

## DEPARTMENT OF JUSTICE

## Bureau of Prisons

## 28 CFR Part 540

[BOP-1048-F]

RIN 1120-AA48

**Correspondence: Restricted Special Mail Procedures**

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

**SUMMARY:** In this document, the Bureau of Prisons is amending its regulations on correspondence to provide for restricted special mail procedures in instances where the Warden has reason to believe that the special mail either has posed a threat or may pose a threat of physical harm to the intended recipient. Under these procedures, such special mail is subject to inspection, in the presence of the inmate, for contraband and, at the request of the intended recipient, may be read for the purpose of verifying that the special mail does not contain a threat of physical harm. These amendments are intended to provide for the continued efficient and secure operation of the institution and to protect the public.

EFFECTIVE DATE: January 9, 1998.

**ADDRESSES:** Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 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 amending its regulations on correspondence (28 CFR part 540). A proposed rule on this subject was published in the **Federal Register** February 14, 1996 (61 FR 5846).

Provisions in § 540.18(c) previously stated that outgoing special mail may be sealed by the inmate and is not subject to inspection. The Bureau proposed a revised paragraph (c) to allow for restricted special mail procedures for special mail addressed to Federal court officials and members of Congress, and, if so requested, to other intended recipients. These restricted special mail procedures would apply in cases where the Warden (with the concurrence of the Regional Counsel) documents in writing that the inmate's special mail either has posed a threat or may pose a threat of physical harm to the intended recipient. Any inmate placed on restricted special mail status would be notified in writing by the Warden of the reason for being

so placed. The Warden is required to review an inmate's restricted special mail status at least once every 180 days and to notify the inmate in writing of the results of that review. The inmate may be removed from restricted special mail status if the Warden (with the concurrence of the Regional Counsel) determines that the inmate's special mail does not threaten or pose a threat of physical harm to the intended recipient. Such determinations are based on a comprehensive review of pertinent factors, such as the inmate's institutional adjustment, institution security level, and a current assessment of the conditions which led to the inmate's placement into restricted special mail status.

The Bureau received 8 comments on its proposed rule. Comment generally focused on the purported need for the proposed restrictions, possible infringement on the confidentiality of the attorney-client privilege, possible delay in handling mail being sent to courts, consideration of other means of dealing with the threat posed by such special mail (including duplicative security measures in place for recipients), ulterior motivation for the restrictions, and the general futility of preventing abuse.

With respect to the need for the regulation, the Bureau disagrees with suggestions that the rule misrepresents its intent. The rule is not intended to restrict an inmate's legal access. Instead, it is intended to help ensure institution security, discipline, and good order, and to protect the public. The Bureau notes that instances have occurred where special mail has caused, or has threatened physical injury to the recipient. While these instances may not constitute a widespread problem, neither do the procedures for restricted special mail status pose any change to the special mail privilege for the vast majority of inmates. Even so, for the purpose of assuring its commitment to the integrity of special mail, the Bureau has modified the proposed procedures to protect the special mail privilege to the extent practicable and commensurate with the need for the security, discipline and good order of the institution.

As previously proposed, the procedures apply only to inmates who have been placed on restricted special mail status (that is to say, those inmates whose special mail has been documented by the Warden, with the concurrence of the Regional Counsel, either to have posed a threat or which may pose a threat to the recipient). An inmate in this status must present all materials and packaging intended to be

sent as special mail to staff for inspection. Staff shall inspect the special mail material and packaging, in the presence of the inmate, for contraband. This last provision deletes the proposed phrase "or the threat of physical harm", as its intent is encompassed within the remaining provision of inspecting for contraband. This change addresses the concern of commenters that the proposed procedure infringes upon the confidentiality of the attorney-client privilege or access to the courts. As revised, the rule now states that staff reading of the correspondence is restricted to when the recipient of the special mail has so requested (the rule as proposed had assumed such permission with respect to Federal court officials and members of Congress). As revised, the procedure now more closely parallels the process for inspecting incoming special mail (see § 540.18).

Upon completion of the inspection, staff shall return the special mail material to the inmate if the material does not contain contraband or, when requested by the intended recipient, a reading determines that there is no threat of physical harm. The inmate must then seal the special mail material in the presence of staff. Special mail determined to pose a threat shall be forwarded to the appropriate law enforcement entity, and staff shall send a copy of the material, minus the contraband, to the intended recipient along with notification that the original of the material was forwarded to the appropriate law enforcement entity.

In response to comments, the Bureau does not expect this procedure to have much impact on the processing of special mail. The limited applicability of the rule and the general Bureau policy that mail be handled promptly should ensure that this mail is processed in a timely fashion.

In response to commenters who suggested that sufficient and less restrictive means were available to the intended recipients of special mail to address threats posed by the special mail, the Bureau believes its procedures are both prudent and unobtrusive. Visually observing the assembling of special mail serves to deter the actual transmission of dangerous materials and is compatible with the existing procedures for handling incoming special mail (see § 540.18). This protects both the intended recipient and other persons involved in the delivery or opening of the special mail. While the Bureau acknowledges, as one commenter noted, that this procedure may not be successful in preventing every possible instance of harm, the

procedure is intended to operate in conjunction with other procedures, such as the ones alluded to by other commenters. Any resultant increase in security which may be obtained through these new procedures clearly is a benefit to the public.

Several commenters expressed concern that Bureau of Prisons staff may abuse their discretion under this provision. As shown, the scope of this rule is clearly limited in its application. Bureau of Prisons staff are professionals and will be familiar with the procedures for applying this rule. In the unlikely event of staff abuse, appropriate disciplinary action will be initiated and appropriate sanctions imposed.

Other commenters raised questions on the general provisions for screening, e.g., how it will be requested, criteria used for assessing threat. In response to such comments, the Bureau again notes that this rule will have limited applicability, with such application governed by § 540.18(c)(2). Placement requires legal review, and notification to the inmate of the reasons for placement. An inmate who disagrees with this decision may appeal the decision through the Administrative Remedy Program (28 CFR part 542).

A commenter questioned the statement in § 540.18(d) advising the recipient of special mail that if the writer raises a question over which the facility has jurisdiction, the recipient may wish to return the material for further information or clarification. The commenter believes that this provision is vague, and that it either should be deleted or specify the return is to the inmate. The Bureau disagrees with this suggestion. This statement is not new and is intended to offer the recipient the opportunity to contact the Bureau of Prisons if that recipient desires further information or clarification over a matter under the Bureau's jurisdiction. The choice on whether this is done is clearly with the recipient of the special mail, and is not violative of an inmate's legal rights.

As a final general comment, the Bureau notes that the provisions for restricted special mail are designed to protect the public and are not motivated by a desire to censor special mail. The procedures for visually observing the assembling of special mail are not dissimilar to procedures already in place for the delivery of special mail. Neither inspection represents any attempt to censor mail. In those instances where the intended recipient has authorized staff to read the special mail (see § 540.18(c)(2)(iii)), the special mail, or a copy of the special mail in cases where the mail has been

determined to pose a threat of physical harm, is forwarded to the recipient.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866, and accordingly this rule was not reviewed by the Office of Management and Budget. 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 economic impact on a substantial number of small entities, within the meaning of the Act. Because this rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, its economic impact is limited to the Bureau's appropriated funds.

#### 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; 28 CFR 0.95–0.99.

2. In § 540.18, paragraphs (c) and (d) are revised to read as follows:

##### § 540.18 Special mail.

\* \* \* \* \*

(c)(1) Except as provided for in paragraph (c)(2) of this section, outgoing special mail may be sealed by the inmate and is not subject to inspection.

(2) Special mail shall be screened in accordance with the provisions of paragraph (c)(2)(iii) of this section when the special mail is being sent by an inmate who has been placed on restricted special mail status.

(i) An inmate may be placed on restricted special mail status if the Warden, with the concurrence of the Regional Counsel, documents in writing that the special mail either has posed a threat or may pose a threat of physical

harm to the recipient (e.g., the inmate has previously used special mail to threaten physical harm to a recipient).

(ii) The Warden shall notify the inmate in writing of the reason the inmate is being placed on restricted special mail status.

(iii) An inmate on restricted special mail status must present all materials and packaging intended to be sent as special mail to staff for inspection. Staff shall inspect the special mail material and packaging, in the presence of the inmate, for contraband. If the intended recipient of the special mail has so requested, staff may read the special mail for the purpose of verifying that the special mail does not contain a threat of physical harm. Upon completion of the inspection, staff shall return the special mail material to the inmate if the material does not contain contraband, or contain a threat of physical harm to the intended recipient. The inmate must then seal the special mail material in the presence of staff and immediately give the sealed special mail material to the observing staff for delivery. Special mail determined to pose a threat to the intended recipient shall be forwarded to the appropriate law enforcement entity. Staff shall send a copy of the material, minus the contraband, to the intended recipient along with notification that the original of the material was forwarded to the appropriate law enforcement entity.

(iv) The Warden shall review an inmate's restricted special mail status at least once every 180 days. The inmate is to be notified of the results of this review. An inmate may be removed from restricted special mail status if the Warden determines, with the concurrence of the Regional Counsel, that the special mail does not threaten or pose a threat of physical harm to the intended recipient.

(v) An inmate on restricted mail status may seek review of the restriction through the Administrative Remedy Program.

(d) Except for special mail processed in accordance with paragraph (c)(2) of this section, staff shall stamp the following statement directly on the back side of the inmate's outgoing special mail: "The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has neither been opened nor inspected. If the writer raises a question or problem over which this facility has jurisdiction, you may wish to return the material for further information or clarification. If the writer encloses correspondence for forwarding to

another addressee, please return the enclosure to the above address.”

[FR Doc. 97-32325 Filed 12-9-97; 8:45 am]

BILLING CODE 4410-05-P

## DEPARTMENT OF JUSTICE

### Bureau of Prisons

#### 28 CFR Part 540

[BOP-1054-F]

RIN 1120-AA52

#### Correspondence: Pretrial Inmates

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

**SUMMARY:** In this document, the Bureau of Prisons is amending its regulations on correspondence to require that general mail from pretrial inmates may not be sealed and may be read and inspected by staff. This amendment is intended to provide for the continued efficient and secure operation of the institution and to protect the public.

**EFFECTIVE DATE:** January 9, 1998.

**ADDRESSES:** Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 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 amending its regulations on correspondence (28 CFR part 540, subpart B). A proposed rule on this subject was published in the *Federal Register* December 9, 1996 (61 FR 64954).

Provisions on general correspondence in § 540.14(b) and (c) previously specified that outgoing general mail from pretrial inmates may be sealed by the inmate and are not subject to inspection by staff. On December 9, 1996, the Bureau proposed to require that general mail from pretrial inmates be sent out unsealed and subject to inspection. The proposed requirement

matched the requirement for outgoing general mail from sentenced inmates in medium, high, and administrative facilities. Ordinarily, pretrial inmates are housed in administrative facilities. Because pretrial inmates are not classified as to levels of security (as sentenced inmates are), the proposed requirement would apply to pretrial inmates even if they happen to be housed in minimum or low facilities. Special mail, whether from pretrial inmates or sentenced inmates, was unaffected by the proposed amendment.

No public comment was received on the proposed rule, and the Bureau is therefore adopting the proposed rule as final without change.

Members of the public may submit further comments concerning this rule by writing to the previously cited address. These comments will be considered but will receive no response in the *Federal Register*.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866, and accordingly this rule was not reviewed by the Office of Management and Budget. 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 economic impact on a substantial number of small entities, within the meaning of the Act. Because this rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, its economic impact is limited to the Bureau's appropriated funds.

#### 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 continues 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; 28 CFR 0.95-0.99.

2. In § 540.14, paragraphs (b) and (c) are revised to read as follows:

#### § 540.14 General correspondence.

\* \* \* \* \*

(b) Except for “special mail,” outgoing mail from a pretrial inmate may not be sealed by the inmate and may be read and inspected by staff.

(c)(1) Outgoing mail from a sentenced inmate in a minimum or low security level institution may be sealed by the inmate and, except as provided for in paragraphs (c)(1)(i) through (iv) of this section, is sent out unopened and uninspected. Staff may open a sentenced inmate's outgoing general correspondence:

(i) If there is reason to believe it would interfere with the orderly running of the institution, that it would be threatening to the recipient, or that it would facilitate criminal activity;

(ii) If the inmate is on a restricted correspondence list;

(iii) If the correspondence is between inmates (see § 540.17); or

(iv) If the envelope has an incomplete return address.

(2) Except for “special mail,” outgoing mail from a sentenced inmate in a medium or high security level institution, or an administrative institution may not be sealed by the inmate and may be read and inspected by staff.

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[FR Doc. 97-32324 Filed 12-9-97; 8:45 am]

BILLING CODE 4410-05-P