, or compel the taking of any action required by or under the CWCIA or the Convention.

§ 103.7 Initiation of administrative enforcement proceedings.

(a) *Issuance of Notice of Violation and Assessment (NOVA).* The Director of the Office of Export Enforcement, Bureau of Export Administration, Department of Commerce, may request that the Secretary initiate an administrative enforcement proceeding. If the request is in accordance with applicable law, the Secretary of State shall initiate an administrative enforcement proceeding under 15 CFR 719.1(a)(2) by providing

notice of the initiation of proceedings through issuance of a Notice of Violation and Assessment (NOVA), so long as the initiation of such a proceeding is in accordance with applicable law. The Office of Chief Counsel for Export Administration, Department of Commerce shall serve the NOVA as directed by the Secretary.

(b) *Content of NOVA.* The NOVA shall constitute a formal complaint, and will set forth the basis for the issuance of the proposed order. It will set forth the alleged violation(s) and the essential facts with respect to the alleged violation(s), reference the relevant statutory, regulatory or other provisions, and state the amount of the civil penalty to be assessed. The NOVA will inform the respondent of the right to request a hearing pursuant to the CWCER (15 CFR parts 710 through 721) at 15 CFR 719.6, inform the respondent that failure to request such a hearing shall result in the proposed order becoming final and unappealable on signature of the Secretary of State and provide payment instructions. A copy of this section, and the Department of Commerce regulations that govern the administrative proceedings, will accompany the NOVA.

(c) *Proposed order.* A proposed order shall accompany every NOVA. It will briefly set forth the substance of the alleged violation(s) and the statutory, regulatory or other provisions violated. It will state the amount of the civil penalty to be assessed.

(d) *Notice of initiation of proceedings.* The Secretary shall notify, via the Department of Commerce, the respondent (or respondent's agent for service of process, or attorney) of the initiation of administrative proceedings by sending, via overnight mail, facsimile, or by personal delivery, the NOVA and proposed order to the respondent (or respondent's agent for service of process or attorney).

(e) *Demand for hearing and answer.* If the respondent wishes to contest the NOVA and proposed order, the respondent must demand a hearing in writing within 15 days from the date of the NOVA, and must answer the NOVA within 30 days from the date of the demand for hearing.

(f) *Waiver.* The failure of the respondent to file a request for a hearing and an answer within the times provided constitutes a waiver of the respondent's right to appear and contest the allegations set forth in the NOVA and proposed order. If no hearing is requested or no answer is provided, the Secretary will sign the proposed order, which shall, upon signature, become a final and unappealable order.

(g) *Administrative procedures.* The regulations that govern the administrative procedures that apply when a hearing is requested are set forth in the CWCER at 15 CFR part 719.

§ 103.8 Final agency decisions after administrative proceedings.

(a) *Review of initial decision—(1) Petition for review.* Any party may, within 3 days of the Administrative Law Judge's (ALJ) certification of the initial decision, petition the Secretary for review of the initial decision. A petition for review shall be addressed to and served on Executive Director of the Office of the Legal Adviser, U.S. Department of State, 2201 C Street, N.W., Room 5519, Washington D.C. 20520, and shall also be served on the Chief Counsel for Export Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room H-3839, Washington, D.C. 20230, and all other parties. Petitions for review may be based only on one or more of the following grounds:

(i) A finding of material fact is clearly erroneous based on the evidence in the record;

(ii) A necessary legal conclusion is contrary to law or precedent;

(iii) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(iv) A prejudicial procedural error has occurred.

(2) *Content of petition for review.* The petition must specifically set forth the reason that review is requested and be supported by citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Administrative Law Judge may not be raised on review unless they were raised for the first time in the initial decision and could not reasonably have been foreseen and raised by the parties during the hearing. New or additional evidence that is not a part of the record before the ALJ will not be considered.

(3) *Decision to review.* Review of the initial decision by the Secretary is discretionary, and is not a matter of right. The Secretary shall accept or decline review of the initial decision within 3 days after a petition for review is filed. If no such petition is filed, the Secretary may, on his or her own initiative, notify the parties within 6 days after the ALJ's certification of the initial decision that he or she intends to exercise his or her discretion to review the initial decision.

(4) *Effect of decision to review.* The initial decision is stayed until further

order of the Secretary upon a timely petition for review, or upon action to review taken by the Secretary on his or her own initiative.

(5) *Review declined.* If the Secretary declines to exercise discretionary review, such order will be served on all parties personally, by overnight mail, or by registered or certified mail, return receipt requested. The Secretary need not give reasons for declining review.

(6) *Review accepted.* If the Secretary grants a petition for review or decides to review the initial decision on his or her own initiative, he or she will issue an order confirming that acceptance and specifying any issues to be briefed by all parties within 12 days after the order. Briefing shall be limited to the issues specified in the order. Only those issues specified in the order will be considered by the Secretary. The parties may, within 5 days after the filing of any brief of the issues, file and serve a reply to that brief. No oral argument will be permitted. The Department of Commerce shall review all written submissions, and, based on the record, make a recommendation to the Secretary as to whether the ALJ's initial decision should be modified or vacated. The Secretary will make a final decision within 30 days after the initial decision.

(b) *Factors considered in assessing penalties.* In reviewing the amount of the civil penalty determined by the ALJ, the Secretary shall take into account the nature, circumstances, extent and gravity of the violation(s), and, with respect to the respondent, the respondent's ability to pay the penalty, the effect on the respondent's ability to continue to do business, the respondent's history of prior violations, the respondent's degree of culpability, the existence of an internal compliance program, and such other matters as justice may require.

(c) *Final decision.* Unless the Secretary, within 30 days after the date of the initial decision and order, modifies or vacates the decision and order, with or without conditions, the ALJ's initial decision and order shall become effective as the final decision and order of the United States Government. If the Secretary does modify or vacate the initial decision and order, that decision and order of the Secretary shall become the final decision and order of the United States Government. The final decision and order shall be served on the parties and will be made available to the public.

§ 103.9 Final agency decision after settlement negotiations.

(a) *Settlements based on letter of intent to charge—*(1) *Approval of settlement.* Pursuant to § 719.5(b)(2) of the CWC (15 CFR parts 710 through 721), the Department of Commerce may notify a respondent by letter of the intent to charge. If, following the issuance of such a letter of intent to charge, the Department of Commerce and respondent reach an agreement to settle a case, the Department of Commerce will submit the draft NOVA, proposed order and a recommended settlement agreement signed by a representative of the Department of Commerce and respondent to the Secretary for approval and signature, if the recommended settlement agreement is in accordance with applicable law. No action is required by the ALJ in cases where the Secretary issues such an order.

(2) *Refusal to approve settlement.* If the Secretary refuses to approve the settlement, the Secretary will notify the parties and the case will proceed as though no settlement proposal had been made.

(b) *Settlements reached during administrative proceedings—*(1) *Approval of settlement.* When the Department of Commerce and respondent reach an agreement to settle the allegations after administrative proceedings have been initiated before an ALJ, the Department of Commerce will submit the NOVA, the proposed order, and the recommended settlement agreement signed by a representative of the Department of Commerce and respondent to the Secretary of State for approval and signature, if the recommended settlement agreement is in accordance with applicable law. If the Secretary approves the settlement, the Secretary shall notify the ALJ that the case is withdrawn from adjudication.

(2) *Refusal to approve settlement.* If the Secretary of State refuses to approve the settlement, the Secretary of State will notify the parties of the disapproval, and settlement negotiations will resume or the case will proceed to adjudication by the ALJ as though no settlement proposal had been made. See CWC at 15 CFR 719.19.

(c) *Scope of settlement.* Any respondent who agrees to an order imposing any administrative sanction does so solely for the purpose of resolving the claims in the administrative enforcement proceeding brought pursuant to this part. This

reflects the fact that the Government officials involved have neither the authority nor the responsibility for initiating, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility is vested in the Attorney General and the Department of Justice.

(d) *Finality.* Cases that are settled may not be reopened or appealed.

§ 103.10 Appeals.

Any person adversely affected by a final order respecting an assessment may, within 30 days after the order is issued, file a petition in the Court of Appeals for the District of Columbia Circuit, or in any other circuit in which the person resides or transacts business, to appeal the order. No other reopening or appeal is permitted.

§ 103.11 Payment of final assessment.

(a) *Time for payment.* Full payment of the civil penalty must be made within 30 days of the date upon which the final order becomes effective, or within the time specified in the order. Payment shall be made in the manner specified in the NOVA.

(b) *Enforcement of order.* The Secretary, through the Attorney General, may file suit in an appropriate district court if necessary to enforce compliance with a final order issued pursuant to this part. This suit will include a claim for interest at current prevailing rates from 30 days after a final order was issued or, if an appeal was filed pursuant to § 103.10 of this part, from the date of final judgment of the court of appeals pursuant to § 103.10 of this part.

(c) *Offsets.* The amount of any civil penalty imposed by a final order may be deducted from any sum(s) owed by the United States to a respondent.

§ 103.12 Reporting a violation.

If a person learns that a violation of the Convention, the CWCIA, or the CWC (15 CFR parts 710 through 721) has occurred or may occur, that person may notify: United States National Authority, Office of Chemical and Biological Weapons Conventions, Bureau of Arms Control, U.S. Department of State, Washington, DC 20520, Telephone: (703) 235-1204, Facsimile: (703) 235-1065.

J. Michael Lekson,

Deputy Assistant Secretary of State for Multilateral Conventional Arms Control, Bureau of Arms Control.

[FR Doc. 99-17617 Filed 7-20-99; 8:45 am]

BILLING CODE 4710-27-P